

Issue: Group II Written Notice (failure to report to work as scheduled without proper notice to his supervisor, failure to follow superintendent's instructions, and failure to comply with established written policy); Hearing Date: August 5, 2002; Decision Date: August 6, 2002; Agency: Department of Transportation; AHO: David J. Latham, Esq.; Case No.: 5485



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5485

Hearing Date:	August 5, 2002
Decision Issued:	August 6, 2002

**PROCEDURAL ISSUES**

In his request for relief, grievant requested that an e-mail note written by grievant's supervisor be removed from his personnel file. The supervisor had written a brief note to himself to document an incident that occurred on March 8, 2002. The incident was not related to the disciplinary action at issue in this grievance. The supervisor did not put the note in grievant's personnel file but kept it for his own records. Since this note has never been placed in grievant's personnel file, he stipulated during the hearing that this is no longer an issue for this grievance.

Grievant also requested that disciplinary action be taken against his supervisor and that grievant be reimbursed for physician fees incurred in connection with the grievance. Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law or policy. Specifically,

hearing officers may not take adverse action against another employee, or award damages or physician fees.<sup>1</sup>

### APPEARANCES

Grievant  
Observer for Grievant  
Human Resource Manager  
Representative for Agency  
Two witnesses for Agency

### ISSUES

Did the grievant's actions 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 II Written Notice issued for failure to report to work as scheduled without proper notice to his supervisor, failure to follow superintendent's instructions, and failure to comply with established written policy.<sup>2</sup> Following failure to resolve the grievance, the agency head qualified the grievance for a hearing.<sup>3</sup>

The Department of Transportation (hereinafter referred to as agency) has employed the grievant as a transportation crewmember for two and a half years. Grievant has one active Group I Written Notice issued for failure to be available for work when he had been designated "essential personnel" and was on call for snow removal duty.<sup>4</sup>

Grievant's supervisor had counseled grievant about his failure to request leave in advance in 2001. Grievant had reported to work two hours late without any notification to the agency on May 14, 2001. The written counseling memorandum also documents other prior verbal counseling on grievant's multiple failures to request leave time in advance.<sup>5</sup>

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

<sup>2</sup> Exhibit 1. Written Notice, issued March 20, 2002.

<sup>3</sup> Exhibit 2. Grievance Form A, filed March 25, 2002.

<sup>4</sup> Exhibit 7. Written Notice, issued December 8, 2000. See also Exhibit 8, Decision of Hearing Officer, Case No. 5188, issued May 16, 2001.

<sup>5</sup> Exhibit 9. Counseling Memorandum from superintendent to grievant, May 15, 2001.

The Department of Human Resource Management has promulgated several policies relating to the use of various types of leave. The policy on *Leave Policies – General Provisions* provides that employees should request leaves of absence as far in advance of the desired leave as practicable. The policy also recognizes that special circumstances may occur and provides that:

If an employee could not have anticipated the need for a leave of absence, the employee should request approval for the leave **as soon as possible** after leave begins.<sup>6</sup> (Emphasis added)

Grievant was hired after January 1, 1999 and is therefore subject to the Virginia Sickness and Disability Program (VSDP). The VSDP leave policy provides up to 32 hours of Family and Personal Leave per year. Family and Personal Leave use is available subject to the following provision:

Participating employees may use credited family and personal leave for absences due to personal and family reasons as well as for personal illnesses or injuries. The employee should give reasonable notice to his/her supervisor.<sup>7</sup>

When an employee requests personal leave in advance, and the supervisor can accommodate the absence, there is no requirement that an employee provide details of why they want to use personal leave. However, there are two circumstances where a supervisor may request at least some general explanation of the leave purpose. First, if an employee's absence would leave the agency shorthanded for an important assignment, the supervisor might seek to determine whether the personal leave is for a reason that could be taken care of on another day. Second, where the leave is taken without advance notice, the supervisor will require a sufficient explanation to determine whether the day off was taken for a genuine emergency or for some less important reason.

