

Issues: Group II Written Notice (failure to follow instructions), and Group III Written Notice with Termination (safety rule violation – threat of bodily harm); Hearing Date: 01/08/16; Decision Issued: 05/12/16; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10716; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10716

Hearing Date: January 8, 2016

Decision Issued: May 12, 2016

PROCEDURAL HISTORY

On October 9, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating agency safety rules. On October 9, 2015, Grievant was issued a Group II Written Notice for failure to follow supervisory instructions.

On October 21, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 9, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 8, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 employed Grievant as a Superintendent SB at one of its Facilities. He was employed by the Agency for approximately 23 years. Grievant had prior active disciplinary action. On November 22, 2013, he received a Group III Written Notice with a 30 workday suspension for workplace harassment.

Grievant received fall protection training in May 2011.

The Agency had safety rules which it posted in buildings, shops, and storage sheds owned or leased by the Agency. The safety rules were also located on the Agency's intranet and accessible to employees. One of the Agency's safety rules was:

All workers shall use appropriate fall protection as required in accordance with applicable occupational Safety and Health standards.

The Agency wanted to demolish a Bridge in a locality. The Bridge was approximately 24 feet wide and between 20 and 30 feet above the ground at its greatest distance from the ground. Demolition involved having employees stand on top and around the Bridge to cut and remove small and large pieces of the Bridge. A crane was used to lift and remove heavier pieces of the Bridge. Employees working on the Bridge would be at risk of falling more than six feet to the ground. Indeed, depending on where

an employee stood, he could fall from the Bridge over twenty feet to the ground thereby suffering injury. Because of this risk of injury, the Agency wanted employees to implement a fall protection program as part of its safety rules.

The Agency had three types of fall protection available to protect its employees – guardrail, personal fall arrest systems, and netting. The Agency did not use netting. A guardrail would serve to block employees from falling over a side of a bridge. Personal fall arrest systems would prevent employees from falling to the ground once they had fallen off of the edge of a bridge.

A Leading Edge is the point where an employee could fall off of the Bridge. The Leading Edge could change as demolition of the Bridge occurred. For example, when a part of the Bridge was removed, a remaining part of the Bridge became a new Leading Edge.

Grievant was the superintendent in charge of the Bridge demolition in a locality. Grievant met with the Supervisor and said he had some concerns about fall protection for his employees. He asked if he could do leading edge work without fall protection. The Supervisor said that was “not acceptable” but he would speak with Ms. M, the Safety Compliance Manager, about the request.

The Supervisor met with Ms. M. They discussed removal of the guardrail from the Bridge. They concluded the guardrail could be removed but replaced with 2 by 6 foot lumber boards attached to the existing posts. They concluded that it was reasonable to require fall protection throughout the project. Lines could be painted within six feet of leading edges and employees would be required to work on the side of the line away from the leading edge without being “tied off”. They also discussed providing cables attached to the existing rail posts for the attachment of fall protection. They discussed the use of individual retractable cable lanyards. They did not discuss whether Grievant would be the person serving as the safety monitor. A safety monitor was required for the job site to ensure employees acted in accordance with the Agency’s safety rules.

The Supervisor met with Grievant to discuss his conversation with Ms. M. Grievant agreed to use a temporary tinner rail on the exterior of the Bridge until the day of removal. They discussed options such as a horizontal line attached to the Bridge, a retractable lanyard, and a D-ring attachment. Grievant thought that a D-ring was a better choice based on his research and understanding of OSHA regulations. Ms. M had not discussed use of D-rings; the idea for their use originated from Grievant. Grievant made an order to purchase D-rings from a supplier and the Supervisor approved the order.

A D-ring consisted of a bar of metal with one end bent to form a “D”. The D-ring attachment envisioned by Grievant involved drilling a hole in the deck of the Bridge, inserting the straight end of the metal bar into the deck, bolting the metal bar under the deck, and leaving the D part of the D-ring exposed above the deck. An employee

wearing a body harness would attach his harness to the D-ring using a lanyard. If an employee fell off the Leading Edge, the harness would hold the employee, the lanyard¹ would tighten and the D-ring would remain attached to the deck preventing the employee from falling to the ground.

