

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 04/01/14;
Decision Issued: 04/21/14; Agency: VDOT; AHO: Ternon Galloway Lee, Esq.;
Case No. 10296; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10296

Hearing Date: April 1, 2014

Decision Issued: April 21, 2014

SUMMARY OF DECISION

The Agency had found Grievant failed to follow instructions and or policy. The Agency then issued Grievant a Group II Written Notice. The Hearing Officer found Grievant engaged in the behavior, it was misconduct, and the Agency's discipline was consistent with policy and law. Thus, the Hearing Officer upheld the Agency's discipline.

HISTORY

On November 13, 2013, the Agency issued Grievant a Group II Written Notice for failing to follow instructions and or policy. On November 18, 2013, Grievant timely filed his grievance to challenge the Agency's action. On March 4, 2014, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A prehearing conference ("PHC") was held on March 11, 2014.¹ Subsequently, the Hearing Officer issued a scheduling order setting the hearing for April 1, 2014, as agreed to by the parties.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. During the hearing the Agency objected to the Grievant's Exhibit 2 arguing that the policy set forth in that exhibit had been superseded and therefore the exhibit was irrelevant. The objection was overruled and during the course of the hearing, the Hearing Officer admitted Agency Exhibits 1 through 20 and the Grievant's Exhibits 1 through 23.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate, and the Grievant by his.

APPEARANCES

Advocate for Agency

Witnesses for the Agency (3 witnesses)

Grievant

Witnesses for Grievant (3 witnesses, including Grievant)

ISSUE

¹ This was the first date available for both parties for the PHC.

Was the written notice warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified, the Hearing Officer makes the following findings of fact:

1. The Agency is the Virginia Department of Transportation (VDOT). Grievant is employed as one of the equipment service and repair personnel in the “C” shop. As such he repairs and provides maintenance to, among other equipment, vehicles assigned to the Agency and used by its employees or customers. Grievant has held this position with the Agency for at least 10 years. (G Exh. 1; A Exh. 8; Testimonies of Grievant and Lead Technician). Grievant is a mechanic and holds Automotive Service Technician and Master Technician certifications and is quite capable of working on the vehicles serviced by the Agency. (Testimony of Supervisor; A Exh. 9).
2. On September 3 2013, Grievant’s supervisor assigned him a maintenance task. Specifically, Grievant was instructed to change the front wheel fuel filter on a 2012 GMC pickup truck assigned to the Agency. The truck’s warranty had not expired. Among other parts, its engine was under warranty for five (5) years and/or 100,000 miles, whichever ever occurred first. (G Exhs. 2, 4; Testimony of Supervisor; A Exh. 19).
3. Grievant decided to save time on completing the assignment by cutting the inner wheel liner to more quickly access the truck’s fuel filter. (Testimony of Grievant; G Exhs. 4, 7).
4. At the time he took this action, the Supervisor had left the shop and placed Lead Technician in charge. Lead Technician informed Grievant that cutting the wheel liner was not proper and although he advised Grievant to stop, the directive was ignored by Grievant. (Testimony of Lead Supervisor; A Exh 10).
5. The proper procedure for accessing the fuel filter so that it can be replaced is to detach or partially detach the inner fender liner (wheel liner) by removing necessary screws and plastic clips (fasteners) that attach it, lowering the wheel liner, and then retrieving the fuel filter and replacing the filter. (Testimony of Lead Technician; G Exh. 3; A Exhs. 11, 12, 13).
6. Grievant was not directed to alter the procedure for changing the fuel filter. While he had previously cut other wheel liners to access the fuel filters, the Agency was unaware of these previous actions until admitted by him on September 3, 4, 2013. The Agency never condoned

Grievant's action. (Testimonies of Supervisor and Lead Technician; A Exhs. 10, 16).

7. Once Supervisor learned of Grievant's action on September 3, 2013, he caused Grievant to replace the inner wheel liner the following day. The Agency incurred the cost of purchasing a new liner for this job which was completed by Grievant in about 1.5 hours. (Testimony of Supervisor; A Exh. 18).

8. Because Grievant cut the inner fender liner to access the fuel filter on the truck, he exposed components of the truck, to include crucial parts like the engine, to possible failure due to water, debris, or other materials reaching those parts of the vehicle, meant to be protected by an unopened inner wheel liner. Grievant's actions could have voided the warranty on the vehicle. (Testimony of Supervisor; A Exhs. 7, p. 2 and 19, pp. 7-8 ; G Exh. 10, p. 2).

9. The vehicle's owner's manual with instructions for changing the fuel filter was located in the truck for review by Grievant at the time Grievant elected to cut the inner wheel liner. Grievant as well as other mechanics working in the shop have access to an online library that includes operating manuals of the vehicles they service in the shop. Grievant knew how to properly change the inner wheel liner. (Testimony of Supervisor).

