

Issue: Group II Written Notice with 5-day suspension (leaving work site without permission); Hearing Date: February 28, 2002; Decision Date: March 6, 2002; Agency: Department of Transportation; AHO: David J. Latham, Esquire; Case Number: 5381; **Administrative Review: Hearing Officer Reconsideration Request; Date of Request: March 14, 2002; Reconsideration Decision Date: March 15, 2002; Outcome: No basis to change the decision**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5381

Hearing Date: February 28, 2002  
Decision Issued: March 6, 2002

PROCEDURAL ISSUE

Prior to and during this hearing, some witnesses expressed concern that their testimony might precipitate retaliation by unnamed person(s) in the agency's supervision or management ranks. The Commonwealth's grievance procedure prohibits retaliation, stating, in pertinent part, "An employee may ask EDR to investigate allegations of **retaliation** as the result of the use of or participation in the grievance procedure...."<sup>1</sup> EDR will investigate such complaints and advise the agency head of its findings.

APPEARANCES

Grievant  
Attorney for Grievant  
Three witnesses for Grievant  
Assistant Resident Engineer  
Representative for Agency

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<sup>1</sup> § 1.5, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

Six witnesses for Agency

## ISSUES

Did the grievant's conduct on August 24, 2001 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

The grievant filed a timely appeal from a Group II Written Notice issued on September 5, 2001 because he left the work site during work hours without permission.<sup>2</sup> As part of the disciplinary action, the grievant was suspended for five workdays.<sup>3</sup> Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Transportation (VDOT) (hereinafter referred to as "agency") has employed the grievant as a maintenance supervisor for 25 years. Grievant has one active disciplinary action - a Group I Written Notice issued on May 22, 2001 for failure to follow a supervisor's instructions.<sup>4</sup> That disciplinary action was not grieved within the 30-day appeal period. Grievant calls in whenever he has to be absent and has a good attendance record.

The Commonwealth's policy on work hours provides that, "The normal working hours for most state agencies, which consist of at least eight hours and usually are from 8:30 a.m. to 4:30 p.m."<sup>5</sup> However, the policy also permits agency heads to adjust the work schedules for employees in the agency, being mindful of the hours of public need. During summer months, VDOT's agency head had approved working hours of 7:30 a.m. to 3:30 p.m.

About two years ago, for unknown reasons, grievant and his fellow supervisor began to experience difficulty in communicating with their immediate supervisor (the maintenance superintendent). As management recognized this problem, some efforts were taken to improve communication between the superintendent and his two subordinates. In early 2001, the assistant resident engineer solicited feedback from grievant regarding progress in his interpersonal communication with the superintendent. Grievant indicated that more information was being exchanged, that the supervisor seemed to be paying more attention to grievant and that communications were better.<sup>6</sup>

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<sup>2</sup> Exhibit 8. *Grievance Form A*, filed October 3, 2001.

<sup>3</sup> Exhibit 12. Written Notice, issued September 5, 2001.

<sup>4</sup> Exhibit 6. Written Notice, issued May 22, 2001.

<sup>5</sup> Exhibit 1. Section II.B, DHRM Policy 1.25, *Hours of Work*, September 16, 1993

<sup>6</sup> Exhibit 11. E-mail from grievant to Assistant Resident Engineer, March 6, 2001.

It has been the practice of the maintenance superintendent to meet with grievant, another supervisor and the maintenance crews at about 7:45 a.m. each morning. The primary purpose of the meeting is to go over job assignments for that day and to disseminate any other necessary information. On some occasions, employees may work more than eight hours on a particular day due to the exigencies of assigned work. It has been the general practice to require employees who have accumulated overtime to utilize compensatory time off each Friday in order to avoid working more than 40 hours per week.<sup>7</sup> The maintenance supervisor had previously advised the two supervisors that he wanted to be informed, in advance, whenever any employee was taking time off from work. Accordingly, during each Friday morning meeting grievant and his fellow supervisor announce who has accumulated overtime, and that those employees will be leaving early that day in order to avoid working over 40 hours.

