

Issue: Group III Written Notice with termination (leaving work site without permission; falsifying timesheet); Hearing Date: October 4, 2001; Decision Date: October 5, 2001; Department of Juvenile Justice; AHO: David J. Latham, Esquire; Case Number: 5286



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5286

Hearing Date: October 4, 2001
Decision Issued: October 5, 2001

APPEARANCES

Legal Representative for Agency
Assistant Superintendent of Operations
Four witnesses for Agency

ISSUES

Was the grievant's conduct on June 16, 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 III Written Notice issued on July 10, 2001 because he left the work site without authorization and because

he falsified a time sheet. In addition, the grievant was discharged from employment on July 10, 2001. Following failure to resolve the matter at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Juvenile Justice (Hereinafter referred to as "agency") has employed the grievant as a juvenile correctional officer since 1999. The grievant had received written counseling for failing to follow supervisory instructions (June 7, 2000), unsatisfactory job performance (November 22, 2000, November 30, 2000, January 22, 2001, February 28, 2001), and for improper procedures (April 10, 2001). During the month of May 2001, grievant failed to report for work as scheduled. His supervisor called grievant at home and verbally counseled him when he reported to work. The following day, grievant again failed to report as scheduled.

Agency policy, of which the grievant was aware, requires that an employee notify his or her supervisor before leaving the work site during a scheduled work shift. Further, a written institutional procedure states that:

If an emergency occurs which prevents an employee from adhering to the leave request deadlines..., the employee shall immediately call his/her supervisor (Shift Commander for security staff) to provide notification of the emergency.¹

On June 15, 2001, grievant was working a shift that began at 5:45 p.m. and was scheduled to end at 2:15 a.m. on June 16, 2001. At 12:50 a.m., the grievant signed out through the Control Center, purportedly to take a break outside the main gate in the parking lot. When doing so, he retrieved his driver's license and keys from the control officer.² He did not thereafter return through the Control Center and was not seen again that night by any employee. A sergeant attempted to contact grievant by radio but was unable to elicit any response. The sergeant then went out to the parking lot and looked in every vehicle to ascertain whether grievant had fallen asleep. The grievant could not be found anywhere. The grievant had not requested permission from his supervisor, the shift commander, or anyone else in a position of authority to leave the work site prior to the end of his regularly scheduled shift.

Early the next morning, the sergeant was able to contact grievant at home. Grievant contended that he had left the facility at 2:15 a.m. and that two other correctional officers could verify that. Those two officers both stated they had not seen grievant after he left for break at 12:50 a.m. After June 16, 2001, grievant met twice with his captain and twice with the assistant superintendent of operations and, on each occasion, gave a different version of what had taken place on the morning of June 16, 2001.

¹ Exhibit 3. Institution Operating Procedure Number IOP-114, *Employee Leave*, August 10, 1999.

² The Control Center takes each employee's driver's license and keys when they sign in through the Center and returns the items when they leave the facility. When an employee is taking a break, however, he does not usually retrieve his license and keys.

The daily time sheets for each officer are maintained in a notebook in the captain's office. At muster, just prior to the start of shift, each employee must sign his name and the time he reports for muster. The employee is then to log his time out when he leaves at the end of shift. The entry for June 15, 2001, shows grievant logged in at 5:45 p.m. and logged out at 2:15 a.m.

The grievant had been heard to voice dissatisfaction with his work and stated that he was "giving up on his job." A few weeks prior to June 16, 2001, a sergeant encountered grievant attempting to leave the facility prior to the end of his shift.

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.³

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 Training promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The

³ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

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 [than Group I] and are such that an accumulation of two Group II offenses normally should warrant removal. One example of a Group II offense is leaving the work site during working hours without permission.⁴ Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. An example of a Group III offense is falsifying any records, including, but not limited to, vouchers, reports, insurance claims, *time records*, leave records, or other state documents.⁵

The agency has demonstrated, by a preponderance of evidence, that grievant left the work site during working hours without permission. The uncontroverted evidence shows that grievant left the facility at 12:50 a.m. and did not sign back in through the Control Center. He was not seen by any other employee after 12:50 a.m. and could not be located despite repeated radio calls and a search of the area, including the parking lot. Similarly, the agency has also shown that grievant falsified his time sheet by logging out at 2:15 a.m. when, in fact, he had left at 12:50 a.m. Because the time sheet was not accessible to him when he left, it is apparent that he had made the entry for his logout time at the time he entered the facility at 5:45 p.m. the preceding afternoon. Moreover, grievant later admitted to the assistant superintendent of operations that he had logged his signout time when he first came on shift at 5:45 p.m.

Grievant failed to appear for his hearing despite having been given written notice of the time, date and location of the hearing. Grievant also failed to submit any documents prior to the hearing to support his position. The attachments to the grievance are inconsistent and contain information that was contradicted by the testimony and evidence of agency witnesses. For example, grievant contended that he had been signing in and out upon arrival at the facility ever since he began employment in 1999.⁶ However, a review of the grievant's daily time sheets from October 1999 through May 2001 reflect that grievant had signed out at times other than the scheduled end of shift on 41 occasions.⁷

By failing to appear for the hearing, and by failing to offer any witnesses or credible evidence to support his position, the grievant has not overcome the

⁴ Exhibit 2, *Ibid.*

⁵ Exhibit 2, *Standards of Conduct.*

⁶ Exhibit 15. Memorandum from grievant to B.W., July 18, 2001

⁷ Exhibit 17. Grievant's *Time Sheets.*

preponderance of evidence presented by the agency. Therefore, the agency's disciplinary action must be upheld.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on July 10, 2001 and the discharge from employment 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 three 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.

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.

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