

Issue: Group III Written Notice with demotion and salary reduction (unauthorized leave); Hearing Date: October 23, 2001; Decision Date: October 24, 2001; Agency: Department of Juvenile Justice; AHO: David J. Latham, Esquire; Case Number 5308



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5308

Hearing Date: October 23, 2001
Decision Issued: October 24, 2001

APPEARANCES

Grievant
Four witnesses for Grievant
Representative for Agency
Superintendent
Three witnesses for Agency

ISSUES

Was the grievant's conduct from July 24, 2001 through July 30, 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 August 13, 2001 because he was absent for five consecutive, scheduled workdays without proper authorization or satisfactory reason. In addition, the grievant was demoted and his salary was reduced by five percent. 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 since 1997; he was a sergeant prior to this disciplinary action. He has, by all accounts, been an excellent employee and was repeatedly described by witnesses as very professional. He has no prior discipline. He is reported to take good care of the employees whom he supervises. Grievant's native language is Spanish and he has been in the United States for about four years. He speaks English reasonably fluently but is not yet familiar with all expressions.¹

During the last week of June, grievant submitted a written leave request to his supervisor (a lieutenant) for the dates of July 24, 25, 28, 29 & 30, 2001 – dates on which grievant would normally be scheduled to work. After about two weeks, grievant asked the lieutenant whether the request had been approved. The lieutenant responded that he didn't know whether it could be approved because personnel transfers were contemplated that might affect the leave request. Grievant did not thereafter ask the lieutenant about his request. Grievant also did not ask the captain (next in the chain of command), the assistant superintendent or anyone else about the status of his request for leave. Grievant was absent on the five days at issue without proper authorization. The captain and others made attempts to contact the grievant but were unsuccessful in reaching him at his home telephone number.

Grievant was absent in order to spend several days with a younger brother who was due to move out of state. The brother has a medical problem and was moving to live with a sister who could better care for him. Grievant wanted to spend some quality time with the brother before his departure.

¹ For example, the Assistant Superintendent had told grievant that he maintains an "open-door" policy. Grievant did not know the meaning of this expression, and did not ask for an explanation.

Grievant acknowledges that his absence was not authorized, that he made a mistake and assured the administration that it would not happen again.² The superintendent issued a Group III Written Notice, demoted grievant to correctional officer, and reduced his salary by five percent. Because of the demotion, the superintendent concluded that it would be difficult for grievant to remain on the same shift as the officers whom he had been supervising; he therefore assigned grievant to a different shift.

During the past several months, five employees who took leave without proper authorization were all discharged from employment. Each of them had been absent for two or three days. Because of grievant's excellent performance record, the superintendent wanted to retain grievant and therefore demoted grievant rather than discharge him. Grievant did not want a demotion on his record and asked to be allowed to resign rather than have a demotion. This request was denied because the agency wanted to retain grievant as an employee.

Subsequent to requesting a hearing in this matter, grievant obtained employment elsewhere and has resigned his position with the agency. Although grievant does not desire to return to the agency, he is pursuing this grievance in order to remove the disciplinary action from his record.

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

² Exhibit 1. Written Notice issued to grievant, August 13, 2001.

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 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 III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. An example of a Group III offense is absence in excess of three days without proper authorization or satisfactory reason.⁴

The agency has demonstrated, by a preponderance of evidence, that grievant was absent from work on July 24, 25, 28, 29 & 30, 2001 without proper authorization. Moreover, grievant admits that he was absent on these dates and that he had not been granted authorization for such an absence. While grievant acknowledges his mistake, he believes that the level of discipline was too severe and that it was inconsistent with disciplinary actions taken against other employees. He particularly objects to the demotion and his transfer to another shift.

Grievant believes that demotion was too harsh a discipline. He offered testimony regarding other employees who have been disciplined for various offenses and feels that his discipline was disproportionate to the discipline they received. In the issuance of any discipline, it is important that the agency be consistent and even-handed in administering the same level of discipline for like offenses. In this case, the most relevant comparison with grievant's offense is those employees who have been disciplined for unauthorized absences. The uncontroverted testimony established that, in recent months, five other employees had absences of either two or three days each. All five employees were discharged. Notwithstanding that grievant is a supervisor, and that his unauthorized absence was for five workdays, the agency did not dismiss him but

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

⁴ Exhibit 1, Standards of Conduct.

only demoted him. Thus, because of grievant's excellent work record, he was able to retain his employment when others were discharged from employment. On the basis of this comparison, grievant's discipline was lenient, not harsh.

Grievant also offered examples of discipline meted out to other sergeants during the past two years. In one case involving the assault of a cadet, it appears that the sergeant resigned before the issuance of discipline. In a second case, another sergeant assaulted grievant and was suspended. A third sergeant was suspended for providing contraband to cadets. A fourth sergeant was suspended for leaving the work site during work hours without permission. Without hearing all the evidence, it is not possible to conclude whether the discipline was appropriate in the two cases involving assault. The contraband in the third case was non-security contraband (CD players) and therefore probably less serious than the grievant's prolonged unauthorized absence. The fourth situation is the only one for unauthorized absence from work. That case involved only a few hours absence on one shift, significantly less serious than the grievant's absence from July 24 until August 1.

The agency's explanation for moving grievant to a different shift following his demotion is logical and reasonable. When a supervisor is demoted, it can be uncomfortable for the supervisor to become a coworker of those he previously supervised. Similarly, his coworkers may now have a different view of, and act differently toward, their former supervisor now that he is a peer and not a supervisor. Grievant stated that he wanted to continue working with the same people and that he would not be uncomfortable working with them. While that may be, the decision to move people from one shift to another is a management decision.⁵ The hearing officer has no authority to override such a reassignment decision. In this case, even if the hearing officer had such authority, he concludes the agency made an appropriate decision to reassign grievant to another shift.

Grievant objects to being held to a higher standard than those who are not supervisors. As grievant correctly observes, the Standards of Conduct apply equally to all employees, whether they are correctional officers or supervisors. However, it is also true that supervisors and management are expected to set the correct example for the correctional officers they supervise. A new employee may not be completely familiar with all agency rules and procedures, and therefore, such an individual might be given counseling rather than discipline for a minor infraction. But by the time an individual has been promoted to sergeant, he has usually worked for a sufficient period of time to have complete knowledge of all rules and regulations. Thus, when a supervisor knowingly violates a rule or

⁵ Hearing Officers have limited authority regarding the types of relief that can be provided to a grievant. Section 5.9(b) of the Grievance Procedure Manual provides that transfer of an employee is an example of relief that is not available. Moreover, § 2.1-116.06(B) of the Code of Virginia makes clear that the grievance procedure is not a mechanism to shift management and personnel decisions away from management, stating, "Management reserves the exclusive right to manage the affairs and operations of state government."

procedure of which he has knowledge, the offense is deemed serious because of the negative example it sets for subordinates. Supervisors are paid a higher salary and given more responsibilities than correctional officers, and accordingly, they are expected to set the proper example by not committing such offenses. Therefore, to that extent, supervisors are held to a somewhat higher standard because of their position.

The captain, upon learning that grievant was absent without permission and could not be located said, "I hope he's locked up somewhere." The captain made that statement inferring that, if grievant had been locked up, he would then have a legitimate excuse for what otherwise appeared to be an unauthorized absence. Grievant misinterpreted the captain's statement to be a derogatory comment. Grievant felt that he was being discriminated against based on his national origin. However, aside from his misunderstanding of the comment, grievant had no other evidence to substantiate the discrimination allegation.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on August 13, 2001, the demotion and the salary reduction 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