

Issue: Group II Written Notice with Suspension (failure to follow instructions/policy);
Hearing Date: 09/24/14; Decision Issued: 10/07/14; Agency: VDOT; AHO: Jane
E. Schroeder, Esq.; Case No. 10436; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA

*Department of Human Resource Management
Office of Employment Dispute Resolution*

DECISION OF THE HEARING OFFICER

In the matter of Case Number 10436

Case Heard: September 24, 2014

Decision Issued: October 7, 2014

PROCEDURAL HISTORY

The Grievant was employed at the agency. On June 20, 2014, the Grievant received a Group II Written Notice for Offenses #13: Failure to follow instructions and/or policy, and #14: Safety rule violation. The Grievant was suspended for two days. The Grievant initiated the Employee Grievance Procedure on June 30, 2014 by completing Grievance Form A. After completion of the first and second resolution steps, the grievance was qualified for hearing. On August 18, 2014, the hearing officer was assigned to hear the case.

A telephonic pre-hearing conference was held on August 22, 2014. The hearing was on September 24, 2014. The Grievant=s exhibits, identified as Grievant Exhibits 1-8 were entered into evidence without objection. The Grievant objected to Agency=s Exhibit 13. The Agency agreed to withdraw that exhibit. The Agency=s exhibits 1-12 and 14 were then entered into evidence. Four witnesses, including the Grievant, testified. The one and one-half hour hearing was recorded on a digital recorder and stored on a compact disk.

APPEARANCES

Grievant

Agency Representative

Witnesses for the Agency:

#1 Supervisor

#2 Maintenance Administrator

Witnesses for Grievant:

#1 Area Superintendent

#2 Grievant

ISSUE

Whether to sustain, modify or revoke the Group II Written Notice and suspension issued to the Grievant on June 20, 2014, for Offenses #13: Failure to follow instructions and/or policy, and #14: Safety rule violation. The Agency described the alleged offenses in the Written Notice as

follows:

“On the afternoon of Thursday May 15, 2014, [The Grievant], while operating [Agency] truck No. [A] backed around a pile of asphalt millings at the [] Maintenance Facility and into [Agency] dump truck No. [B]. He provided a written statement on 5/19/14 which said, “I was looking in the passenger side mirror to make sure I didn’t run up in the millings. At which point, I ran into [truck B] on the left rear of [truck A], which resulted in damage on [truck A], and no damage to [truck B], this was at 3pm and no witnesses were present and it was reported to [Area Superintendent] and the State police.” [Grievant] is aware that all backing incidents are preventable. The same awareness required to operate a vehicle in the forward direction must be used when backing a vehicle. On January 14, 2014, [], his supervisor, reviewed the [Agency] Safety Rules with him and all employees in the [] Area Headquarters. [The Grievant] signed [Agency]’s Safety Policy acknowledging that he understood them and will abide by them. Because [Grievant] failed to comply with written policy, his action resulted in a preventable incident which is the determining factor in issuing this Group II offense.”

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, 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.

The Agency must prove that it is more likely than not that the Grievant failed to follow instructions and policy and violated safety rules when he backed up a vehicle on May 15, 2014. The Agency must show that its action against the Grievant was warranted and appropriate under the circumstances. In this case the action against the Grievant was the issuance of a Group II Written Notice and suspension without pay for two days.

FINDINGS OF FACT

1. The Grievant worked as Transportation Operator II for the agency. For the last two yearly Performance Evaluations, the Grievant has received a “Contributor” rating. Both evaluations (given before the incident in this case) noted that the Grievant had no accidents to self or equipment.¹
2. The Agency has 35 Safety Rules for employees. The relevant section of Rule Number 17 of the safety rules is as follows: “**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 **G.O.A.L. –Get Out and Look** to avoid a backing

