

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 06/21/06; Decision Issued: 06/22/06; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8359; Outcome: Agency upheld in full.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8359

Hearing Date: June 21, 2006

Decision Issued: June 22, 2006

APPEARANCES

Grievant  
Engineer Manager  
Representative for Agency  
Four witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## FINDINGS OF FACT

Grievant filed a timely grievance from a Group I Written Notice issued for unsatisfactory work performance.<sup>1</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Virginia Department of Transportation (Hereinafter referred to as “agency”) has employed grievant as a transportation operator for 13 years.

For at least two years, agency policy has been to maintain a logbook for each piece of vehicular equipment operated by the agency.<sup>3</sup> The logbook includes a list of inspections required for the particular equipment, inspection forms, deficiency forms, safety rules and other relevant information.<sup>4</sup> Pursuant to federal and state law, operators of such equipment are required to conduct an inspection of the equipment before operating it each day on public highways. The logbook includes a vehicle inspection form which is to be filled out by the operator and signed. If deficiencies are found during an inspection, they are to be noted on a deficiencies form in the logbook and the vehicle taken to the repair shop. If no deficiencies are found, that is also noted on the deficiencies form.

In January 2006, agency inspectors found that some employees had not been completing the required paperwork on a daily basis. Area superintendents were notified to enforce the completion of paperwork on all vehicles before the equipment was used. The superintendent at grievant’s area headquarters conducted safety meetings on January 19 and 24, 2006; grievant was present at both meetings. The superintendent explained the use of the logbook in page-by-page detail during these meetings. Grievant did not ask any questions about the superintendent’s explanations. Each vehicle has its own logbook that is kept in the vehicle.

On January 25, 2006, a superintendent at another area headquarters needed a backhoe operator to complete a repair project. Grievant was loaned to that area superintendent to operate the backhoe. When grievant arrived at the other area headquarters, the supervisor gave grievant an inspection sheet<sup>5</sup> and told him to inspect the backhoe and complete the form before taking the equipment out. Grievant said, “Yeah, right.” and threw the form on the table in the crew room.<sup>6</sup> Grievant left the room and went outside to the backhoe. Grievant inspected the backhoe and found problems with two hydraulic hoses, a bucket swivel, and the accelerator. Grievant and another crew member worked for about 1.5 hours to repair the problems. Grievant did not fill out the inspection report form, and he did not note the deficiencies on the deficiency form. He took the backhoe to the worksite at about 10:30 a.m., completed the repair project,

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<sup>1</sup> Agency Exhibit 2. Group I Written Notice, issued February 7, 2006.

<sup>2</sup> Agency Exhibit 2. Grievance Form A, filed March 7, 2006.

<sup>3</sup> Includes dump trucks, graders, backhoes, etc.

<sup>4</sup> Grievant Exhibit 1. Logbook Table of Contents.

<sup>5</sup> Agency Exhibit 2, p.9. Inspection form for Vehicle # R04407, January 25, 2006.

<sup>6</sup> Agency Exhibit 2. Supervisor’s written account of incident, January 26, 2006.

and returned the backhoe to the area headquarters by 1:30 p.m. He then left the area headquarters.

The supervisor had reported grievant's refusal to fill out the inspection form to the area superintendent. When the superintendent returned from the field later in the day, he found that the backhoe's emergency flashers had been left on. He went to the backhoe, shut off the flashers, and looked at the vehicle logbook, which was on the dashboard of the backhoe. Grievant had not made any entries in the logbook. The superintendent later asked grievant why he had not filled out the inspection form and grievant said, "I didn't feel like doing it." The superintendent told grievant that they were telling all employees to fill out the paperwork every day. Grievant said, "They are telling us the same thing at [my] headquarters also."<sup>7</sup> The superintendent reported to grievant's area superintendent that grievant had refused to fill out the inspection form and failed to complete the deficiency form. Grievant's area superintendent issued the Group I Written Notice to grievant.

#### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the

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<sup>7</sup> Agency Exhibit 2. Written statement of superintendent, January 25, 2006.

circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>8</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Policy No. 1.60 provides that Group I offenses include acts and behavior that are the least severe.<sup>9</sup> Unsatisfactory work performance is an example of a Group I offense.

The agency has shown by a preponderance of evidence that grievant failed to complete a mandatory inspection form for a backhoe before he operated it on public highways. In fact, grievant admitted that he did not complete the form even though a supervisor had handed him the form and specifically instructed him to fill it out. Failure to follow supervisory instructions is a Group II offense.

Grievant claimed that he had not been given training regarding the inspection forms and logbook and that he had not attended any meetings at which such instruction was given. However, both the superintendent and grievant's supervisor testified about their specific recollections of grievant's attendance at meetings on January 19 and 24, 2006. Their testimony was detailed, credible, and event-specific. One of grievant's witnesses corroborated agency testimony that the training on January 24<sup>th</sup> was detailed, and that the superintendent had emphasized that forms must be filled out and signed. Accordingly, grievant's denial of knowledge about these forms is not credible and taints his credibility regarding other testimony.

Grievant denied that he said, "Yeah, right." when he threw the inspection form on the table. However, the supervisor's testimony about grievant's statement is both credible and consistent with his statement written contemporaneously to the incident. The supervisor's testimony is also consistent with the superintendent's testimony and written statement.<sup>10</sup> The testimony of these two witnesses outweighs grievant's denial.

Grievant argued that he did not complete the inspection form because the form was headed "Daily Truck Inspections." He claims that this form is not

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<sup>8</sup> § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

<sup>9</sup> Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>10</sup> Agency Exhibit 2. Superintendent's written account of incident, January 25, 2006.

appropriate for a backhoe and should only be used on a truck.<sup>11</sup> However, when the supervisor handed grievant the form, grievant did not ask him whether this was the appropriate form. Instead, grievant gave a cavalier response and threw the form on the table. If grievant truly had a concern about the appropriateness of the form, he had ample opportunity to ask the supervisor about it.

A witness who is employed at the area headquarters to which grievant was loaned on January 25, 2006 stated that there have been two other instances where employees did not complete inspection forms. In one case, the employee was new, inexperienced, and did not understand the form's importance – he was counseled. In the other case, the vehicle in question was a pickup truck for which no logbook had been prepared. At the area headquarters where grievant is employed, grievant's witness testified that he has heard a rumor that two employees did not complete inspection forms but there is no evidence whether the rumor is true, and no evidence to substantiate what, if anything, occurred in those cases.

### Mitigation

The normal disciplinary action for a Group II offense is a Written Notice, or a Written Notice and up to 10 days suspension. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has long state service and a satisfactory work record. The agency took these factors into consideration and issued a Group I Written Notice even though the offense was a Group II offense. After carefully reviewing the circumstances of this case, it is concluded that the agency appropriately applied the mitigation provision.

### DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on February 7, 2006 is hereby UPHELD.

### APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this decision was issued, if any of the following apply:

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<sup>11</sup> In fact, that area headquarters was using that form for all equipment because most of the items on the checklist are common to most of their equipment.

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 400  
Richmond, VA 23219

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 give one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>12</sup> 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.<sup>13</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

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<sup>12</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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/*David J. Latham

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David J. Latham, Esq.  
Hearing Officer