In August 2015, Grievant and several employees began demolishing the Bridge. Grievant selected himself to be the safety monitor. Grievant met with his crew and told them they would have fall protection. He mentioned that D-rings were being ordered and would be used by employees.

Initially, Grievant set up a guardrail system to prevent employees from falling over the edge of the Bridge. On August 24, 2015, the crew took down the guardrails. The crew was not able to install 2 by 6 foot boards in place of the guardrails because the posts had to be disassembled with the guardrails. The result was that neither side of the Bridge had a temporary guardrail.

Grievant had white lines painted parallel to each edge of the Bridge but approximately six to eight feet away from the Leading Edge.

On August 26, 2015, the crane attempted to lift sections of the Bridge. Several sections were too heavy so employees had to cut those sections into smaller pieces that weighed less.

Grievant had a "boom truck" backed to the Bridge and employees hooked themselves to the pintle hitch. Several employees told Grievant that this approach was not safe but Grievant insisted the Bridge work had to be completed. On the second day, the boom truck could not be parked on the bridge. Employees could not use the truck to "tie off". Several employees asked Grievant about using D-rings. Grievant said he had read OSHA policy and concluded harnesses were not necessary under OSHA's Leading Edge policy. He said a line could be painted six feet from the edge of the Bridge and employees would be required to stay on the side of the line away from the edge.

Grievant did not have his employees use the D-rings as fall protection during the Bridge demolition. When several members of his crew expressed concern about working without fall protection, he told them the D-rings had not arrived from the supplier and that they had to complete the work anyway. Grievant did not contact the Supervisor or Ms. M to determine how to provide fall protection without using D-rings.

In order to complete the the Bridge work, several employees placed themselves at risk of falling from the Bridge. For example, an employee stood near the edge of the Bridge on a side without guardrails. He was not wearing a harness that attached to a fall arrest system. Grievant and another employee stood within six feet of the Leading

¹ The lanyard is made of steel and can function like a car seat belt. A rapid pull on the lanyard causes the lanyard to stop expanding.

Edge without any fall protection. In some instances, employees leaned over the edge of the Bridge to reach the chains needed to hook the crane to the Bridge so that sections could be removed. Grievant instructed employees to follow these practices even though some employees expressed concerns about safety.

While the employees were working on the Bridge surface, ropes, cables, and a chain saw were placed on the surface. These items placed employees at risk of tripping and falling.

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.”² 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.”

Group II Written Notice – Supervisor’s Instructions

The Agency alleged that Grievant failed to follow the Supervisor’s instruction because the Supervisor instructed Grievant to use a fall protection system. The evidence did not show that the Supervisor instructed Grievant to use fall protection for the Bridge demolition. The evidence showed that their interaction was one of collaboration regarding how to ensure safety of the employees working on the Bridge. Once fall protection was identified as an expectation, Grievant researched how to best implement fall protection. He generated the idea of using D-rings to secure employees to the Bridge. He did not provide employees with a safe work place but attempted to do so by using a bucket truck and painting lines on the Bridge. Grievant attempted to satisfy the Supervisor’s expectation of an adequate fall protection plan, but failed to do so. The Group II Written Notice must be reversed.

Group III Written Notice – Violating Safety Rules

The Agency’s Safety Policy addresses Fall Protection:

When working in heights of four feet in general industry or six feet or more above a lower level in the construction industry, then employees must be protected from falling by using one of the following conventional fall protection systems: standard railing (guardrail) system, personal fall arrest system or safety net system. The use of a fall protection plan is only allowed for specific walking/working surfaces and under certain

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

conditions. Each type of walking/working surface presents different challenges and hazards. The following is a discussion of the different types of walking/working surfaces and the safety requirements for each:

Leading Edge

Each employee who is constructing a leading edge six feet or more above lower levels shall be protected from falling by guardrail (standard railing) systems, personal fall arrest systems or safety net systems. If, however, a qualified person can demonstrate that it is infeasible or creates a greater hazard to use these systems, then the qualified person shall develop and implement a fall protection plan. ***

Fall Protection

Each employee on a walking/working surface four feet or more in general industry or six feet or more above a lower level in the construction industry where leading edges are under construction, but who is not engaged in the leading edge work, shall be protected from falling by a guardrail (standard railing) system or personal fall arrest system. If a fall protection plan is being used to protect employees engaged in the leading edge work and controlled access zone has already been established for the leading edge work, then the control line may be used in lieu of a guardrail (standard railing) along the edge that is parallel to the leading edge.

