

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9243;
Ruling Date: April 2, 2010; Ruling #2010-2533; Agency: Virginia Department
of Transportation; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2010-2533
April 2, 2010

The agency has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9243. For the reasons set forth below, we will not disturb this decision.

FACTS

The pertinent facts, as set forth in the hearing decision in Case Number 9243, are as follows:

PROCEDURAL HISTORY

On September 2, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence.

On September 28, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 7, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing the decision because of the unavailability of the parties. On January 12, 2010, a hearing was held at the Agency's regional office.

FINDINGS OF FACT

The Virginia Department of Transportation employed Grievant as a Traffic Controller at one of its Bridge Tunnels. The purpose of this position was:

Perform operational functions for the [Bridge Tunnel] such as traffic control, public safety, communications, removal of disabled vehicles and enforcement of facility regulations. This position is designated as essential and, as such, all duties associated with this job are required during emergency situations which may include but are not limited to inclement weather, disaster response and emergency operations. VDOT will determine when essential positions are required.

Grievant had been employed by the Agency for over 18 years prior to his removal effective September 2, 2009. Grievant was highly regarded by many of his coworkers who described him as hard-working, detail oriented, and a significant asset to the Agency's operations. Grievant's evaluations showed that he met the Agency's expectations every year of his employment. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Underneath the road surface of the Tunnel is a large air duct that extends from one end of the Tunnel to the other. A fire main is also located under the road surface. The fire main is a pipe containing water that extends from one end of the tunnel to the other. In the event of a fire inside the Tunnel, firefighters could draw water from the fire main to extinguish the fire.

When it rains, water often runs inside the Tunnel. Drains are located inside the Tunnel to collect the rain and prevent it from flooding the road surface. Drain pumps underneath the road surface collect any water accumulating inside the air duct under the road surface and pump the water up to the Tunnel entrances and outside of the Tunnel. Drain pumps 1, 2, and 3 are located near the Tunnel entrance. Drain pumps 4 and 5 are located closer to the mid-point of the Tunnel. They pump water towards drain pumps 1, 2, and 3 so that those pumps can remove the water from the Tunnel. In order to prevent excessive wear and tear, one drain pump will activate and then stop as another pump begins its cycle. A drain pump may operate for approximately 30 minutes before shutting off while another drain pump begins operating. If a drain pump operated for more than 30 minutes to an hour, this may indicate the pump or the pump system is not operating appropriately.

Grievant worked in the Control Room of the Bridge Tunnel. He was responsible for monitoring Control Panels such as CCTV monitors, CO Analyzers, fire alarms, traffic map boards, and active components and operations such as event fans, electrical distribution systems, drain pipe systems, cameras, and traffic signals. He was expected to monitor any

alarms and lights located on the Control Panels and on the Electronic Control (EC) system. Grievant was responsible for reporting to his Supervisor any irregularities that he observed on the devices he was monitoring. Grievant sat at workstation desk 30. Directly in front of him was a monitor for the Electronic Control system. When a pump activated, an alert would appear on Grievant's screen. The alert read, "New Event Check Log". Grievant was expected to use his computer's mouse to click on the acknowledgment button to open another computer screen to reveal more details about the event. For example, if a drain pump began working, Grievant was expected to acknowledge that event and to make sure that the drain pump shut off within a reasonable period of time. Grievant was expected to use his judgment to consider whether the event was unusual and, if so, report the event to his Supervisor.

On July 1, 2009, at approximately 8:45 p.m., a brief but intense storm passed over the Bridge Tunnel. The storm lasted until approximately 9:30 p.m. The Bridge Tunnel receives electric power from sources on both the North and South sides of the Bridge Tunnel. The storm caused a power outage on the one side of the Bridge Tunnel. A Traffic Controller acknowledged the event in the Electronic Control system and assisted in ensuring that the Bridge Tunnel began using power solely from the other side.

