

Issue: Group III Written Notice with 3-day suspension (falsifying a State document); Hearing Date: 07/24/02; Decision Date: 07/25/02; Agency: Department of Corrections; AHO: David J. Latham, Esq.; Case No.: 5481



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5481

Hearing Date:	July 24, 2002
Decision Issued:	July 25, 2002

PROCEDURAL ISSUE

In her request for relief, grievant requested that a policy regarding the filling out of leave forms be created. Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law or policy. Specifically, hearing officers may not establish or revise policies, procedures, rules or regulations.¹

APPEARANCES

Grievant
Representative for Grievant
Legal Assistant Advocate for Agency
Business Manager for Agency

¹ § 5.9(b)4, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

Two witnesses for Agency

ISSUES

Did the grievant's actions on January 30, 2002 warrant disciplinary action under the agency's 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 because she had falsified a state document on January 30, 2002.² The grievant was suspended for three days as part of the disciplinary action. Following failure to resolve the grievance, the agency head qualified the grievance for a hearing.³

The Department of Corrections (DOC) (hereinafter referred to as agency) has employed the grievant as a retail specialist (commissary clerk) for two years. Grievant works from 8:00 a.m. to 4:30 p.m. The assistant commissary manager, who reports to the commissary manager, supervises grievant. Grievant was counseled on October 23, 2000 regarding the improper use of Sick Personal leave on her leave form.⁴ Grievant was counseled on February 23, 2001 regarding the proper use of Family/Personal leave and Annual leave.⁵

On some occasions in the past, grievant's supervisor had filled in portions of leave forms and given them to grievant for completion, review and signing. On other occasions, grievant completed the entire leave form.

The agency's policy regarding sick leave provides that, "The justification for any sick leave use shall be subject to verification at any time."⁶ Further, "Employees shall be responsible for keeping accurate, up-to-date personal leave records to assist in verifying leave records."⁷ The policy also provides that, "False reporting of leave may be subject to disciplinary action under the Standards of Conduct."⁸ During employee orientation training, different types of leave and their appropriate use are discussed. The commissary manager explains proper use of the Leave Activity Reporting Form to new employees as they begin to utilize leave. In the past, when grievant had questions about proper completion of leave forms, she had asked her supervisors for assistance. During

² Exhibit 7. Written Notice, issued March 11, 2002.

³ Exhibit 12. Grievance Form A, filed February 24, 2002.

⁴ Exhibit 10. Leave Activity Reporting Form, certified by grievant, October 23, 2000.

⁵ Exhibit 9. Memorandum to file by Commissary Manager, February 23, 2001.

⁶ Exhibit 1. Section 5-12.13B.1, Department of Corrections Procedure Number 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.

⁷ Exhibit 1. Section 5-12.24A.2, *Ibid.*

⁸ Exhibit 1. Section 5-12.27, *Ibid.*

her two years of employment, grievant had signed and submitted 60 leave forms for several different types of leave.

On January 22, 2002, grievant told the commissary manager that she had to leave work on the following day, January 23, 2002, at 12:30 p.m. The manager asked grievant whether she would be using sick leave or personal leave; grievant responded that it would be Sick Personal leave.⁹ The manager asked grievant whether she had an appointment; grievant responded in the affirmative. The manager told grievant to notify her immediate supervisor.

On the morning of January 23, 2002, grievant's immediate supervisor asked grievant for the name of the physician with whom she had an appointment. Grievant said that she, "can't remember his name but he is located north of town." Later, at about 10:30 a.m., grievant came to the manager's office and asked to speak with both the manager and the assistant commissary manager. Grievant apologized to both and admitted that she had lied about the reason for taking leave. She stated she did not have a doctor's appointment that day but rather had personal business she had to take care of.¹⁰ Grievant then said that she used to be able to look someone straight in the face and lie, and he or she would never know it. However, she no longer has that ability and decided to admit that she had lied. The manager counseled grievant about the use of various types of leave, explaining that Sick Personal leave may only be used if the employee is ill, and that Family Personal leave and Annual leave may be used for any personal reason, if approved in advance. Grievant took leave that afternoon to consult an attorney about her rights stemming from an accident in which she had been injured.

By January 30, 2002, grievant had not yet completed a Leave Activity Reporting Form to account for either the leave she had taken on January 23 or for leave taken on January 25, 2002. Because the manager was required to submit leave forms on or before January 31, 2002, she requested grievant come to her office during a break to fill out the Leave Form. Shortly thereafter, grievant completed the form certifying that she had taken 3.5 hours of Sick Personal (SP) time on January 23, 2002, and signed the form.¹¹ She did not request assistance from either her supervisor or the manager before completing and signing the form. On this date, grievant had available leave balances of: Sick Personal – 64 hours; Family Personal – 32 hours; Annual – 16 hours.

Later, the supervisor reviewed the form and noted the falsified entry for Sick Personal Leave. On January 31, 2002, the supervisor, manager and the human resources business manager met with grievant and told her to correct the

⁹ The Leave Activity Reporting Form (referred to by DOC as a P-8 form) incorporates a reporting legend for various types of leave. Sick Personal leave is SP; Family Personal leave is FP; and Annual leave is AT.

¹⁰ Exhibit 6. Written documentation of verbal counseling, January 23, 2002.