Section 6.2.4 of the Safety Policy addresses Safety Monitoring Systems.

A safety monitoring system is a fall protection system in which a competent person is responsible for recognizing and warning employees of fall hazard while working near unprotected sides or edges, classified as controlled access zones. It is used as a part of a fall protection plan or can be used when overhand bricklaying is taking place. This system relies on the ability of the monitor to see all employees working in the controlled access zone, the worker to hear the safety monitor and the timely reaction of the employee to such warnings. ***

Section 7.0 of the Safety Policy provides:

Controlled access zone

An area where certain types of work may take place without the use of standard railing systems, personal fall arrest systems, or safety net systems where access to and within the zone is controlled by a Safety monitor. Use of controlled access zones requires a written fall protection plan. ***

Leading edge

The edge of a floor, roof or formwork for a floor or other walking/working surface (such as a deck) which changes location as additional decking, floor, roof, or formwork sections are placed, formed, or constructed. A leading edge is considered to be an “unprotected side and edge” during periods when it is not actively and continuously under construction.

“[V]iolating safety rules (where threat of bodily harm exists)” is a Group III offense. Grievant violated safety rules because he worked on a Bridge without guardrails and without fall arrest protection. He forced his subordinates to work on a Bridge without guardrails and without fall arrest protection. If he or his employees had fallen off the Leading Edge of the Bridge, they may have suffered bodily harm. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he utilized a bucket truck³ to prevent employees from falling as they hooked the chains to the deck for the crane to lift. Employees in the bucket truck were harnessed to the truck. This argument fails. Using bucket trucks was not an appropriate fall protection system. The Agency had not approved use of bucket trucks as catch platforms. In addition, it did not prevent some employees from having to reach over the edge of the deck to help attach chains to the deck. Those employees remained at risk of injury if they had fallen of the Leading Edge.

Grievant argued that he had lines painted down each side of the Bridge and instructed employees to avoid crossing the lines and getting close to the Leading Edge. The evidence showed that employees including Grievant disregarded the lines thereby placing themselves at risk of falling off the Bridge. Grievant was the safety monitor and should have been at the Bridge at all times demolition was being performed and should have made sure employees complied with safety rules.

Grievant argued that he had been given significant autonomy by the Supervisor and could make his own decisions regarding how to perform the Bridge demolition. He pointed out that sometimes weeks or months passed without Grievant speaking with the Supervisor. He asserted the Supervisor would not have expected Grievant to call him if the fall protection plan could not be implemented. The evidence showed that if Grievant was hesitant to contact the Supervisor, he could have contacted Ms. M for guidance. In any event, Grievant’s hesitancy to contact his Supervisor would not justify placing other employees at risk of bodily harm.

Grievant presented evidence showing that using D-rings as part of a fall arrest system was not appropriate. He pointed out that the D-rings could not be secured to the Bridge deck. He added the D-rings could not be positioned at a worker’s feet but rather had to be above the worker’s head. This evidence does not show that Grievant

³ A bucket truck was sometimes referred to as an aerial lift or a man lift. Employees could get inside the “bucket” and be lifted by the truck operator.

was free to proceed without fall protection because the D-rings could not be utilized. It shows that Grievant should have contacted the Supervisor or Ms. M for further guidance regarding fall protection. It also shows that Grievant failed to properly research using D-rings in fall protection.⁴ Grievant claimed he knew the D-rings could not be used on the Bridge before the work began but he told his crew that they had to perform their work without fall protection because the D-rings had not been delivered by the supplier.

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 Human Resource Management”⁵ 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 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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor’s instructions is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for violation of a safety rule with a risk of bodily harm 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 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:

⁴ Grievant’s failure to erroneously recommend use of D-rings would support the issuance of disciplinary action. With his existing Group III Written Notice, any additional disciplinary action would form a basis to justify the Agency’s decision to remove him from employment.

⁵ Va. Code § 2.2-3005.

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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.