Issue: Group I Written Notice (unsatisfactory performance), and Termination due to accumulation; Hearing Date: 12/09/16; Decision Issued: 12/21/16; Agency: VDOT; AHO: Thomas P. Walk, Esq.; Case No. 10887; Outcome: No Relief - Agency Upheld.

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO. 10887

DECISION OF HEARING OFFICER

HEARING DATE: DECEMBER 9, 2016
DECISION DATE: DECEMBER 21, 2016

I. PROCEDURAL BACKGROUND

The grievant commenced this matter with the filing of his Form A on September 30, 2016. I was appointed as Hearing Officer on October 18, 2016. A prehearing conference call was conducted with the agency advocate and counsel for the grievant on October 21. In the course of the conference call I scheduled the matter for hearing on December 9. I conducted the hearing on that date. The hearing lasted approximately 6.5 hours, including recesses.

II. APPEARANCES

The agency was represented by an advocate. It presented seven witnesses. Prior to the hearing, it proffered a notebook of exhibits, consisting of eight sections. The grievant objected to the consideration of the exhibits in Section 5. After hearing argument, I admitted all of the proffered exhibits by the agency.

The grievant appeared and was represented by legal counsel. He had submitted a notebook of exhibits labeled A through I. All those exhibits were admitted into evidence as well.

III. ISSUE PRESENTED

Whether the agency acted properly on September 8, 2016 in issuing the grievant a Group I Written Notice and terminating him from employment based on accumulated prior active Written Notices?

IV. FINDINGS OF FACT

On July 13, 2016 the grievant was assigned by his supervisor to work as a flagger on two separate road projects, one in the morning and one in the afternoon. A flagger controls the flow of traffic through a work zone in which maintenance or construction of a roadway is occurring. A co-worker (hereafter "fellow flagger") was also assigned to assist in flagging duties on these projects. The grievant performed his morning tasks without incident. During the lunch break, the grievant and the fellow flagger were told to flag at a worksite on a different road (referred to herein as "Circle Road"). The grievant and the fellow flagger drove to the Circle Road. They were unfamiliar with the road and discovered that it was horseshoe-shaped and approximately one-third mile in length. One additional road intersected with Circle Road.

The initial step in beginning a flagging assignment is to place multiple warning signs on either side of a worksite so that approaching motorists from either direction are aware of work being performed and the flow of traffic restricted. The agency utilizes a detailed manual setting forth the distances at which warning signs are to be placed. The placement of the signs depends on the speed limit along the road, whether curves interfere with the line of sight, and other factors. The primary determinant is the speed limit on the road. A minimum of 100 feet between warning signs is specified by the manual.

The grievant and fellow flagger were the first members of the crew assigned to this

project to arrive at Circle Road. This was standard procedure as the signs needed to be placed before work began. They had not been told where the work was to be performed. They waited until a fellow crew member operating a grade-all arrived at Circle Road. The grievant asked him if he knew where the work was to be performed. The grade-all operator was similarly unsure. He pointed out a likely spot where work had been done in the past. The grievant made the determination that if the grade-all operator was correct in his assumption, then the normal rules for placement of warning signs would not apply due to the lack of adequate distance between the signs.

Each morning the work crew meets to receive assignments and hear a safety message. The employees are constantly advised to ask questions if they need direction on anything. The grievant and fellow flagger chose to wait for further directions from the crew leader, who had not yet arrived at Circle Road. Under the agency's work zone safety procedures, only an employee with a minimum of intermediate level work zone safety training is allowed to bury the layout of the warning signs and placement of flaggers. The grievant had received only the basic level training; the fellow flagger had received less training than the grievant. The grievant had accessible to him the option of attempting to contact the crew leader or a supervisor by radio or phone. He chose to do neither, choosing instead to wait until the crew leader arrived at Circle Road.

When the crew leader arrived, he did not notice that the warning signs had not been placed prior to work commencing. When the fellow flagger notified him of that, the crew leader instructed the grievant and fellow flagger to place appropriate signage. They then did so. As a result of the signs not being placed prior to work commencing, the crew leader was forced to

stop the work while the signs were placed. This caused the crew to be unable to finish this job that afternoon as scheduled.

Prior to July 13 the agency had given the grievant prior formal disciplines which were active. Those former disciplines consisted of two Group I Written Notices and one Group II Written Notice. The grievant had filed grievances regarding other nondisciplinary matters, which grievances were pending on July 13. Rather than immediately issuing the grievant an additional disciplinary action, the agency waited until August 16 to provide him with notification of its intent to impose corrective action based on the events of July 13. Upon the pending grievances being determined not to qualify for a hearing, the agency issued the current Group I Written Notice on September 8, 2016 for unsatisfactory performance. The Notice was based, in part, on the failure to properly communicate with the crew leader or other better-trained employee to seek instructions on where to place the signs. Because of the active prior Written Notices, the grievant was terminated on September 8. This grievance ensued.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual* (*GPM*). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment

Dispute Resolution, *Rules for Conducting Grievance Hearings*. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The grievant has not contested that he failed to place the appropriate signage on or near Circle Road prior to begin flagging operations on July 13. He also does not contest that he did not attempt to contact anyone for clarification regarding the placement of the signs prior to beginning flagging operations that afternoon. The evidence, as a whole, supports his position that he could not have placed the signs without appropriate instructions from the crew leader or other individual better trained than himself. An effective placement of the signs would have been inconsistent with the safety manual which he was expected to follow.