POLICY

10. Under Agency Policy No. 3.35 (Policy 3.35), any modifications to equipment assigned to the Agency must first be reviewed with the District Equipment Manager (DEM) for approval. The policy defines modifications as "[a]ny structural or cosmetic change to the original design or original intended use of the equipment." (A Exh. 14).

11. Cutting the front inner wheel liner as Grievant did on September 3, 2013, is a modification to the equipment and Grievant had not obtained permission to make this change in the equipment. (Testimony of Supervisor; A Exh. 14).

12. Grievant was aware of the policy requiring permission from the DEM to modify equipment. (Testimony of Supervisor).

GROUP NOTICE

13. After learning on September 3, 2014, that Grievant had cut the inner wheel liner, Supervisor conducted an investigation and determined it was appropriate to discipline Grievant and sought guidance from Human Resources. Due to the appropriate human resource staff being out of the office or on leave, it took several weeks for Grievant to confer with human resource about the matter. On October 22, 2014, Supervisor issued Grievant a due process letter informing him that management intended to issue him a Group II Written Notice. Grievant requested an extension of time to respond and was granted until October 28, 2013 to do so. (A Exh. 3; G Exh. 6)

14. On November 13, 2013, Grievant was issued a Group II Written Notice that described the offense as set forth below:

On September 3, 2013, you were assigned to perform level A and B preventive maintenance service on [Agency] rental equipment unit R12372, a 2012 GMC 2500 4WD pickup truck. While servicing this truck, you cut out an area of the inner front wheel liner to access the fuel filter to and replace it. Modifying this wheel liner violated the September 1, 2005 Maintenance Division Memorandum Number 3.35 which states the following: "certain modifications may be needed and must be reviewed with the District Equipment Manager prior to performing the modification." The definition of modification in this section includes "any structural or cosmetic change to the original design or original intended use of the equipment." You confirmed that you have cut the inner fender liner on one or more trucks to access and replace the fuel filters.

(A Exh. 3).

15. In response Grievant contends he is being unfairly treated and that the Lead Technician who was the acting supervisor at the time Grievant cut the liner condoned his actions. (Testimony of Grievant; G Exh. 8).

OTHER

16. Grievant's disciplinary record contains two counseling memorandums issued in 2011, and 2012, regarding conducting himself in a professional manner and abiding by safety rules, respectively. His disciplinary record also contains three inactive group notices. (A Exh. 20).

17. Sometime between September 11, 2013, and October 2013, Grievant testified in the grievance of Co-worker I. The decision in that grievance was in favor of Co-worker I. Co-worker I perceived that his work and Grievant's work was more scrutinized after Co-worker's I grievance in fall 2013. (Testimony of Co-worker I).

18. Since Grievant received his written notice, he has lodged a complaint contending that Supervisor treats him unfairly. Management is currently investigating Grievant's complaint. (Testimony of District Equipment Manager).

19. Although Co-worker II was present for about 2 minutes during the period Grievant was cutting the wheel liner, he is uncertain were Grievant was in the process of cutting the liner. At that time, he did observe Lead Technician in the general area of Grievant and looking in the direction of Grievant. Co-worker II did not observe Lead Technician speaking to Grievant. (Testimony of Co-worker II).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act, VA. Code §2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act

balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.²

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy No. 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further an offense is appropriately identified as a Group II offense when it significantly impacts business operations/constitute neglect of duty or violation of a policy/procedure. Group III offenses are the most severe and normally warrant termination. *See* Standards of Conduct Policy 1.60.

On November 13, 2013, management issued Grievant a Group II Written Notice for failure to follow instructions and/or policy on September 3, 2013. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group II Written Notice and did that behavior constitute misconduct?

² Grievance Procedural Manual §5.8

The Agency contends that Grievant failed to comply with instructions/policy regarding replacing a fuel filter and making modifications to equipment. The Hearing Officer now examines the evidence to determine if the Agency has met its burden.

The evidence shows that the proper procedure for accessing the fuel filter so that it can be replaced is to lower the wheel liner. This is done by removing several screws and plastic clips (fasteners) that attach the wheel liner, then lowering the liner (either partially or entirely) to retrieve the fuel filter, and then replacing the filter. On September 3, 2013, Grievant was instructed to change the fuel filter of a 2012 GMC pickup truck assigned to the Agency. The vehicle remained under warranty. It is undisputed that Grievant employed a different method than that referenced above to access the fuel filter. In particular, he cut the inner wheel liner to retrieve the filter. Grievant contends that he was under pressure to finish the task quickly. Thus, he cut the liner to gain easy access. He also asserts that the acting supervisor condoned or approved his action.

