

Issues: Group II Written Notice (failure to follow policy), and Termination (due to accumulation); Hearing Date: May 15, 2015; Decision Issued: 06/01/15; Agency: VDOT; AHO: Jane E. Schroeder, Esq.; Case No. 10593; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF THE HEARING OFFICER

In the matter of Case # 10593

Case Heard: May 15, 2015

Decision Issued: June 1, 2015

PROCEDURAL HISTORY

The Grievant was employed by the Agency as a transportation operator. On March 4, 2015, the Agency issued a Group II Written Notice to the Grievant for failure to follow written policy/procedures/guidelines. The Grievant was terminated. The Grievant filed a Dismissal Grievance asking for the withdrawal of the Group II Written Notice, return to employment, back pay, and relocation to another headquarters. After several attempts to contact the Grievant, the Hearing Officer spoke separately to the Grievant and the Agency Advocate to set up a hearing date.

Four days before the hearing the Grievant called the Hearing Officer to inquire if the Hearing Officer had received a packet that he sent and to ask for a continuance. A telephonic pre-hearing conference was held the next day. At that time the Grievant said he had sent a packet to the Agency with a copy to the hearing officer the previous week. In it, he requested that the Agency provide certain papers to the Grievant prior to the hearing. Neither the Agency Advocate nor the Hearing Officer received any correspondence from the Grievant. The Grievant stated that he had not received the Exhibits sent by the Agency. I asked if he was still at the address, 301 [] Street, and he said he was, but lots of neighbors had that address. The Agency provided the confirmation of delivery. He asked that the hearing be continued indefinitely because an attorney he contacted was not available on that date. The Hearing Officer denied that request. The Grievant stated that he may not show up for the hearing.

The case was heard on May 15, 2015. The Grievant did not attend the hearing, nor did he send any exhibits. The Grievant sent an email to the Agency Advocate on the morning of the hearing stating that he was not attending due uncontrollable and unforeseen circumstances. He did not ask for the case to be reset. Twelve Agency exhibits were entered into evidence. Three witnesses for the Agency testified. The Hearing Officer asked the HR Consultant to testify briefly towards the end of the hearing to review the Human Resources Consultation Summary included as Exhibit 4, pages 1-4. The hearing was recorded on a digital recorder and stored on one compact disk.

APPEARANCES

Agency Advocate
Agency Representative
Witnesses for Agency:

Supervisor
Superintendent
Acting District Administrator
HR Consultant

ISSUE

Whether the Group II Written Notice Issued to the Grievant on March 4, 2015 and subsequent termination should be sustained, modified or revoked.

BURDEN OF PROOF

In disciplinary actions, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual). This case is a disciplinary action. The burden of proof is on the agency. In this case, the agency must prove that it is more likely than not that the Grievant failed to follow written policy/procedures/guidelines. The agency must prove that issuing a Group II Written Notice and termination of the Grievant was warranted and appropriate.

FINDINGS OF FACT

1. The Grievant worked at the Agency for approximately 15 years. He was a Transportation Operator II.
2. On December 17, 2014, the Grievant was driving a dump truck at work. He was instructed by his supervisor to tow a Portable Changeable Message Sign, "PCMS" trailer to a staging area so it would be ready when needed. He attached the PCMS trailer to the dump truck and drove to the staging area. After waiting some time, he was instructed to tow the PCMS sign down the state highway to the spot where it was needed. When enroute, the PCMS trailer swayed in the wind, became unhooked from the dump truck, and flipped up and hit the dump truck. This resulted in damage to the dump truck and the PCMS trailer.¹
3. The damage to the PCMS trailer included a bent left axle, broken tail light, and damage to tongue of the trailer and to the sign. The Agency determined that it was not cost effective to repair the PCMS trailer and it was replaced with a newer model. The dump truck had minor damage to the tailgate.²
4. The Grievant attended periodic training for different equipment and safety issues from

¹ Exhibit 2, pp. 10-12, Exhibit 5, p. 7-14

² Exhibit 2, p. 5-6, Exhibit 5, p. 17-26, Testimony of Supervisor

1999 – 2015. One course he attended on November 15, 2013 was Portable Changeable Message Sign-PCMS.³ Included in the Participant Handbook from that class is a checklist for preparing the PCMS sign for towing. Included in the checklist are three steps that the Grievant failed to follow: Lowering the sign before transport, having the hitch secured with the safety pin, and having the safety chains attached and crossed.⁴

5. The Grievant, in his statement about the incident, admitted that there was no safety pin in the hitch at the time. He claimed that there were no safety pins in the truck. However, the supervisor testified that he looked in the truck after the accident and there were safety pins in the truck. The Supervisor also observed after the accident that there was only one of the two required safety chains was attached, and that sign had not been lowered into horizontal position, as required during transport.⁵