On Friday, August 24, 2001, the morning meeting was attended by grievant, the other supervisor, the maintenance superintendent and at least 11 other employees. All were seated around a 10' long table in the crewmember room. Grievant announced the names of those who had overtime, the amount of their overtime, and that they would be leaving early. Grievant also said he would be leaving early because he had accumulated overtime earlier in the week when he attended a conference. The superintendent asked grievant who his replacement would be; grievant named a specific crewmember. Grievant worked during the morning and left work at 12:40 p.m. in order to use three hours of compensatory time prior to 3:30 p.m. The meeting was orderly and quiet enough for everyone to hear what was being said.

Four employees – the other supervisor, an administrative office specialist, and two crewmembers – all testified that the maintenance superintendent sometimes does not communicate well. Specifically, they noted that when spoken to directly, the superintendent sometimes fails to respond either verbally or by nodding. On such occasions, employees feel unsure of whether the superintendent understands what they are attempting to tell him.

#### 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

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<sup>7</sup> Agency management generally utilizes compensatory time to avoid the added expense of overtime pay. This is a customary practice in state government in order for an agency to maintain better control of its budget.

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 circumstances.<sup>8</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training<sup>9</sup> 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.1 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 a Group I offense and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Two examples of a Group II offense are failure to follow a supervisor's instructions, and leaving the work site during work hours without permission.<sup>10</sup>

Grievant's discipline was issued because his supervisor concluded that grievant failed to notify him about leaving and left the work site without permission. However, a preponderance of the evidence establishes that grievant did notify his supervisor that he would be leaving early. Three employees who attended the meeting testified that they heard both grievant's announcement and

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<sup>8</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

<sup>9</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>10</sup> Exhibit 2. Section V.B.2, *Standards of Conduct*, September 16, 1993.

the superintendent's response.<sup>11</sup> One of the three remembers it especially clearly because grievant named him as the replacement supervisor for the afternoon. This particular employee does not enjoy being temporary supervisor and so this conversation was clearly imprinted in his memory. Thus, four people including grievant have offered sworn testimony that grievant informed the superintendent that he would be leaving early. The superintendent does not deny that grievant said he was leaving early; he contends only that he did not hear grievant. The agency has offered no evidence to discredit the testimony of the other three employees. All three witnesses testified credibly, despite concerns by some that their testimony might result in retaliation.

The same witnesses also testified credibly that the superintendent responded to grievant by asking him whom his replacement would be. Not only does this response serve to verify that grievant informed the superintendent, but it also constitutes implicit permission to leave. When grievant told the superintendent the name of the employee replacing him, the superintendent did not disagree or make any other statement to suggest that grievant could not use his compensatory time that afternoon. Therefore, it is concluded that grievant did notify his supervisor and did not leave the work site without permission.

However, the totality of the evidence during this hearing strongly suggests that the communication difficulty between the superintendent and his supervisors requires further improvement. The evidence did not establish whether the superintendent had told his subordinates that they must communicate their requests for time off in a particular fashion. By the same token, it must be conceded that grievant knew, or reasonably should have known, that he could have communicated his request in a more direct fashion. For example, prior to the 7:45 a.m. meeting with all employees, it has been the practice for the superintendent to meet briefly with only the two supervisors. Grievant could, and probably should, have told the superintendent during that meeting that he planned on using three hours of compensatory time that afternoon.

Some agencies require employees planning to take time off to complete a simple form that states the type of leave requested, the reason for the time off, and the date. This form is given to the supervisor in advance for review and approval. The use of such a form assures that the supervisor is fully informed of the details and documents whether the supervisor granted approval for time off.

Telling one's supervisor in front of subordinates that one is taking time off creates a potential problem for the supervisor if he disagrees. The superintendent could have overruled grievant if he chose but that would have been damaging to grievant's standing in the eyes of subordinates. Thus, grievant effectively gave the superintendent the choice of either, a) agreeing to

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<sup>11</sup> A fourth witness testified that he had heard grievant's announcement and the superintendent's response. However, his testimony was discredited when the agency successfully demonstrated that the witness was actually on sick leave on August 24, 2001.

the time off in front of the group or, b) denying the request resulting in an embarrassing situation for both grievant and the superintendent. Grievant should have known that this was not the best time, place or method to advise the superintendent about his time off. Thus, grievant's action constitutes unsatisfactory job performance – a Group I offense.

Grievant has previously received a Group I Written Notice for failure to follow a supervisor's instructions.<sup>12</sup> While his unsatisfactory performance in the instant case does not rise to a Group II offense, the two offenses are somewhat interrelated in that they both stem from a communication problem between grievant and his direct supervisor.<sup>13</sup> Such communication difficulties are rarely one-sided. If good communication is going to occur, grievant will have to make a determined effort to assure that his communications to the supervisor are clear, direct and, when appropriate, documented in writing.