In support of his contention, Grievant testified that the acting supervisor, Lead Technician, was present during the time he was making the cut and this supervisor did not tell him to stop. Further, Grievant testified that at least on one occasion prior to the September 3, 2013 incident, he asked Lead Technician if he could access the fuel filter of vehicles serviced by cutting the inner wheel liner. Grievant testified that in response to this question, the Lead Technician shrugged his shoulders. Grievant indicated he interpreted the shrug as consent to cut the inner wheel liner. In contrast, Lead Technician testified that on September 3, 2013, he observed that Grievant had begun to cut the inner wheel liner and he advised Grievant to stop. But Grievant ignored him and continued to cut out a portion of the liner. Lead Technician also testified that he had never given Grievant instructions on how to replace fuel filters. He stated that he had worked at the shop less time than many of the current employees, including Grievant. And further, when he arrived as a mechanic there, the other repairman already knew how to change a fuel filter.

Another assertion Grievant makes is that the job he was assigned was new to him and he had no access to the proper instructions to complete the task. Grievant testified that he had never worked on a 2012 GMC truck before and that he was unaware that the owner's manual was in the glove compartment of that vehicle. The evidence shows this manual provided the proper instructions on replacing the fuel filter. Next, Grievant asserts he was unable to access proper instructions on the internet or by way of the shop's on-line library. In contrast to these claims, the evidence demonstrates that Grievant holds Automotive Service Technician certification, as well as Masters technician certification. Moreover, he has worked over 10 years as a mechanic in the Agency's "C" shop. Prior to September 3, 2013, he had passed competency tests involving the types of maintenance/repairs "C" shop is expected to perform. As such, the Hearing Officer finds Grievant was qualified to perform, among other work, preventive maintenance. Further, it is reasonable to infer that Grievant should have known how to properly change the fuel filter. Alternatively, if Grievant was unsure how to perform the task, his training indicates that he should have known the owner's manual with the proper instructions was in the glove compartment of the vehicle and applied those instructions.

The Hearing Officer also notes that, Grievant's own witness testified that getting on the internet to access the library to obtain guidance on servicing equipment was not a problem. Further, Grievant acknowledged that if he had taken his own vehicle to be repaired and a hole was cut in one of its parts he would be displeased.

Considering the evidence above and the Hearing Officer's observance of the witnesses' demeanor, she finds Grievant's testimony and assertions self-serving and unpersuasive. In contrast, she finds the Lead Technician's testimony believable. Accordingly, the evidence establishes that Grievant failed to follow the proper procedure for replacing the fuel filter and he was not given permission to do so.

As noted previously, the Agency also contends that Grievant violated Policy No. 3.35. It requires approval from the District Equipment Manager (DEM) before equipment assigned to the Agency is modified.

The evidence shows Grievant modified the truck when he cut the wheel liner. In fact the modification put the Agency at risk of the truck's warranty being voided. The evidence also demonstrates that Grievant did not have permission to modify the truck.

Thus, the Hearing Officer finds the Grievant engaged in the conduct alleged; that is, he cut the wheel liner and he modified the equipment. The Hearing Officer also finds misconduct as both actions were against Agency instructions and/or policy.

Having made this ruling the Hearing Officer is cognizant of Grievant's contention that he was unfairly treated and is being retaliated against because he testified in a Grievance for a co-worker in the fall of 2013. The Hearing Officer finds the evidence is not sufficient to substantiate either claims.

B. Was the discipline consistent with policy and law?

The evidence shows that Grievant engaged in misconduct. Policy No. 1.60 indicates that failure to comply with instructions/policy is a group II offense.

The Hearing Officer has considered Grievant's claim that the acting supervisor condoned his behavior and therefore should have been disciplined as well. And since the acting supervisor was not punished, Grievant should not have been disciplined. As noted above, Grievant's claim(s) are unsubstantiated.

Thus, the Hearing Officer finds the Agency's issuance of the Group II Written Notice is consistent with policy and law.

II. Mitigation.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with

the rules established by the Office of Employment Dispute Resolution [“EDR”].”³ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁴ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁵

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice and it was misconduct. Further, the Hearing Officer has found, the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated. This has included considering all the evidence, to include (but not limited) testimony of all witnesses, Grievant’s work history, Grievant’s receipt of prior counseling, Grievant’s claim that he was denied due process because it took the Agency 48 days to issue the group notice, and his claim of unfair treatment. Having taken all evidence into account, the Hearing Officer cannot find the Agency acted unreasonable. The Hearing Officer also finds Grievant’s behavior aggravating because the Agency’s warranty on the truck could have been voided by Grievant’s actions. Further, even though the liner was replaced by Grievant the next day, the Agency incurred a non-reimbursed expense to replace it.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency’s discipline.

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:

³ Va. Code § 2.2-3005 and (c)(6)

⁴ *Rules for Conducting Grievance Hearings* VI(A)

⁵ *Rules for Conducting Grievance Hearings* VI(B)

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:

Director
Departmental of Human Resource Management
101 N. 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 N. 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

Entered this 21st day of April, 2014

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant's Advocate
Grievant
EDR's Director of Hearings Program

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