¹Grievant Exhibit 5: Oct 15, 2012 and Oct. 10,2013 Performance Evaluations

incident.”²

3. The Agency also has a District Equipment Backing Policy. The introduction paragraph states as follows: “The following Equipment Policy for backing up vehicles is effective January 12, 1998. The policy applies to **ALL** employees of the [] District. Operators of motor vehicles failure to comply with this policy are subject to review under the Standards of Conducts (sic).” The sections of this policy that are relevant to this case are as follows:
 - No vehicle will back from a parking space without the driver first walking completely around the vehicle to insure there are no obstructions present. The ground guide will be equally responsible, along with the driver, for the safe backing of the vehicle.
 - When backing vehicles with limited visibility, a ground guide will be utilized whenever a second person is available, either in the vehicle or nearby. Limited visibility vehicles include dump trucks, large vans and other such large vehicles.³ The Grievant was aware of these policies.⁴
4. The Supervisor and Administrator both testified that is another backing policy that was initiated by the Agency in the [] District after a March, 2014 staff meeting. Due to the high volume of backing accident in this District, all backing accidents are subject to disciplinary action and the drivers are to be issued Group II Written Notices. No written copy of this policy was provided for this hearing.⁵
5. On May 15, 2014, the Grievant was at work at an Agency maintenance facility, and was going to back up a truck from a parking space. There was a large piling of millings to the left of the truck. Before he got into the truck, he walked completely around the vehicle. He then got into the truck which had a rear window and rear view mirror as well as side mirrors on the driver’s and passenger side. When he was backing up the truck, he was using the side mirror and watching to avoid the pile of millings. While watching for the millings, he backed into another agency truck. There was damage to the truck he was driving, but not to the other truck. There were no witnesses to the accident.⁶
6. The Grievant immediately went to the office at the facility and reported the accident to the Area Superintendent and to the state police. The Area Superintendent testified that his office was about 300 yards from the site of the accident, and he would not have expected the Grievant to come that distance to ask the Area Superintendent to leave his office to act as a ground guide. He also testified that the truck that was hit was not usually parked where it was parked on the day of the accident. Usually it would be parked inside a garage at the facility. The Grievant then filled out an accident report.⁷
7. The Grievant’s Supervisor testified that he was not at that facility on the day of the

² Agency Exhibit 10, page 2

³ Agency Exhibit 11, page 2

⁴ Agency Exhibit 11, page 2: Grievant’s signature; Testimony of Grievant

⁵ Testimony of Supervisor and Administrator

⁶ Testimony of Grievant.

⁷ Testimony of Area Superintendent

- accident. When he returned the next day, there was a post-it note from the Area Superintendent telling the Supervisor to complete the accident report.⁸
8. Part of the [Agency] Equipment Crash Report completed by the Supervisor, is a page entitled, “VEHICLE ACCIDENT/INCIDENT RECOMMENDATION FORM.” The instructions are, “Please indicate your opinion relating to the employee’s accident”. The choices to check are: Incident, Non-preventable, Preventable Gross Negligence, and Preventable Simple Ordinary Negligence.⁹
 9. The Supervisor marked that his opinion was it was an “incident,” the least serious category in the report he submitted dated 5/16/14. The Supervisor and the Area Superintendent both testified that was their opinion of the category for the accident. The Supervisor was later instructed by upper management to change the designation to Preventable Simple Ordinary Negligence. The Supervisor then crossed out his check mark in the “Incident” category and added a check to Preventable Simple Ordinary Negligence.¹⁰
 10. The Supervisor issued the Group II Written Notice. He testified that he issued the group notice because upper management directed him to do so. He testified that, if the Grievant had gone around the vehicle to check and had used the mirrors and windows, the Grievant had not violated the written policy and safety rules. When questioned further about what the violation was, he said that the violation was backing up and hitting the other vehicle.¹¹
 11. The Maintenance Administrator testified that believed that the Grievant had violated the safety policy, which states that all backing incidents are preventable. He recommended the Group II Written Notice. When asked what specifically the Grievant should have done to comply with policy, he stated that the Grievant should not have hit the object.¹²

⁸ Testimony of Supervisor

⁹ Agency Exhibit 6, p. 8

¹⁰ Testimony of Supervisor and Area Superintendent, Agency Exhibit 6, p. 1, 8

¹¹ Testimony of Supervisor, Agency Exhibit 4

¹² Testimony of Maintenance Administrator

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.

Policy 1.60: 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.

