

Issue: Group II Written Notice with 1 day suspension (leaving work site without permission); Hearing Date: August 8, 2001; Decision Date: August 9, 2001; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5254

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse Services
Case Number 5254

Hearing Date: August 8, 2001
Decision Issued: August 9, 2001

APPEARANCES

Grievant
One witness for Grievant
Grievant's Supervisor
Representative for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct on June 8, 2001 subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on June 13, 2001 because she left the work site without permission. The grievant was suspended from work without pay for one workday. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed the grievant as an occupational therapist since 1993. The supervisor of physical therapy supervises grievant and one rehabilitation aide. Her annual performance in 1999 met expectations; her evaluation in 2000 exceeded expectations.¹ Grievant's regularly scheduled work hours are 8:00 a.m. to 4:30 p.m., Monday through Friday.

On April 13, 1998, grievant left the hospital facility at 12:00 noon to take a patient to Richmond for treatment. She failed to notify her supervisor that she was leaving the hospital. Even though she was performing a work-related task during her absence, leaving without permission was cause for her supervisor to counsel her that she must always obtain the permission of her supervisor before leaving the facility. The counseling was documented in writing.²

On April 17, 2001, grievant left work at about 3:45 p.m. to pick up her daughter. Grievant had asked permission to leave work but her supervisor denied the request. Grievant thought that she could have the time off and attributes her leaving to a misunderstanding. Her supervisor verbally counseled her and documented the incident in writing.³ Grievant was required to submit a leave slip for the time for the time taken off.

On June 7, 2001, grievant asked her supervisor for permission to take off from work on Friday, June 8, 2001. He advised grievant that he was already approved to be off himself and that he wanted grievant to work on Friday. Grievant understood that her request had been denied and that she was expected to be at work on Friday. By 3:30 p.m. on Friday, grievant had completed all required work and she was exhausted. She and the rehabilitation aide left work together without requesting permission from her supervisor's superior or anyone else.

In consultation with human resources, grievant's supervisor determined that a Group II Written Notice with a one-day suspension should be issued.⁴ All employees of the facility who commit the offense of leaving the work site without permission are counseled on the first offense and receive disciplinary action for a second offense.

The rehabilitation aide who left early with grievant on June 7, 2001 had not previously been counseled or disciplined for this offense. The supervisor verbally counseled the aide and documented the counseling in writing.

¹ Exhibit 15. *Performance Evaluations*, October 20, 1999 and September 25, 2000.

² Exhibit 8. *Verbal counseling summary*, April 14, 1998.

³ Exhibit 7. *Memorandum* to grievant from her supervisor, April 24, 2001.

⁴ Exhibit 1. *Written Notice*, issued June 13, 2001.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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 § 2.1-116.05(A) 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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training⁶ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal [from employment].⁷ An example of a Group II offense is leaving the work site during work hours without permission.

The agency has borne the burden of proof and demonstrated, by a preponderance of the evidence, that grievant left work without permission on June 8, 2001. Moreover, grievant acknowledges that she had asked for permission to take off, had been denied such permission but

⁵ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2000.

⁶ Now known as the Department of Human Resource Management (DHRM).

⁷ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

nevertheless left work approximately one hour prior to the end of her scheduled workday. Therefore, grievant's conduct is subject to disciplinary action.

Grievant contends that she was subjected to disparate treatment because the rehabilitation aide had also left early on June 8th but received only verbal counseling. However, the evidence reflects that grievant's situation differed significantly from that of the rehabilitation aide. Grievant had previously been counseled on two occasions about leaving the hospital without permission. Thus this was grievant's third offense while the aide had never been counseled previously. Both grievant and the aide received counseling for their first offense; therefore, the treatment was not disparate but equal.

Grievant said she was unaware that she could take differences of opinion to her supervisor's superior or that, in her supervisor's absence, she could request permission to leave from her supervisor's superior. The supervisor's superior is the hospital medical director. It is understandable that grievant may have been hesitant to approach the medical director because of his position. Nonetheless, if that is the next person in the organizational chain-of-command, grievant has the right to take her concerns to the medical director.

Leaving the work site without permission is a designated Group II offense.⁸ Because the grievant had previously been counseled on two occasions about the necessity for obtaining permission before leaving the work site, she was clearly on notice of this offense. Thus, when she left the work site without permission on a third occasion, the agency acted appropriately in escalating from corrective action (counseling) to disciplinary action (Written Notice). The hearing officer might be inclined to reduce the discipline to a Group I Written Notice but for the fact that grievant had been specifically told that her request for time off was denied and that she would have to work all day Friday. By ignoring her supervisor's instruction, the grievant also committed another Group II offense – failure to follow a supervisor's instructions. Therefore, after examining the totality of the circumstances, it must be concluded that a Group II Written Notice with one-day suspension was reasonable in this case.

Grievant also cites as disparate treatment, the fact that her supervisor always asks her for the reason she wants to leave early but does not ask the aide for her reasons.⁹ While this does reflect a difference in approach by the supervisor, it does not affect the outcome of this case. Nonetheless, this disparate treatment by the supervisor points to what appears a contributing factor in this case. Although both grievant and her supervisor were very polite, cordial and respectful during the hearing, the evidence elicited in this hearing suggests that the relationship between these two people is arm's length rather than close. First, grievant is properly concerned about the fact that she is always asked for the reasons for absences but her coworker is not asked to provide such information. Second, from the documents proffered by grievant at the hearing, it is clear that she has felt compelled to record in great detail conversations between her and her supervisor. Third, rather than talking with grievant about leaving early, the supervisor felt it necessary to send her a typewritten memorandum to obtain the answers to three simple

⁸ Exhibit 5. *DMHMRSAS Employee Handbook*.

⁹ The rehabilitation aide corroborated in her testimony that the supervisor has never asked her to provide a reason for leaving early.

questions.¹⁰ Communication by memorandum in a three-person unit strongly suggests a reluctance to talk with each other – an indicator of a less than ideal relationship.

These indicators suggest a strain in the relationship that should be nipped in the bud before the rift widens. It would appear appropriate for grievant and supervisor to have some private, face-to-face discussions to allow both persons to openly discuss concerns they have with one another. These discussions can be initiated on their own or with a third-party facilitator. The human resources manager may be willing to act as facilitator or, she may assign someone else in her department who could fill this role. The Department of Employment Dispute Resolution (EDR) employs professional counselors who are trained mediators and facilitators. An EDR counselor, who is totally neutral, would welcome the opportunity to assist both parties to improve their working relationship.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on June 13, 2001 and the one-day suspension are **AFFIRMED**. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

¹⁰ Exhibit 4. *Memorandum* from supervisor to grievant, June 11, 2001.

4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq., Hearing Officer