On July 1, 2009, a 52-year-old cast-iron fire main encased in concrete beneath the Tunnel's road surface burst. Water began filling the underground duct. At 9:12 p.m., fire pump number 4 began pumping. Fire pumps are used to boost water supply to the fire main. At 9:24 p.m., a Traffic Controller noticed that fire pump number 4 had activated and did not turn off as expected. An Agency supervisor notified the Agency's maintenance staff of the problem and asked for assistance. At 11:39 p.m., the Maintenance Tech reported to the Control Room and learned of the problem regarding the fire pump. He was told of the power outage and that the Control Room no longer had a water supply to its sinks and toilets. He inspected the fire pump system but could not determine the problem. He wanted to shut down the main fire system. He asked his supervisor if he could do so but was told the fire system had to continue to operate so that water could be provided in the event of a fire in the tunnel. The Maintenance Tech decided to shut down only fire pump number 4. He then left the Facility.

On July 2, 2009 at 2:02 a.m., drain pump number 5 begin running. An alert appeared on Grievant's Electronic Control system to indicate that drain pump number 5 had started. Grievant did not acknowledge and monitor the event and, thus, he did not realize that drain pump number 5 was operating. Under normal circumstances, drain pump number 5 would

shut off automatically after operating from 30 minutes to an hour. Drain pump number 5 continued to operate through the remainder of Grievant's shift which ended at 6 a.m. An employee from the oncoming shift noticed that drain pump number 5 had been operating for a lengthy period of time and reported the matter to a supervisor. At 6:15 a.m., maintenance staff were notified of standing water at the lowest point of the Tunnel. The Tunnel was closed immediately. The incident closed a major interstate and cause travel delays for thousands of motorists. VDOT closed the road for more than eight hours on July 2 while crews addressed the flooding and began pumping water from the roadway.¹

Based on the previous findings, the hearing officer reached the following “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.” 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.”

DHRM Policy 1.60 lists numerous examples of offenses. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

On July 2, 2009, one of Grievant's duties was to monitor drain pump number 5. He should have observed the Electronic Control system and realize that drain pump number 5 begin working at 2:02 a.m. Grievant should have continued to monitor drain pump number 5 and realize that it remained working too long. When drain pump 5 did not turn off on a timely basis, Grievant should have informed the Supervisor to enable the Supervisor to provide that information to the maintenance staff. Grievant failed to perform his job duties on July 2, 2009. As a result, the Agency's maintenance staff was not given critical information to make an informed decision that may have led to the discovery of the broken fire main.

¹ Decision of Hearing Officer in Case 9243, issued January 21, 2010 (“Hearing Decision”) at 1-4. Footnotes from the original Hearing Decision have been omitted from this statement of fact.

The Agency contends Grievant's behavior was gross negligence and that gross negligence rises to the level of a Group III offense. "Gross negligence" is not listed as an example of an offense in Attachment A DHRM Policy 1.60. When the Hearing Officer considers the "Examples of Offenses Grouped by Level" listed in Attachment A of DHRM Policy 1.60, Grievant's omission is best described as "unsatisfactory work performance". Unsatisfactory work performance is a Group I offense. The question becomes whether the Agency can elevate a Group I offense to a higher level, and if so, whether a Group I offense can be elevated to a Group III offense.

DHRM Policy 1.60(B)(2) provides:

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

Based on this language, it is clear that Grievant's omission may be elevated from a Group I offense to a higher level offense depending on the impact to the Agency. By failing to monitor the Electronic Control system, Grievant denied material information to Agency managers and maintenance staff. By failing to provide essential information, Grievant denied the Agency the opportunity to make an informed decision that may have enabled it to timely respond to the broken pipe and avoid closure of the Bridge Tunnel. The disciplinary action given to Grievant should be higher than a Group I Written Notice.

Attachment A DHRM Policy 1.60 provides:

*Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) Similarly, in rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the

grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

This language suggests that in certain extreme circumstances, an Agency may elevate a Group I to a Group II offense and a Group II to a Group III offense. It does not appear to authorize an agency to elevate a Group I offense to a Group III offense. Accordingly, Grievant should receive a Group II Written Notice of disciplinary action.

