

Issues: Group II Written Notice (violation of safety rule) and Termination (due to accumulation); Hearing Date: 06/03/13; Decision Issued: 06/06/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10084; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10084

Hearing Date: June 3, 2013

Decision Issued: June 6, 2013

PROCEDURAL HISTORY

On March 6, 2013, Grievant was issued a Group II Written Notice of disciplinary action for violation of a safety rule. Grievant was removed from employment based upon the accumulation of disciplinary action.

On March 5, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 22, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 2013, 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 employed Grievant as a Transportation Operator II at one of its locations. He had been employed by the Agency for approximately 15 years prior to his removal effective March 6, 2013. The purpose of his position was:

Performs a combination of skilled equipment operation, preventive maintenance, and manual labor. Equipment operation includes but is not limited to backhoes, dump trucks, tractors, and similar equipment. Perform emergency roadway operations as an essential employee; must be willing to work outside of normal work hours during emergency conditions. This position is designated as essential and as such, all duties associated with this job are required during emergency situations which may include but are not limited to inclement weather, disaster response, and emergency operations in accordance with DPM 1-27, Staffing for Emergency Events.¹

Grievant had prior active disciplinary action. On November 17, 2012, Grievant received a Group II Written Notice for failure to comply with written policy.²

¹ Agency Exhibit 4.

² Agency Exhibit 12.

The Agency issued Safety Rules that were to be posted and kept posted in all buildings, shops, and storage sheds. One of these rules governed how employees operated certain vehicles in reverse:

All backing incidents are preventable. The same attention and awareness required to operate a vehicle in the forward direction must be used when backing a vehicle. Where there is limited sight distance, obstructions, or limited maneuverability, a ground guide or spotter must be used, if available. If a spotter or ground guide is not available, have a G.O.A.L – Get Out And Look to avoid a backing incident. When parking a vehicle, pull through parking is preferred or parking in a safe and legal location free of obstructions to avoid backing altogether. In addition, back-in parking of state vehicles should be practiced at all times, unless situations do not allow.³

The Agency provided Grievant and other employees with a brochure setting forth the Agency's Safety Rule regarding Reverse Signal Operations. The brochure states, in part:

Driver Requirements

1. The vehicle must have a reversal alarm that is audible above surrounding noise.

AND

2. A designated ground guide is present.

OR

Before operating the vehicle in reverse, the driver must exit the vehicle to visually determine that nothing or no one is in the path of the vehicle.⁴

In the Frequently Asked Questions portion of the brochure, the question is asked, "why do we need additional regulations on backing up?" The answer is as follows:

New regulations were adopted because of a continuing pattern of work-related vehicular incidents and fatalities, and realization that the existing standards were limited in their scope and did not apply to all construction vehicles and equipment with an unobstructed view to the rear. The new regulation places a positive responsibility on the driver to either keep the

³ Agency Exhibit 5.

⁴ Agency Exhibit 7.

designated ground guide in sight at all times during reverse operations, or in the absence of a designated guide, to visually determined that no one is in the back-up zone prior to beginning reverse operations.⁵

On December 19, 2012, Grievant was operating a 1 ton dump truck with an obstructed rearview. The truck had mirrors on each side and a rearview mirror. Although the truck had a rearview mirror enabling the driver to look through a small window in the back of the cab, the driver's view directly behind the truck was obstructed. Grievant had another employee with him in the front passenger seat. Grievant drove the vehicle to a local church to park while his crew ate lunch. He pulled the vehicle into the parking space. The parking space was near the church building. The back of Grievant's truck faced the church building. The church had steps with a wood railing on the outside of the building. Grievant and the passenger got out of the vehicle and were able to see whether any obstructions existed behind the truck at that point in time. After finishing his lunch, Grievant backed the vehicle out of the parking space to return to his work site. He did not ask his passenger to serve as a spotter while he backed up. He did not get out of the vehicle immediately before backing up. Grievant assumed he had sufficient room to back up without hitting anything. Grievant backed the truck into the stairs of the church building. The left rear of the truck hit two support posts of the wood railing. Grievant pulled forward, noticed the damage to the stairs and called the supervisor who indicated Grievant should return to work and the supervisor would "handle it." The truck was not damaged but two of the wood posts in the stairs had to be replaced. The cost of the damage was approximately \$300.

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."⁶ 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."

"[V]iolation of a safety rule or rules (where no threat of bodily harm exists)" is a Group II offense.⁷ The Agency's safety rule required that Grievant back the dump truck using a spotter. Grievant had a coworker with him who could have served as a spotter while Grievant backed the vehicle. Grievant did not use the spotter to assist him when he backed the truck thereby violating the Agency's safety rule. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for

⁵ Agency Exhibit 7.

⁶ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁷ See, Attachment A, DHRM Policy 1.60.

failure to follow a safety rule. Upon the accumulation of a second active Group II Written Notice, an agency may remove an employee. Grievant had a prior active Group II Written Notice. Accordingly, Grievant's removal must be upheld.

Grievant argued that it was not necessary to have a spotter because there was more than adequate room for him to back the vehicle out of the parking space. Even if the Hearing Officer assumes that this assertion is true, Grievant failed to exit his vehicle and look behind the truck to ensure he had an adequate path to move the vehicle safely. Grievant argued that he had looked at the area around the parking lot during his lunch period and concluded he had sufficient room to operate the vehicle safely. This argument fails because Grievant was expected to look behind his vehicle immediately before placing the vehicle in reverse. Had he specifically focused on the distance between his vehicle and the church, he would have reduced the risk of causing damage to the church stairs.

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"⁸ 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 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 with removal 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:

⁸ 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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.