6. The Superintendent testified that he was not there the day of the accident. The following day, the Superintendent looked at the damaged equipment, took statements from other employees, and met with the Grievant and the Supervisor. The Superintendent concluded that the accident was preventable.⁶

7. The Agency has a safety policy which provides guidelines regarding state-owned vehicles involved in crashes and moving violations. The Grievant acknowledged in writing that he reviewed this policy.⁷

8. In accordance with the policy, the Grievant's actions regarding the accident were reviewed by the District Safety Committee. The committee found the accident was preventable, and that the Grievant was negligent when he failed to properly secure the trailer to the dump truck prior to transporting and when he left the sign board upright during transport.⁸

9. The Grievant was issued a Group II Written Notice for failing to follow written policy/procedures/guidelines which contributed to a preventable equipment accident causing significant damage to agency equipment.⁹

10. The Grievant had previous Written Notices that remain active. One was a Group III Written Notice from January, 2014 for failing to follow supervisory instructions. At that time, the Agency mitigated termination due to the Grievant's performance and tenure, and opted to suspend the Grievant for 30 days instead. On that Written Notice the Agency stated, "[Grievant] is hereby advised that any subsequent infraction warranting discipline under Policy 1.60 may lead to further disciplinary action up to and including termination of employment."¹⁰ Another active Written Notice of the Grievant is a Group II Written Notice issued on July 27, 2012 for failure to follow supervisor's instruction. At that time the Grievant was suspended for 10 days.¹¹

³ Exhibit 4, pp.5-10

⁴ Exhibit 4, p. 22, Testimony of Supervisor

⁵ Exhibit 2, pp. 10-12, Testimony of Supervisor

⁶ Testimony of Superintendent

⁷ Exhibit 6

⁸ Testimony of Superintendent, Acting District Administrator

⁹ Exhibit 2

¹⁰ Exhibit 10, p. 1

¹¹ Exhibit 12, p. 32

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Standards of Conduct provides a set of rules governing the professional 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.

Section B.2.b. provides that Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.

In the present case, the Grievant was issued a Group II Written Notice for failure to follow written policy/procedures/guidelines. Grievant failed to follow instructions for lowering the sign before transport, having the hitch secured with the safety pin, and having the safety chains attached and crossed. This resulted in an accident with damage to the Agency's equipment. The Grievant was terminated. The Grievant filed Grievance Form A, and a hearing was scheduled and conducted to determine whether the Group II Written Notice and the termination should be sustained, modified or revoked.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section AFramework for Determining Whether Discipline was Warranted and Appropriate@ states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and

policy (e.g., properly characterized as a Group I, II, or III offense).¹²

Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

In this case, I find that the Grievant did engage in the behavior described in the Written Notice. It is clear from the facts presented that the Grievant failed to follow written procedures and safety policies when he failed to secure the sign and failed to lower the sign before towing the sign on a state highway.

(ii) Whether the behavior constituted misconduct

The Grievant was trained in the correct procedures for moving a sign on the highway. His signature confirms he was familiar with the safety policies. The accident he caused by his negligence and failure to follow policy was preventable. Failure to follow the policies and procedures resulted in damage to Agency equipment. I find that the failure of the Grievant to follow the written policies of the Agency constitutes misconduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy

The Grievant was found to be negligent by the District Safety Committee. Under the Agency Safety Policy, an employee found negligent is subject to discipline under the Standards of

Conduct Policy. The Grievant was given a Group II Written Notice and was terminated. The Grievant has two active previous Written Notices (a Group II and a Group III) for failure to follow supervisory instruction. Under the Standards of Conduct, “A second active Group II Notice normally should result in termination.” The level of discipline in this case is consistent with the Agency Safety Policy and Standards of Conduct Policy analyzed above. This Hearing Officer finds that the agency’s disciplinary action is consistent with law and policy.

Mitigating Circumstances

In the previous active Group III Written Notice from January, 2014, the Agency considered the Grievant’s performance and tenure as part of the mitigation. The Grievant was warned in January 2014 that any subsequent infraction could lead to termination. The Agency considered the Grievant’s performance, tenure, and progressive disciplinary record and found no mitigating factors for the present disciplinary action.

According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness.¹³ After review of the agency’s consideration and assessment of mitigating circumstances, this Hearing Officer finds

¹²Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

¹³ Rules for Conducting Grievance Hearings, p. 17

that the agency's discipline of imposing a Group II Written Notice and termination does not exceed the limits of reasonableness.

DECISION

The Grievant's Group II Written Notice issued December 17, 2014 is upheld. The Grievant's termination 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:

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.¹⁴

[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].

June 1, 2015

Jane E. Schroeder

Jane E. Schroeder, Hearing Officer

¹⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.