The question then becomes, as the agency argues, whether it was reasonable for him to not contact someone for clarification. The grievant was asked twice by the fellow flagger whether he was going to put the signs out. Also, he was asked the same question by the grade-all operator. The grievant presented no evidence that he knew when the crew leader would arrive at Circle Road or when clarifying information would otherwise be provided. Because of his experience and training, the grievant knew, or should have known, that completion of the project

would be delayed by work not being properly commenced until the signs were placed. The failure to place signage before work started at Circle Road created a safety hazard for his fellow crew members and motorists. I find that this failure to seek clarification and guidance does constitute unsatisfactory performance.

Policy 1.60 of the Department of Human Resource Management includes under the category of Group I Offenses "minor misconduct that require formal disciplinary action." This includes "first offenses that have a relatively minor impact on business operations but still require formal intervention." I agree that the conduct of the grievant can easily be described as "minor." I also agree that the impact on the operations of the agency was relatively minor. The harder question is whether the conduct "requires formal intervention."

I find that it does. As a flagger, the grievant was responsible for the safety of the work zone. He allowed work to begin on Circle Road without notifying the crew leader that the appropriate signs had not been placed. Had he immediately informed the crew leader of that fact upon his (the crew leader) arriving at the site, my conclusion may have been different. Instead, he put his fellow crew members at risk of injury. My job is not to serve as a "super personnel manager." Section VI (B) of the *Rules* prescribes that deference be given to the reasonable decisions of agency management. I find that safety is an area where great deference should be given. Therefore, I conclude that the issuance of the Group I Written Notice was appropriate.

The grievant has also argued that the issuance of the discipline, aside from not being based on sound facts and reason, is contrary to applicable law and policy. He has raised two arguments.

First, he asserts that this discipline was imposed as retaliation against him for the grievances which were pending on July 13. He points to the delay in the issuance of this Written Notice as evidence of this. He further points to a meeting conducted on July 1 by a Human Resource Officer with many of his co-workers. At this meeting concerns regarding the grievant were addressed. As part of its exhibits, the agency submitted written statements by twelve employees. Of those twelve, only five testified at the hearing. I have considered the remaining seven statements as being evidence only of attendance by those employees at the meeting and not for the statements contained therein.

The incident on July 13 presented the agency with what can be best described as a Hobson's choice. If it had issued the discipline on July 14, the grievant surely would have argued that it was in retaliation for the pending grievances. The agency waited and is still accused of retaliation. I believe the retaliation argument would be stronger if those other grievances had been resolved favorably for the grievant. The grievant failed to prove it more likely than not that the current Group I was issued in retaliation.

The grievant has also argued that he is being discriminated against. He asserts, but has not proven, that none of the fellow flagger, grade-all operator, nor crew leader have been disciplined as the events on July 13. I note that the agency is still within the time frame in which such an action could be taken.

Section VI (B) of the *Rules* allows a hearing officer to mitigate punishment if the imposed discipline is not consistent with the "agency's treatment of similarly situated employees." I cannot find that the grievant is "similarly situated" with any of these three co-workers. The fellow flagger had less safety training. He inquired of the grievant twice whether

the signs would be placed, obviously deferring to his greater training and experience. When asked by the grade-all operator about why the signs had not been placed, the grievant did not use the collective "us", referring to himself and the fellow flagger. He said he had not been directed by the crew leader. The testimony of the grievant, consistently with the other evidence, is that he considered himself as being in charge of the placement of the signs.

The grade-all operator had no responsibility for the placement of the signs. Admittedly, where the signs were to be placed depended upon the location of the work to be performed. The grade-all operator could have asked the grievant to seek clarification from the crew leader of the work location and failed to do so. Nevertheless, the grievant could have proactively determined the work location and the placement of the signs in a single contact with the crew leader.

The crew leader, upon his arrival, directed the grievant and fellow flagger to begin flagging. He failed to notice that the signs had not been put out. It was at that point that the grievant had the last, best opportunity to obtain further clarification from the crew leader as to how he was to perform his duties. Because the concept of "when in doubt, ask" had been stressed by the agency at the daily meetings, I do not fault the crew leader for thinking it reasonable that the grievant had performed his assigned duties or would inquire if he had any questions or concerns.

VI. DECISION

For the reasons stated above, I affirm the issuance of the Group I Written Notice to the grievant on September 8, 2016 and his termination from employment.

VII. 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.[a]

[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].

ORDERED this December 21, 2016.

Thomas P. Walk, Hearing Officer