

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11201; Ruling
Date: July 26, 2018; Ruling No. 2019-4756; Agency: Virginia Department of
Transportation; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2019-4756
July 26, 2018

The Virginia Department of Transportation (the “agency”) has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11201. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTUAL BACKGROUND

The facts in Case Number 11201, as found by the hearing officer, are as follows:¹

The Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its facilities. He has been employed by the Agency for approximately five years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked on a crew responsible for filling potholes on Virginia highways. The Agency used three trucks and four crew members to serve as a mobile work unit locating and filling potholes. The First Truck was a dump truck containing the mix used to fill potholes. The Second and Third Trucks were vehicles with mounted attenuators. These trucks were called crash cushion trucks. When the attenuator was lowered behind the truck it served as a cushion or barrier to absorb the blow of a vehicle crashing into the back of the truck. A crash cushion truck also had boards with blinking lights forming an arrow to point to the left or the right so that motorists know to move to their left or right to avoid a work area.

When filing a pothole, the Dump Truck was to be positioned in front of the pothole. The Second Truck was to be positioned in the lane behind the pothole to protect the crew repairing the hole. The Third Truck was to be positioned approximately 1000 feet behind the Second Truck.

¹ Decision of Hearing Officer, Case No. 11201 (“Hearing Decision”), June 19, 2018, at 2-4.

The Highway was two lanes heading west and two lanes heading east. The west and east bound lanes were separated by an area with grass, bushes, and trees.

The Pothole was approximately 3 inches to the right of the center lane of the eastbound Highway. The Pothole was approximately 18 inches in diameter and 3 to 4 inches deep. The Pothole was located in part of the road after a hill. While standing at the Pothole and looking backwards towards oncoming traffic, one could not see 1000 feet behind the Pothole. The view would be blocked by the descending portion of the hill.

On December 14, 2017, Grievant, Mr. C, Mr. T, and Mr. D were in the shop preparing to leave for the day. They participated in an approximately 15 minute safety meeting. Mr. C was the crew leader. Mr. C told Grievant to operate the Third Truck. Grievant inspected the Third Truck and noticed that its radio did not work. He obtained a hand held radio and told the other employees he would use the hand held radio.

Mr. C and Mr. T were in the Dump Truck. Mr. D was operating the Second Truck which was a crash cushion truck. Grievant was operating the Third Truck. Grievant's worksite was the mobile unit.

The crew began filling potholes on the west bound side of the Highway. Grievant noticed a Homeless Man on the side of the road near a Restaurant. When they reached closed to the county line, they made a U-turn to change from facing the westbound lanes to driving on the eastbound lanes. The mobile unit travelled at approximately 15 miles per hour.

Grievant decided to separate from the mobile unit to cross back to the westbound lane to give the Homeless Man money. He used the hand held radio to announce to the two other trucks that he was going to stop to give the Homeless Man some money. He did not receive any response from Mr. C because Grievant's radio transmission failed. Grievant assumed the drivers of the two other trucks had heard his radio transmission even though they had not heard Grievant.

Grievant turned his vehicle to his left and crossed through a passing area to enter the westbound lanes of the Highway. He drove to the beginning of a right turn lane in front of a Restaurant and stopped his vehicle. He got out of the vehicle and walked to the Homeless Man. Grievant asked the man if he wanted some money. The man said "yes." Grievant gave the man some of Grievant's money and then returned to his vehicle.

Once Grievant had turned towards the Homeless Man, the other two trucks continued eastbound on the Highway at approximately 15 miles per hour. They travelled approximately 3.1 miles to the Pothole. The Dump Truck parked in front of the Pothole. Mr. C and Mr. T got out of the Dump Truck and began working to fill the Pothole. Mr. D parked the Second Truck approximately 40

feet behind the Dump Truck. Mr. D got out of the Second Truck and walked to the two men working at the Pothole. The Second Truck was at the top of the hill with the Pothole at the bottom of the hill.

After giving money to the Homeless Man, Grievant drove the Third Truck westbound a short distance and made a U-turn to begin driving eastbound. He was driving at the speed of approximately 45 to 55 miles per hour to catch up with the other two vehicles. Grievant parked approximately 1000 feet behind the Second Truck. Grievant watched Mr. D get out of the Second Truck to walk to the Pothole. Grievant could not see Mr. C and Mr. T working at the Pothole because they were on the other side of the hill.