The issue in the present case is whether to sustain, modify or revoke the Group II Written Notice and 2-day suspension issued to the Grievant on June 20, 2014 for failure to follow instructions and/or policy, and for a safety rule violation. The Agency must prove that it is more likely than not that the Grievant failed to follow instructions and policy and violated safety rules when he backed up a vehicle on May 15, 2014 and that the Agency's action against the Grievant was warranted and appropriate under the circumstances.

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).¹³

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, the Grievant was backing up a truck at work.

In the Agency safety rule 17, there are pertinent procedures to follow: “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.”

The Agency’s []District Equipment Backing Policy includes the following pertinent instructions: “No vehicle will back from a parking space without the driver first walking completely around the vehicle to insure there are no obstructions present. The ground guide will be equally responsible, along with the driver, for the safe backing of the vehicle. When backing vehicles with limited visibility, a ground guide will be utilized whenever a second person is available, either in the vehicle or nearby. Limited visibility vehicles include dump trucks, large vans and other such large vehicles.”

There was no ground guide at the scene. The nearest employee was the Area Superintendent in his office 300 yards away. The Area Superintendent testified that he did not expect the Grievant to come get the Area Superintendent to be a ground guide. There was no person nearby to be a ground guide. The Grievant testified that he did do a walk-around the vehicle. While looking out his mirrors to avoid a pile of millings, he backed into a truck that was usually parked in the garage. No one testified to dispute this. This hearing officer find that the Grievant did back up and accidentally hit a parked truck after following the safety rules and backing policy.

(ii) Whether the behavior constituted misconduct

The Safety Rule 17 states that, “**All backing incidents are preventable.**” This statement alone does mean that, if you have a backing accident, you are subject to disciplinary action. There must be some policy, procedure, or instructions that were not followed for there to be misconduct.

The Agency’s []District Equipment Backing Policy does state that “Operators of motor vehicles failure to comply with this policy are subject to *review* under the Standards of Conducts (sic).” The Grievant would be subject to *review* under the Standards of Conduct if he had not followed that policy. But the Grievant did follow the policy. He walked around the vehicle before driving. There was no ground guide nearby.

There was no malicious intent. Accidents can and do occur, even when procedures are followed. After the accident occurred, the Grievant went immediately to the office to report the accident to the Area Supervisor and the state police. He filled out an accident report.

The actions of the Grievant do not fit the Group II Offense category. He had never had a

¹³Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

safety violation. There was no testimony that the accident significantly impacted business operations. There was no insubordination or abuse of state resources. There was no violation of policies, procedures, or laws.

This hearing officer finds that behavior of the Grievant does not constitute misconduct under the Standards of Conduct and Agency policies.

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

The Supervisor issued the Group II Written Notice because he was so directed by the upper management. The Supervisor and Maintenance Administrator both testified that is another backing policy that was initiated by the Agency in the [] District after a March, 2014 staff meeting. Due to the high volume of backing accident in this District, all backing accidents are subject to disciplinary action and the drivers are to be issued Group II Written Notices. No written copy of this policy was provided for this hearing.

A policy such as that one is inconsistent with the Standards of Conduct. Under the General Principles of the Standards of Conduct, “Corrective actions, whether informal or formal, must depend upon the nature, consequence(s), or potential consequence(s) of the employee’s conduct or performance and the surrounding circumstances and mitigating factors, if any. Management should apply corrective actions consistently, while taking into consideration the specific circumstances of each individual case.”¹⁴

In this case, the management decided all backing accidents would result in a Group II Written Notice, even if the policies and safety rules were followed. The Supervisor testified that the Grievant had followed the procedures. An unwritten policy to issue Group II Written Notices to all drivers involved in a backing up accident cannot be sustained.

This hearing officer finds that the disciplinary actions taken against the Grievant are inconsistent with law and policy.

DECISION

The Agency has not proven that the Grievant failed to follow instructions and policy and violated safety rules when he backed up a vehicle on May 15, 2014. The Agency’s action against the Grievant was not warranted or appropriate under the circumstances.

The Grievant’s Group II Written Notice is revoked and shall be removed from his personnel file. The Grievant’s pay for the two-day suspension is to be restored by the Agency.

14 Agency Exhibit 9, page 5

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.¹⁵

¹⁵Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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].

October 7, 2014

Jane E. Schroeder, Hearing Officer