

Issue: Compliance/Administrative review of hearing decision; Ruling Date: August 31, 2004; Ruling #2004-776; Agency: Department of Transportation; Outcome: EDR will not disturb hearing officer's decision



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2004-776
August 31, 2004

The grievant has requested that this Department administratively review his June 21, 2004 hearing decision. He contends that a witness who had been ordered to appear at his hearing never showed up. For the reasons set forth below, this Department will not disturb the hearing officer's decision.

FACTS

The grievant timely filed a grievance challenging a Group III Written Notice issued for violating established safety rules and failing to follow supervisor's instructions. The grievant was removed from employment effective April 2, 2004 as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Virginia Department of Transportation (VDOT) (hereinafter referred to as "agency") has employed grievant as an Electrician for six years.

The agency has promulgated a safety belt policy that provides, in pertinent part, that safety belts "shall be worn properly by all Agency personnel on official State business while operating or riding in vehicles or equipment so equipped whenever the vehicle or equipment is in motion." The policy provides exceptions for instances where it is impossible to operate the vehicle or equipment while wearing a safety belt, such as a road grader. It is understood that when employees are working *within* a designated work zone on various types of equipment, it is not always possible to be seated using a safety belt. However, it is also understood that the safety belt policy cited above means that when such equipment is being driven on an interstate highway, *outside* a protected work zone, employees should be riding inside the vehicle with safety belts fastened.

Prior to 2003, the agency had utilized the platform on a tunnel-washing tanker truck to provide access to the lights located in an interstate highway tunnel. In about mid-2003, the agency fabricated a platform that could be fastened to a dump truck for use in tunnel lighting repair. The platform was designed to be used only in the eastbound tunnel. A lower platform was fabricated for use in the westbound tunnel because that tunnel is two feet, nine inches shorter than the eastbound tunnel.

On the evening of March 16, 2004, while the grievant and another electrician were repairing and replacing lights in the eastbound tunnel of an interstate highway, the facility manager visited the work zone to observe progress. He and the maintenance superintendent met with the electricians, including the grievant, and instructed them on meal and break procedures. He specifically directed the crew to leave the tunnel either by riding in the cab of the truck with the driver, or by radioing for a pickup truck to come into the tunnel to provide transportation. The facility manager instructed the grievant and the others while they were gathered in a small group at the rear of the truck; all nodded their heads to indicate agreement and understanding of the instruction. The cab of the platform truck has sufficient seating space and safety belts for three people including the driver.

On the evening of March 17, 2004, the grievant and another electrician were replacing lights in the right lane of the eastbound tunnel. The grievant was the lead electrician in the three-man crew because the other electrician was on loan from another facility. Thus, the grievant was the *de facto* team leader. The portion of the highway and tunnel in which they were working was designated a work zone by reflective cones, barrels, crash trucks, and arrow trucks that directed traffic to the left lane. They rode on the platform while the truck driver slowly moved from light to light. At about 11:30 p.m., the crew decided to take a meal break. The grievant descended from the platform and told the driver to take them back to the repair shop at the west end of the eastbound tunnel. The grievant then got back on the platform; he and the other electrician each sat on triangular braces facing the rear of the truck. The seats are approximately 21 inches from the top rail of the platform; the top rail of the platform is 13 feet, one inch from the ground. The driver exited from the eastbound tunnel, crossed the interstate on an overhead loop at the end of the tunnel, and reentered the interstate in order to drive at highway speed through the westbound tunnel. The westbound tunnel was not a protected work zone. The ceiling of the westbound tunnel is only 13 feet, 11 inches high. As the truck entered the westbound tunnel, both electricians' heads struck the ceiling of the tunnel entrance. The other electrician was killed; the grievant was treated at a local hospital and released. The accident received publicity in the local news media.

Following an investigation, both the grievant and the driver were disciplined and removed from state employment. It has been a common practice for employees to ride on the platforms of both dump trucks and tanker trucks when coming out of the tunnels. No employees have previously been disciplined for this practice.

The hearing officer upheld the grievant's discipline and termination.

DISCUSSION

By statute, this Department 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.”¹ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.²

The grievant claims that he was prejudiced at hearing because an individual whom the hearing officer had ordered to the hearing as a witness never appeared. The grievant contends that he believes that this potential witness would have testified that riding in the truck in the manner that the grievant rode on the night of the accident was a common practice and not a violation of any known safety rule.

According to the hearing officer, this speculative testimony would have been redundant. He had already heard testimony to the effect that ‘everybody does it’ and found it unpersuasive. The hearing officer observed that the agency has a policy that states that “[s]afety belts shall be worn properly by all Agency personnel on official State business while operating or riding in vehicles or equipment so equipped whenever the vehicle or equipment is in motion.” He held that the grievant violated this rule by failing to ride in the cab of the truck and using a seatbelt. The hearing officer concluded by finding that violation of a safety rule where there is a threat of physical harm is a Group III offense.

In addition, the hearing officer found that the grievant failed to follow his supervisor’s direct and unambiguous instruction to either (1) ride in the truck’s cab, or (2) radio for pickup truck when they wanted to take a break outside of the tunnel. The alleged testimony that the grievant asserts would have been offered by the missing witness would not have had any bearing on the grievant’s purported failure to follow his supervisor’s instructions.

For these reasons, this Department finds no error with the hearing officer’s decision.

APPEAL RIGHTS AND OTHER INFORMATION

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.³ 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.⁴ Any such appeal must be based on the assertion that the

¹ Va. Code § 2.2-1001(2), (3), and (5).

² See *Grievance Procedure Manual* § 6.4(3).

³ *Grievance Procedure Manual*, § 7.2(d).

⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

final hearing decision is contradictory to law.⁵ This Department's rulings on matters of procedural compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁵ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

⁶ Va. Code § 2.2-1001 (5).