

Issue: Group III Written Notice with Termination (safety rule violation); Hearing Date: 09/04/19; Decision Issued: 09/24/19; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11381; 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: 11381

Hearing Date: September 4, 2019
Decision Issued: September 24, 2019

PROCEDURAL HISTORY

On April 22, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating a safety rule where there is a threat of bodily harm.

On May 1, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 10, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 4, 2019, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 facilities. He had been employed by the Agency for approximately eight years. Grievant did not have prior active disciplinary action.

On October 31, 2018, Grievant was assigned to operate a tandem dump truck. He was expected to secure a trackhoe on a Trailer and attach the Trailer to the Truck.

On October 31, 2018, Grievant completed a Pre-Operational Vehicle Inspection Sheet for the Truck. The form stated, "If Safety deficiency is noted, items must be repaired before operating." He wrote "none" because he found no safety deficiencies. Grievant's Operator Check List included "CHECK TRAILER COUPLING OPERATION AND CONDITION."

Grievant completed a Pre-Operational Vehicle Inspection Sheet for the Trailer. The form stated, "If Safety deficiency is noted, items must be repaired before operating." He wrote "none" because he found no safety deficiencies. Grievant's Pre-Operational Checklist included:

CHECK TRAILER COUPLING OPERATION AND CONDITION
CHECK ALL SAFETY DEVICES¹

¹ Agency Exhibit 4.

Grievant went to one job site and then began the process of loading the trackhoe to travel to another job site a short distance away.

Grievant secured the trackhoe to the trailer using ratcheting binders with 2 chains attached to each side of the trailer and fed through the front and rear tracks (4 total).² The chains were then secured and tightened using a ratcheting binder between the tracks. The trackhoe bucket and arm was secured within one chain stretched across the trailer and over the bucket secured with a ratcheting binder. The roller was loaded perpendicular to the trailer and secured with two chains and ratcheting binders across the top of the roller.

The Route was an undivided highway with gradual elevation changes and moderate curves. The crash occurred southbound exiting a slight uphill curve to the right continuing into a flat curve to the right. The east shoulder of the road intersected with a private driveway and an open field. The west shoulder was wooded.

Grievant drove the Truck and Trailer towards the curve in the road. Grievant was driving too fast into the curve. His vehicle was top-heavy because of the load he carried. The Trailer detached from the Truck and began rolling on its side. The Trailer rolled onto its left side, then upside down, and finally rested on its right side. The trackhoe remained attached to the Trailer. The Trailer crossed into the lane of oncoming traffic and through that lane into a wooded area where it stopped. When the Trailer hit the asphalt it created a hole. Neither the trackhoe nor the roller became detached from the trailer during the crash.

If another vehicle had been coming towards Grievant in the adjacent lane, the vehicle and passengers could have been injured or killed by the Trailer as it rolled into the wooded area.

A State Trooper went to the crash site. The State Trooper completed a Crash Report showing that the speed limit was 55 mph, Grievant was travelling at 40 mph, but the "Maximum Safe Speed" was 30 mph. The State Trooper concluded Grievant, "Fail[ed] to Maintain Proper Control." The State Trooper concluded that Grievant failed to "SECURE LOAD PROPERLY AND AS VEHICLE CAME AROUND CURVE LOAD SHIFTING ON TRAILER AND CAUSED TRAILER TO OVERTURN." Grievant was charged with reckless driving for failure to maintain control.

The damages caused by the accident totaled over \$168,000 with approximately \$142,000 damage to the trackhoe.

² Grievant received assistance from another employee. After loading the trackhoe, Grievant walked around the Truck and Trailer to verify everything was properly secured.

The Agency's Statewide Safety Review Committee concluded that the crash was preventable.

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."³ 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."

49 CFR § 393.130(c) requires "heavy equipment or machinery with crawler tracks or wheels must be restrained against movement in the lateral, forward, rearward, and vertical direction using a minimum of four tiedowns." Grievant failed to comply with this safety rule because he did not use four tiedowns at each of the four corners of the trackhoe. Grievant used two tiedowns - one chain crossing the tracks in the front and one chain crossing the tracks in the back of the trackhoe. The State Trooper concluded this could have allowed the trackhoe to shift as the Trailer went around the curve.

Violating safety rules where there is a threat of bodily harm is a Group III offense.⁴ On October 31, 2018, Grievant failed to properly secure a trackhoe on a Trailer and drove a Truck with an attached Trailer and trackhoe too fast into a curve on a road causing the Trailer to detach. Grievant should have used four point ties for the equipment and one for the boom. The failure to properly secure the trackhoe may have allowed the equipment to slide on the deck shifting the weight as Grievant turned the corner. Grievant caused over \$160,000 in damages to the Agency and placed oncoming traffic at risk of death or injury. The accident was preventable meaning Grievant was at fault for the accident. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for failure to follow a safety rule where there is a threat of bodily harm and because of the impact of the accident on the Agency's operations. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that he secured the trackhoe the way he was trained by other staff. The evidence showed that Grievant held a Commercial Driver's license and should have received training and understood how to properly secure the trackhoe. The Hearing Officer does not believe the Agency's training included any improper method of securing heavy equipment on Trailers. If Grievant chose to rely on instructions from his co-workers, he did so at his own risk.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

Grievant argued that he was not driving at an excessive rate of speed. The State Trooper concluded otherwise. Grievant held a Commercial Driver's license. The Commercial Driver's License Manual section 2.6.3 provides:

Drivers must adjust their speed for curves in the road. If you take a curve too fast, two things can happen. The tires can lose their traction and continue straight ahead; so you skid off the road. Or, the tires may keep their traction and the vehicle rolls over. Tests have shown that trucks with a high center of gravity can roll over at the posted speed limit for a curve.⁵

Grievant had adequate training that he was obligated to drive carefully and slowly through road curves when carrying a heavy load with a high center of gravity.

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"⁶ 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 III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

⁵ Agency Exhibit 8.

⁶ Va. Code § 2.2-3005.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.