Grievant attempted to contact Mr. C using his hand held radio to let Mr. C know he was in place. Grievant waited for a response from Mr. C but did not receive one. Grievant used his personal cell phone to call Mr. C's cell phone. When Mr. C answered, Grievant said, "All right I'm back, I had to do something, but I'm back." Mr. C said "what do you mean you are back, man, we are out here filling holes." Mr. C understood Grievant to mean that he had just rejoined the group after approximately ten minutes had passed and they finished filling the Pothole. Mr. C believed Grievant had gotten in place at the time of the cell phone call and not before that time even though Grievant had rejoined the mobile unit at the time Mr. D exited the Second Truck. Mr. C decided not to go to the next pothole and instead took the crew to the shop to inform his supervisor.

On January 3, 2018, the grievant was issued a Group III Written Notice with a five workday suspension.² The grievant timely grieved the disciplinary action and a hearing was held on June 15, 2018.³ In a decision dated June 19, 2018, the hearing officer concluded that the agency had not presented sufficient evidence to support a Group III Written Notice, but upheld the disciplinary action and suspension as a Group II for leaving the worksite without permission.⁴ The agency now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."⁵ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.⁶ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 4-5.

⁵ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

Consistency with State and/or Agency Policy

The agency has appealed the hearing decision on the basis that it is inconsistent with state and/or agency policy. The agency's position is that the grievant's departure from the worksite, i.e., the mobile operations unit (MOU) itself,⁸ violated safety rules and warranted the Group III Written Notice. The agency's position in this regard is a proper application of state and/or agency policy and well within the agency's discretion under its "exclusive right to manage the affairs and operations of state government."⁹ The whole purpose for grievant's job on the MOU was the safety of the crew.¹⁰ Thus, leaving an agency MOU implicates safety issues that could result in personal injury and the agency can consider such misconduct as a Group III under the *Standards of Conduct*.

For example, testimony indicates that the proper procedure for a member of the MOU to leave the MOU for an appropriate reason (such as to use the restroom or take an emergency phone call) would be to contact the crew leader and receive permission to depart the MOU.¹¹ The MOU would then get off the road completely until the team member returned to the MOU.¹² Such a procedure underscores the safety implications and potential dangers to the team of leaving the MOU. In addition, the topography of the section of road that this crew operated increased the danger involved. Those members of the crew filling the pothole could not have seen the position of the grievant and had to trust that he would be there.¹³ Thus, the agency's consideration of an employee's departure from an MOU without permission is understandably a significant safety issue and properly considered at the Group III level under policy.

The hearing officer has misapplied state and/or agency policy in failing to uphold the disciplinary action as a Group III. Leaving an agency MOU, which the hearing officer has found occurred in his factual findings,¹⁴ is appropriately considered a disciplinary action at the Group III level under policy. Accordingly, the matter must be remanded to the hearing officer for revision of his determinations in this case to be consistent with this ruling.

Factual Determinations

In its request for administrative review, the agency also challenges the hearing officer's findings of fact related to the grievant's contacts with other members of the crew by radio and cell phone, as well as the relative timing of such actions, and the impact of such findings on the hearing officer's determinations in this case. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁵ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁶ Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or

⁸ *E.g.*, Hearing Recording at 2:25:00 –2:25:40.

⁹ Va. Code § 2.2-3004(B).

¹⁰ *See* Hearing Decision at 2.

¹¹ *E.g.*, Hearing Recording at 49:20 – 49:53.

¹² *E.g.*, *id.*

¹³ *See* Hearing Decision at 3.

¹⁴ *Id.* at 4.

¹⁵ Va. Code § 2.2-3005.1(C).

¹⁶ *Grievance Procedure Manual* § 5.9.

removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.¹⁷ Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.¹⁸ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In reviewing the agency's submission and the record evidence, there are reasonable questions raised as to the timing of events and veracity of the claims made by the grievant and the hearing officer's related findings. Ultimately, the hearing officer makes determinations of such disputed facts. However, for the reasons described above, these factual determinations are essentially immaterial to the outcome of this case. The timing of the grievant's return to the MOU and his contacts with crew members have no effect on the final determination of this case. The fact that the grievant departed the MOU at all without permission is what subjects him to a properly issued Group III Written Notice in this case. As such, because the factual determinations challenged by the agency are essentially immaterial, they will not be addressed further here.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for revisions consistent with this ruling. The hearing officer is directed to issue a remand decision **within 15 calendar days** of the date of this ruling.

Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's second reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original or first reconsidered decision).¹⁹ Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.²⁰

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.²¹ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



¹⁷ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁸ *Grievance Procedure Manual* § 5.8.

¹⁹ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

²⁰ See *Grievance Procedure Manual* § 7.2.

²¹ *Id.* § 7.2(d).

²² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

July 26, 2018
Ruling No. 2019-4756
Page 7

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