Upon the issuance of a Group II Written Notice, an employee may be suspended for up to 10 workdays. Based on the severity of the consequences to the Agency, it is appropriate that Grievant be suspended for 10 workdays.

Grievant contends that the Electronic Control system failed to work properly on July 2, 2009 and did not generate an alert that drain pump 5 had stopped working. This argument is not supported by the evidence. Grievant responded to numerous alerts prior to the alert at 2:02 a.m. indicating that drain pump 5 had stopped. Grievant responded to numerous alerts occurring after 2:02 a.m. No credible evidence was presented to show that the Electronic Control system was without power or malfunctioning at approximately 2:02 a.m. The most logical conclusion to be drawn from the evidence is that the alert activated at 2:02 a.m. but Grievant failed to observe it.

Grievant argues that at least two other employees would have observed the alert if it had been shown on the Electronic Control system. These employees were working at different locations in the Control Room and may have been performing duties different from Grievant's duties. The failure of these other employees to observe that drain pump 5 had stopped is not a basis to conclude that the Electronic Control system was not working at 2:02 a.m. on July 2, 2009.

Grievant argues that he was distracted by an irate driver who contacted the Control Room to complain. To the extent this driver distracted Grievant, Grievant should have known to return to his desk and review the automatic log generated by the Electronic Control system and determine if he missed any alerts for which he was responsible.

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 Employment Dispute Resolution....”

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 further the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.²

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.”³ 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.⁴

Abuse of Discretion/Policy Violation

The agency asserts that the hearing officer abused his discretion by reducing the level of the offense from a Group III to a Group II. As a matter of compliance with the grievance procedure, we find no error with the hearing officer’s analysis or the

² Hearing Decision at 4-7. Footnotes from the original decision have been omitted.

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

⁴ *Grievance Procedure Manual* § 6.4.

conclusions in his decision.⁵ However, this Department has no authority to assess whether the hearing officer correctly interpreted policy in rendering his decision. Rather, the DHRM Director (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy.⁶ Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state policy. Accordingly, if the agency has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, it must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling**. The DHRM Director's address is 101 N. 14th Street, 12th Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Since the initial request for review to this Department was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.⁷

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.⁸ If the agency does not appeal to the DHRM Director within 15 calendar days of the date of this Ruling, the Ruling will become a final 15 calendar days after the issuance of this ruling. If the decision is timely appealed to the DHRM Director and subsequently remanded, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).⁹ Any such requests must be **received** by the administrative

⁵ The hearing officer's actions here can hardly be viewed as an abuse of discretion, clearly erroneous, or in any other way a violation of the grievance procedure. Where policy is silent or ambiguous, a hearing officer often must interpret policy before he can apply it. His interpretation is subject to review by the DHRM Director.

⁶ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2); *see also* Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989). By acknowledging that the hearing officer used a traditional means of interpretation (statutory construction), we do not imply that the DHRM Director is bound to use statutory construction principles (or any other particular construct) when interpreting policy. We merely suggest that the hearing officer's approach was not an abuse of discretion.

⁷ It should be noted that this Department has long held that a *timely* request for administrative review of a particular issue, but initiated with the wrong reviewer, will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day period. EDR Ruling Nos. 2008-1811; 2007-1635. *See also*, Virginia Department of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19 at *6-7 (January 15, 2008). (Court affirmed EDR's determination that an appeal based on inconsistency with policy which should have been raised with the Department of Human Resource Management (DHRM) but was raised with EDR within 15 calendar days of the original decision, was timely appealed to DHRM.) The reason for this rule is that the determination of the appropriate administrative reviewer—which, depending on the issue to be reviewed, could be the hearing officer, EDR, or DHRM—can be somewhat perplexing for parties not familiar with the process.

⁸ *Grievance Procedure Manual* § 7.2(d).

⁹ *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.

reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.¹⁰

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.¹¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹²

Claudia T. Farr
Director

¹⁰ See *Grievance Procedure Manual* § 7.2(a).

¹¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹² *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).