

Issue: Group II Written Notice with Suspension (unsatisfactory performance); Hearing Date: 08/09/13; Decision Issued: 10/10/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No.10136; Outcome: Full Relief.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10136**

Hearing Date: August 9, 2013  
Decision Issued: October 10, 2013

#### **PROCEDURAL HISTORY**

On April 26 2013, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for unsatisfactory performance.

On May 24, 2013, 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 July 15, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 9, 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 (VDOT) employs Grievant as a Project Manager at one of its facilities. He is responsible for getting projects ready for construction and then manages the development of the construction plans. He is not responsible for designing projects. Grievant is a section leader.

Grievant had prior active disciplinary action. On March 7, 2013, Grievant received a Group I Written Notice for unsatisfactory work performance.

Grievant reported to the Assistant District Administrator (ADA). The ADA was responsible for overseeing all project development activities and making sure construction projects were advertised. The ADA also served as the District Project Development Engineer (DPDE).

The Commonwealth Transportation Board (CTB) consists of political appointees, the Secretary of Transportation, and VDOT Commissioner. The CTB holds public meetings on a monthly basis during which it discusses and approves proposed construction projects. A CTB meeting was scheduled for April 16, 2013.

The Federal Highway Administration (FHWA) must give its approval before a construction project partially funded by the Federal government can be presented to the CTB for approval. The FHWA has an engineering and right of way section that reviews proposed construction plans and offers approval in writing or by email. When the

FHWA approves a project, it sends a letter to the Agency's Central Office. The letter is then attached to the package to be presented to the CTB for approval.

The Interstate Project involved construction to a major Virginia interstate and it affected properties adjacent to the construction. The Interstate Project plan involved establishing a limited access right of way to govern the use of property adjacent to the project. A limited access right of way on a large interstate project involves limiting the rights of adjacent property owners who otherwise have direct access to the interstate roadway. For example, the Agency would not want adjacent land owners to have a private drive onto an interstate roadway.

Grievant was the Project Manager for the Interstate Project. He was responsible for making sure all milestones on the project were met and within budget. Grievant was responsible for preparing the public hearing transcript to get the package ready for the ADA's signature. Once the ADA signed the package and everything was correct, the package was to be submitted by the Project Manager to the Assistant State Location and Design Engineer (ASLDE) at the Agency's Central Office.

On November 29, 2012, a Combined Location and Design Public Hearing was held for the Interstate Project. The hearing was regarding the Agency's intention to relocate an interchange. The construction of the project would have a right of way impacting 72 properties.

Grievant drafted a memorandum to the ASLDE and the DPDE seeking approval of the Interstate Project. Grievant described what occurred during the public hearing and reflected on comments made during the hearing. He wrote, "[I]t is the staff's recommendation that the major features of this project be approved as proposed and presented at the public hearing." He signed the memorandum on February 12, 2013.

On February 12, 2013, the DPDE signed the memorandum indicating "I concur with staffs' recommendation, that the major design features for the above project be approved, as noted."<sup>1</sup>

The ASLDE began preparing a package to send to the FHWA for approval. On March 26, 2013, the ASLDE sent Ms. L of the FHWA an email stating:

The public hearing for the [Interstate Project] referenced above was held on November 29, 2012. We are preparing for the submission to the [CTB] for approval of the location and the Limited Access Control Changes required by the design. I have been told that I need concurrence from the FHWA for the changes to the Limited Access Line before the CTB will act on this (forgive me, it has been a long time since I have done an Interstate Limited Access change). Can you provide me such concurrence or let me know what information you may need for your review?

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<sup>1</sup> Agency Exhibit 2.

On March 27, 2013, Ms. L replied to the ASLDE:

As discussed yesterday, need to see the applicable revised plan sheets that reflect my discussion with [Grievant] and [Consultant M] on Tuesday 15<sup>th</sup> January 2013, during which we agreed that the limited access line needed to extend around the radii at the first intersection on each approach, not just stop at the end tangent. I believe that [Consultant M] marked/noted on a set of plans he had with him, the precise locations of each.<sup>2</sup>

On March 27, 2013, Consultant M sent the ASLDE and Grievant an email stating:

The attached plan sheets show the begin and end points of the LA line. These sheets will be provided in the constructability/UFI submission next week. I believe that the LA limits shown here reflect our conversation with [Ms. L].<sup>3</sup>

On March 27, 2013, Grievant forwarded the email he received from Consultant M to Ms. L with the FHWA. Grievant wrote:

Please call to discuss. As per my voice message these points reflect both my notes as well as [Consultant M's] as to the limited access line; all these points are well beyond the curb return several hundred feet on [AR drive], over 150 feet on [VD drive], and over 300 feet on [JM drive].<sup>4</sup>

On April 4, 2013, Ms. L sent Grievant an email with a copy to the ASLDE and Consultant M stating:

[Grievant's first name] we talked over the phone but don't think I ever replied to this. I know [ASLDE] is putting together an official package (anticipated tomorrow) which I'll check & [Ms. BM] in my office (ROW lady) will sign (presuming it all matches). So:

(1) Just to confirm – yes, the four sheets you sent below do show the revised Limited Access just as I recall us discussing it with [Consultant M] in January. Thank you.