¹¹ Exhibit 4. Leave Activity Reporting Form, signed by grievant January 30, 2002.

form. Grievant made a correction on the form to reflect that the time taken on January 23, 2002 was, in fact, Personal Time.¹² The manager then issued to grievant a Written Notice that included both a Group I offense (abuse of sick leave) and a Group III offense (falsification of a state record), and suspended her for five days.¹³ At the second resolution step of the grievance process, the facility business manager revised the Written Notice to correct the administrative error of checking two levels of offense on the same written notice.¹⁴ In addition, it was decided to reduce the suspension from five to three days.

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 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.¹⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the

¹² Exhibit 5. Corrected Leave Activity Reporting Form.

¹³ Exhibit 13. Initial Written Notice, issued January 31, 2002.

¹⁴ A disciplinary action may include a description of more than one offense, however, only one level of offense may be checked in Section II, *Type of Offense*. Generally, if there are multiple offenses, the level of discipline selected is the highest applicable level.

¹⁵ § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

Code of Virginia, the Department of Personnel and Training¹⁶ 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 defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. Group III offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment; one example of a Group III offense is falsifying any records or other official state documents.¹⁷

The agency has demonstrated, by a preponderance of evidence, that grievant knowingly filled out a Leave Activity Reporting Form and certified by her signature that she had utilized 3.5 hours of Sick Personal leave on January 23, 2002. In fact, grievant was not sick or disabled. She had worked during the morning and did not seek medical care in the afternoon. Rather, she attended to a purely personal situation by meeting with an attorney to discuss legal matters.¹⁸ Grievant had extensive experience with leave forms, having signed 60 such documents during the past two years. Accordingly, it is concluded that grievant falsified a state document – a Group III offense. The burden of persuasion now shifts to the grievant to show any mitigating circumstances.

Grievant argued that supervisors are responsible for completing leave forms. This argument is inaccurate, specious and self-serving. First, the preponderance of evidence established that supervisors of non-security personnel generally do not complete leave forms for subordinates. Supervisors of security personnel do complete leave forms for employees but, as a retail specialist in the commissary, grievant is a non-security employee. Second, even if her supervisor had filled in part of the form, grievant signed the form, thereby certifying that, “the information on this form is accurate and complete.”¹⁹ Since grievant certified the accuracy of the form, she cannot now seek to absolve herself of responsibility because a supervisor may have filled in part of the form.

¹⁶ Now known as the Department of Human Resource Management (DHRM).

¹⁷ Exhibit 8. Section 5-10.17A & B.2, Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

¹⁸ Exhibit 15. Letter from law firm, July 10, 2002.

¹⁹ Exhibit 4. Certification in signature block of Leave Activity Reporting Form.

Grievant faults the manager because she did not give grievant a copy of the memorandum that documented the January 23, 2002 counseling session. Pursuant to the Standards of Conduct, verbal counseling is an informal discussion between employee and supervisor. Supervisors have the option to document the discussion for their own records if they so choose. There is no requirement that a copy of the supervisor's personal documentation of counseling be given to an employee.²⁰

Grievant argues that an appointment with her attorney to discuss legal matters relating to an injury sustained in an accident entitles her to Sick Personal leave. Grievant's employment of this argument corroborates that her use of entry of sick leave on the Leave Activity Reporting Form was intentional, not accidental. The Commonwealth provides sick leave for absences caused by illness, injury, or health problems related to pregnancy or childbirth.²¹ The policy on sick leave provides that an employee's need for sick leave is subject to verification which may include certification from the employee's treating physician that the employee is temporarily disabled from work.²² The fact that the Commonwealth may monitor the use of sick leave by requiring physician verification makes clear that this category of leave is only to be used when an employee is physically unable to work. A meeting with an attorney to discuss legal strategy, even though it relates to an injury, does not entitle grievant to utilize sick leave. Two other types of leave – Annual, or Family/Personal may be utilized for any purpose, including meeting with attorneys.

In the alternative, grievant contends that she wrote SP (Sick Personal) on the leave form because she was upset about another matter and it was the, "first thing that came to mind." This assertion is less than credible for two reasons. First, grievant knew from prior counseling that the agency expects leave forms to be completed accurately. She knew, or reasonably should have known, that such a cavalier approach of writing the "first thing that came to mind" would be unacceptable. Second, it is not credible that on January 30, 2002, grievant would have forgotten the counseling she had received just seven days earlier. During that meeting with her supervisor and manager, grievant admitted she had lied about needing sick leave. During the same meeting, her manager counseled her in detail about the appropriate use of both Sick Personal and Family/Personal leave. It is simply not believable that grievant would have forgotten such a meeting one week later.

The grievant has not presented any circumstances that sufficiently mitigate her offense. The agency applied the appropriate level of discipline specified in the Standards of Conduct for this offense.

²⁰ Exhibit 8. Section 5-10.6, *Ibid*.

²¹ Section II.A.2, Commonwealth of Virginia *Employee Handbook*, 1998.

²² Exhibit 18. DHRM Policy No. 4.55, *Sick Leave*, September 16, 1993.

DECISION

The disciplinary action of the agency is affirmed. The Group III Written Notice for falsifying an official state record and the three-day suspension issued to grievant on March 11, 2002 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²³

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

²³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer