

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 10/25/10; Decision Issued: 10/27/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9417; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9417

Hearing Date: October 25, 2010
Decision Issued: October 27, 2010

PROCEDURAL HISTORY

On October 5, 2009, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On October 27, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 4, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 25, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its Facilities. He has been employed by the Agency for approximately six years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant worked as a member of a crew involved in road paving. The Dump Truck was used by Grievant and the other crew members to obtain, transport, and dispense asphalt as part of various projects. The Dump Truck was equipped with a tarp that could be rolled from the front to the back of the truck bed. The tarp was attached to a metal bar that attached to one side of the truck, extended up and over the bed of the truck and was attached on the other side of the truck. On the metal bar appeared a yellow warning sticker with the words, "KEEP CLEAR OF MOVING ARMS." The bar was connected to a hydraulic drive that moved the top of the bar from the front of the truck to the back of the truck bed. When the bar was activated to move the tarp, it moved in a manner as if one were pulling a bedspread from the top of a bed to the foot of the bed in order to cover the bed (and vice versa). The purpose of the tarp was to cover the contents in the truck bed when the truck was transporting materials such as gravel or asphalt from a pickup point to the work site. In order to move the tarp from the uncovered position to the covered position, the truck driver had to move a joystick located next to the driver's seat in the truck cab from the upright position to a position tilting towards the driver. Tilting the joystick away from the driver caused the tarp to uncover the truck bed. When the tarp was covering the truck bed, portions of the bar rested on brackets toward the back of the truck and on each side of the truck. The

Dump Truck and one similar to that truck had bars that moved rapidly when activated by the truck driver.

On May 1, 2009, Mr. B was operating the Dump Truck. After asphalt was loaded into the Dump Truck, he tilted the joystick towards him to cause the hydraulic drive to move the metal bar and pull the tarp from the front of the truck bed to the back of the truck bed thereby covering the asphalt. When the bar reached the back of the truck and rested on the braces, one part of the bar became caught underneath one of the braces. When Mr. B attempted to uncover the asphalt, he activated the hydraulic drive but the bar would not move from the back of the truck bed to the front. Grievant and Mr. L observed that the bar would not move and that one side of the bar was stuck underneath the brace. Mr. L grabbed a shovel and positioned the shovel in a manner to pry the bar away from the bracket. Grievant climbed on top of the rear truck tire and place both of his hands on the metal arm. He pulled the arm away from the bracket and freed it to move. Because the bar was under tension from the hydraulic drive, the bar moved quickly from the back of the truck to the front of the truck to uncover the asphalt. Grievant was holding onto the bar as it moved. Grievant was thrown from the backside of the truck to the front side of the truck and landed on the ground. He suffered several injuries resulting in his absence from work.

The Agency provides “lockout, tagged out” training for its employees on a regular basis. The purpose of this training is to remind employees to exercise extreme caution when operating electrical or mechanical equipment that poses a risk of severe injury. For example, an employee who wanted to work on machinery connected to electricity would be taught to turn off the electricity at the voltage box and place a lock on the box to prevent the electricity from being restored during the work. Or the employee could place a tag on the voltage box to indicate that work was being performed and that the electricity should not be restored. Similarly, an employee who wanted to work on a machine hydraulically charged would be taught to use a block to prevent the machine for moving in the event the hydraulic drive activated or failed.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

“Unsatisfactory work performance” is a Group I offense.² In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant’s work performance was unsatisfactory for several reasons. First, Grievant disregarded the warnings appearing on the bar to keep clear of the moving arms. The sign would have been visible as Grievant climbed onto the truck tire. Second, Grievant disregarded the concepts presented in the Agency’s “lockout, tagged out” training. The bar was attached to a hydraulic drive. Under the Agency’s training, Grievant should have taken an extra precaution to block the bar before working on it with his hands. Since he could not block the bar, he should have concluded it was not appropriate to touch the bar. Third, Grievant should have realized he could have attempted to unhook the bar using a shovel or long pole. By comparison, another employee, Mr. L, realized the danger posed by the hydraulic bar and he used a shovel to try to unhook the bar. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

Grievant argued that he did not violate a written safety rule and thus the decision of the safety committee that he was negligent did not justify the issuance of a Group II Written Notice. The Group II Written Notice was based on the decision of the safety committee that Grievant failed to comply with a safety rule. That Written Notice, however, was withdrawn by the Agency. Although Grievant is correct that the Agency has not established that he violated a written safety rule, that conclusion does not affect the outcome of this case. Grievant was issued a Group I Written Notice by the District Maintenance Engineer for exercising poor judgment given Grievant’s training and experience with the Agency. The Group I Written Notice was not issued because Grievant violated a written safety rule.

Grievant argued that he should not be disciplined because the event resulted from a malfunctioning piece of equipment. Although this assertion is true, Grievant failed to exercise proper precaution when dealing with a hydraulic system. Even if the hydraulic system had not malfunctioned, Grievant’s attempt to unhook the metal bar would have constituted unsatisfactory work performance.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds

² See, Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision

was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.