(2) Can you or [ASLDE] confirm that the only thing that changed regarding the limited access from the PH set were the 4 sheets you sent? I was a bit confused because [ASLDE] sent a pdf of 20 sheets to [Ms. BM] and myself, and I thought only those 4 had changed, but then I realized he was providing all the sheets with Limited Access shown on them, changed

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<sup>2</sup> Grievant Exhibit 7.

<sup>3</sup> Grievant Exhibit 8.

<sup>4</sup> Grievant Exhibit 9.

from PH or not (I think). Of course, I'll look at all 20 but it is faster when one knows what to expect.<sup>5</sup>

On April 4, 2013, the ASLDE got a "signed letter" and believed that it was what Ms. L wanted based on his communication with her. On April 5, 2013, the ASLDE made a "formal submission" to the FHWA for approval for the limited access control changes.

The ASLDE prepared a resolution, decision brief, project brief, obtained information from the consultant through Grievant and spoke with the Attorney General staff. He submitted the Interstate Project package to the CTB and scheduled the Interstate Project to be heard at the April 16, 2013 meeting.

On April 5, 2013, Grievant and the ADA met for their "weekly progress meeting." At this meeting, the ADA first learned that the Interstate Project had been placed on the CTB's agenda.

On April 8, 2013, Ms. L sent an email to Grievant and to Ms. BM of FHWA with a copy to the ASLDE stating:

[Ms. BM] See below FYI. I have the package that [ASLDE] provided Friday PM 5<sup>th</sup> April on my desk. I have checked it and the Limited Access lines shown are as agreed upon relative to the design of the project. I have not placed it on your desk for action because of concerns over this proposed gate. Just trying to make sure we don't repeat the problems that [District] had on [another interstate] with what I understood was a similar situation, but not written agreement. Should we attach a copy of the draft Agreement, or make FHWA approval contingent upon it or what? I meant to just talk to you about this today, but I must leave for a meeting & I see you are not in this AM, & also I thought it would be helpful for [ASLDE] to know the status. Reach me by phone if need be.<sup>6</sup>

Prior to April 8, 2013, the ASLDE had no indication that the FHWA would not approve the change. He was not aware of the problem with the gate prior to April 8, 2013. The ASLDE did not contact the ADA or District Administrator (DA) to inform them of the problem with obtaining approval from the FHWA. The ASLDE decided to go forward with the Interstate Project and the CTB despite not having FHWA approval because he believed if he waited the project could not have been approved by the CTB in April or May and would have had to be approved in June 2013.

On April 16, 2013, the ADA learned that the FHWA did not agree with the proposed changes to the limited access control shown on the plans to be submitted to

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<sup>5</sup> Grievant Exhibit 9.

<sup>6</sup> Grievant Exhibit 10.

the CTB for consideration. The ADA and the DA devoted several hours discussing with the FHWA the reasons for the change and seeking approval. The FHWA did not agree with the change. The DA contacted the Agency Commissioner to inform him that the package had to be delayed until the next CTB monthly meeting. Because of the time that had passed, the DA was unable to have the Interstate Project removed from the CTB's agenda. Delaying the project caused embarrassment to senior managers at the District office.

On May 6, 2013, the FHWA notified the Deputy Chief Engineer that it concurred with the Interstate Project but noted that its concurrence was contingent upon the Agency's submission and FHWA approval of a "formal locked gate access request."<sup>7</sup>

### **CONCLUSIONS OF POLICY**

The Agency has not presented sufficient evidence to support the issuance of disciplinary action in this case. The Group II Written Notice must be rescinded.

As of March 26, 2013, the ASLDE knew he needed to obtain approval from the FHWA for changes to the Limited Access Line plan. He sought approval from Ms. L with the FHWA. Because he expected to receive approval, he placed the Interstate Project on the CTB's April 16, 2013 agenda. He did not anticipate the FHWA's concerns about a gate that was tied to the limited access control line. When the FHWA failed to grant approval, the Interstate Project had to be delayed.

The thrust of the Agency's allegation against Grievant is that he caused the Interstate Project to be placed on the CTB April 16, 2013 meeting agenda without first having obtained concurrence from the FHWA. The evidence showed that the decision to place the Interstate Project on the CTB agenda was made by the ASLDE and not by Grievant. The evidence also showed that the ASLDE attempted to have the FHWA's concerns about a gate resolved but he failed to obtain FHWA concurrence before placing the Interstate Project on the CTB agenda. In short, it was the error of the ASLDE that caused the frenzied attempts of the ADA and DA to obtain the FHWA's final approval. The ASLDE acted prematurely to place the Interstate Project on the agenda of the CTB.

The Agency argued that the Interstate Project was changed after the ADA gave her approval on February 12, 2013 and that Grievant should have obtained additional approval from the ADA. The ASLDE testified credibly that the changes were minor and not significant enough to require approval from the ADA.

The Agency argued that Grievant failed to keep the ADA informed of the Interstate Project's status. The evidence showed that the ADA learned on April 5, 2013 that the project had been placed on the CTB's April 16, 2013 agenda. The ASLDE

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<sup>7</sup> Grievant Exhibit 13.

decided to place the project on the CTB's agenda shortly before April 5, 2013. Grievant informed the ADA of the ASLDE's action within a reasonable period of time.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

Or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>8</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.