

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 05/24/02;
Decision Date: 05/28/02; Agency: Department of Corrections; AHO: Carl Wilson
Schmidt, Esq.; Case No. 5440



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5440

Hearing Date: May 24, 2002
Decision Issued: May 28, 2002

PROCEDURAL HISTORY

On February 19, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

Unsatisfactory Attendance: Non-exempt employees should not work overtime without advance authorization from their supervisor. During the week of 2/10/02 through 2/16/02, [Grievant] worked 1.7 hours overtime which was unauthorized. [Grievant] has repeatedly been informed of this inappropriate action.

On February 27, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 30, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 24, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel

Agency Representative
Human Resource Officer
Supervisor
Secretary Senior
Personnel Analyst
B&G Supervisor B

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as an Administrative Office Specialist. She has a visual impairment¹ requiring accommodation. No evidence of prior disciplinary action against Grievant was presented.

On June 15, 1998, Grievant's supervisor gave her a written counseling stating:

I have talked with you several different times advising you that you are not authorized overtime and you are not to work any overtime without specific authorization. Today when completing the FLSA sheets from last week, I found that on 6/11 you worked one and two tenths hours over and did not adjust this off on 6/13; therefore, you received overtime for last week.

Effective immediately, you are expected to leave after you have worked 8 hours each day and if you must stay over you need approval and then you are expected to adjust your schedule accordingly. You are not to work any overtime without my specific authorization and in my absence you are expected to receive authorization form [Mr. R].

¹ Vision in her left eye is 20/500 and her right eye is 20/50.

On November 23, 1998, Grievant's supervisor gave her a written counseling stating:

You are not authorized to work any overtime whatsoever at any time. I have asked you repeatedly not to stay after your 8 and one half hours because you consistently will not adjust your schedule. You worked one half hour overtime on 11/19 and did not adjust it off. I cannot justify this, but it has to be paid by law.²

On November 9, 2001, Grievant's unit within the Facility held a staff meeting. During the meeting the Supervisor discussed overtime. Grievant prepared the minutes to the meeting stating:

Overtime is not authorized. Anytime worked past the 8½ hour shift must be adjusted off within the workweek. [The Supervisor] advised staff that they are aware when they have worked over and it is [their] responsibility to make arrangements to adjust this time. In addition, staff was advised that except in unusual circumstances where they are so busy they cannot take their lunch break, they are requested to take the 30 minutes break and do not use this to make up for leave time, or to leave early.³ (Emphasis original.)

On January 12, 2002, Grievant's unit had a staff meeting during which overtime was discussed. Grievant prepared the minutes stating:

OT must be approved. Overtime does not begin until you have worked 8½ hours (8 hrs work & ½ hour lunch). Anyone who works over during the week to complete duties, etc. is responsible to make sure they make arrangements to adjust their schedule. This adjustment must be done within the same work week. Our [workweek] is from Saturday midnight to Saturday midnight.⁴

For several years, Grievant has had an excessive workload beyond her control. The Agency is demanding of her and she regularly meets the challenges of her position. Grievant's supervisor and the Warden have instructed Grievant to perform her duties in accordance with their expectations.

For at least a month, Grievant had difficulty accessing her computer. She made numerous attempts to have the computer fixed but because of the Agency's limited resources, she was unable to have the problem corrected. She had to rely on other

² Agency Exhibit 4.

³ Agency Exhibit 6.

⁴ Agency Exhibit 7.

employees who were kind enough to share their computers with her. One employee was located upstairs in an adjoining building, and Grievant had to carry her files with her to that employee's workstation. This delayed Grievant and placed additional pressure on her to perform her duties.

During the week of February 10, 2002 to February 16, 2002, Grievant worked 1.7 hours of overtime. Under the Fair Labor Standards Act, the Agency must pay Grievant for the overtime worked and it did so.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

Although Grievant failed to follow her supervisor's instructions⁵ not to work overtime, the Agency issued her a Group I Written Notice for unsatisfactory attendance. The Agency's concern is the budgetary impact of permitting employees to work overtime at their own discretion. Without the ability to control overtime, the Agency could find itself forced to pay employees with money it has not been authorized to spend. The Agency has taken numerous steps to inform employees, including Grievant, that they cannot work overtime without authorization. Grievant was not authorized to work overtime yet she did so. Her actions rise to the level of a Group I offense.

The Hearing Officer is sympathetic to Grievant's dilemma. On the one hand, she is instructed to perform her work duties and on the other hand she is instructed not to work any overtime even when doing so will enable her to complete all of her work. Grievant is dedicated to doing a good job and is willing to work the additional overtime hours without compensation in order to satisfy her employer's goals. Federal labor laws, however, will not permit Grievant to work overtime without being compensated. Mitigation would normally be appropriate under these circumstances, except that the Agency has made it clear several times that Grievant is not permitted to work overtime. When faced with conflicting instructions,⁶ Grievant should have informed her supervisor

⁵ Failure to follow a supervisor's instructions is a Group II offense. DOCPM § 5-10.15(B)(1).

⁶ Grievant contends she had to work overtime because the Agency failed to timely repair her computer. While this may be true, it is not an excuse for Grievant to disregard her supervisor's instruction not to work overtime. Had the Agency disciplined Grievant for failing to perform her work duties, the absence of a working computer may have been a basis to excuse her failure to perform her work. Grievant was not disciplined for failing to perform her work.

of the problem⁷ and let her supervisor decide whether the job duties were of such importance that overtime should have been permitted.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.⁸

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 Resource 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.

⁷ Grievant informed her supervisor of the problems with her computer but did not inform the supervisor that Grievant could not complete her work within the 40 hour workweek.

⁸ Grievant sought relief of a full time secretary to assist her and for operable computer equipment. These issues are not ripe for resolution by the Hearing Officer. Subsequent to the disciplinary action, the Agency completed an accommodation report to address her needs. No evidence was presented suggesting this report was unsatisfactory to Grievant. It appears to the Hearing Officer that the Agency and Grievant remain in the process of determining how to best accommodate Grievant's disability. In addition, Grievant's testimony was that the Agency fixed her computer albeit it after much delay.

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 DHRM, 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.

Carl Wilson Schmidt, Esq.
Hearing Officer