As noted earlier, a communication problem that goes well beyond this one incident continues to exist. Regardless of the decision in this case, this problem will not disappear unless it is addressed by more than disciplinary action. It appears that it would be appropriate for the agency's Human Resources Manager to examine this situation and take steps to provide counseling, training, team-building or whatever action it decides is most appropriate to achieve harmonious and effective communication among the three employees.

### DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued to the grievant on September 5, 2001 is VACATED. The agency shall assure that grievant receives his salary and all other benefits that may have been withheld during the period of suspension.

The agency shall prepare, and grievant shall sign, a Group I Written Notice for unsatisfactory work performance. 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

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<sup>12</sup> Failure to follow a supervisor's instructions constitutes a Group II offense. In the prior disciplinary action, the agency elected to reduce the level of discipline to a Group I offense due to the mitigating circumstances of grievant's length of service with the Commonwealth.

<sup>13</sup> Given the prior related offense, no further mitigation (other than reduction to Group I) is warranted in this case.

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.



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David J. Latham, Esq.  
Hearing Officer



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**Department of Employment Dispute Resolution**

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In re:

Case No: 5381

Hearing Date:	February 28, 2002
Decision Issued:	March 6, 2002
Reconsideration Received:	March 14, 2002
Reconsideration Response:	March 15, 2002

**PROCEDURAL ISSUE**

An attorney represented grievant during the hearing. However, grievant submitted his request for reconsideration pro se. The hearing officer called grievant's attorney to ascertain whether his representation of grievant had ended. The attorney advised that he and the grievant had mutually decided that grievant should file his request for reconsideration on a pro se basis.

**APPLICABLE LAW**

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision 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.<sup>14</sup>

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<sup>14</sup> § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

## OPINION

Although the hearing decision held in the grievant's favor and vacated both the Group II disciplinary action and grievant's suspension for failure to follow a supervisor's instructions, grievant now takes issue with the decision to impose a lesser disciplinary action for the Group I offense of unsatisfactory job performance. Grievant has presented no newly discovered evidence or evidence of incorrect legal conclusions to support his request. Rather, he has focused on the fact that he complied with leave policies and notified his supervisor that he would be leaving on the day at issue.

Grievant has apparently missed the import of the decision in this case. The hearing officer agrees with grievant. The decision specifically concludes that "grievant did notify his supervisor that he would be leaving early."<sup>15</sup> It was only because the hearing officer agreed with grievant on this point that the discipline was reduced from a Group II to a Group I offense.

The basis for concluding that grievant should receive a written notice for unsatisfactory job performance is explained in the Applicable Law and Opinion section, beginning with the last paragraph on page 5 and concluding in the first paragraph on page 6. Grievant is urged to carefully read these two paragraphs. The testimony and evidence in this hearing made it abundantly clear that there is a significant communication problem between grievant and his supervisor. While some of that difficulty is attributable to the supervisor, grievant has to share responsibility as well. Although grievant did tell his supervisor he would be leaving, the timing and circumstances (a meeting with subordinates) were unsatisfactory. If grievant had made his request in private, or given the supervisor a request form or memorandum, there would not be a finding of unsatisfactory job performance.

One of the purposes of disciplinary action is to prevent recurrence of the behavior that requires change.<sup>16</sup> The totality of the circumstances<sup>17</sup> in this case suggest that this level of disciplinary action, even though the lowest possible level, is required to get grievant's attention. Hopefully, agency management will address this communication problem between the superintendent and grievant in a holistic manner so that grievant's supervisor also will become an integral part of the solution.

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<sup>15</sup> Decision, p. 4., 4<sup>th</sup> paragraph, 2<sup>nd</sup> sentence.

<sup>16</sup> Section VI.A. DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

<sup>17</sup> The fact that grievant had been disciplined less than four months earlier for failing to follow his supervisor's instructions was a factor in deciding the appropriate level of discipline in this case.

## DECISION

The grievant has presented no newly discovered evidence or evidence of incorrect legal conclusions. Therefore, there is no basis to change the Decision issued on March 6, 2002.

## APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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.

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Hearing Officer