On Friday March 15, 2002, grievant was scheduled to work from 8:00 a.m. to 4:30 p.m. He did not appear for work and did not call his supervisor or anyone else before the start of his shift to provide notification that he would not be reporting to work. Sometime between 4:15 p.m. and 4:25 p.m., grievant called his supervisor and said words to the effect of, "This is to let you know I'm not coming to work today, ha, ha, ha." On Monday, March 18, 2002, grievant's supervisor asked grievant for an explanation of his absence. Grievant said that he had received a telephone call early Friday morning (between 1:00 a.m. and 2:00 a.m.) regarding a family emergency out of town. He had to drive three hours to deal with the emergency and then drove another three hours to return home at about 4:00 p.m.

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<sup>6</sup> Exhibit 4. DHRM Policy No. 4.30, *Leave Policies – General Provisions*, September 16, 1993.

<sup>7</sup> Exhibit 4. DHRM Policy No. 4.57, *Virginia Sickness and Disability Program Leave*, January 1, 1999.

Grievant contends that a second family emergency – the death of a relative – also occurred on March 15, 2002. He did not learn about this until sometime during the afternoon and since he did not return from out-of-town until 4:00 p.m., the second emergency was not the primary reason for grievant's failure to attend work that day.

Grievant requested to utilize personal leave for the time missed on March 15, 2002. A significant amount (37%) of grievant's leave time has occurred on Fridays. Many employees use Friday leave in order to have a long weekend. However, because grievant wanted to use personal leave after failing to provide advance notification, his supervisor asked grievant for a further explanation of his emergencies. Grievant refused to provide any further information contending that it was a personal matter. His request to use personal leave was denied and grievant was given leave without pay for March 15, 2002.

Although grievant does not own a cellular telephone, he has a telephone in his residence, could have utilized public phones on his trip and had access to telephones at his out-of-town destination. Grievant acknowledged that he was physically able to call his supervisor prior to or at the beginning of his shift but failed to do so because he was preoccupied with his family emergency.

#### 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.<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.2 defines Group II offenses as acts and behavior which are more severe in nature than Group I offenses, and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Examples of Group II offenses include failure to follow a supervisor's instructions or otherwise comply with established written policy, and failure to report to work as scheduled without proper notice to supervisors.<sup>10</sup>

The evidence is undisputed that grievant failed to follow a supervisor's instructions because he failed to request leave before the start of the workday, as he had been counseled to do during 2001. Grievant's failure to call in before 8:00 a.m. on March 15, 2002 was also a failure to comply with the established written policy requiring that, even in emergency circumstances, he must notify his supervisor as soon as he learns that he cannot report to work. Finally, grievant's absence was a failure to report to work as scheduled without proper notice to a supervisor. Accordingly, the agency has demonstrated, by a preponderance of the evidence, that grievant's failure to call his supervisor prior to the start of his work shift was a Group II offense.

While the facts documenting the Group II offense are uncontraverted, grievant contends that discipline is unwarranted because he had an unexpected family emergency that took priority over his work. Further, he requested personal leave to cover the time off. There are, however, several concerns that negate grievant's contention. First, grievant failed to comply with verbal and written instructions to notify supervision in advance of any leave. Even if the need for leave arises suddenly and unexpectedly, grievant is obligated to notify the agency that he cannot come to work. Grievant had ample opportunity to call his supervisor at home, to call the residency early in the morning, to call his supervisor at work before 8:00 a.m., or to call the residency at 8:00 a.m.

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<sup>8</sup> § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

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

<sup>10</sup> Exhibit 4. DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

Grievant had access to telephones and was not otherwise prevented from calling his supervisor or the residency.

Second, while grievant may have been preoccupied with the family emergency when he first received a telephone call, he alleges that he left home and drove for three hours to an out-of-town destination. It is not credible that grievant would fail to remember during a three-hour-long drive that he was scheduled to report to work at 8:00 a.m. that morning. He could then have stopped at a public telephone or used a telephone at his destination to call the residency.

Third, grievant has refused to provide any kind of explanation about the nature of the family emergency. Grievant contends that it is a personal matter and that he should not have to divulge such personal information. He also maintains that, if he provides an explanation, it will quickly become known among all of his coworkers. Grievant's concern for his privacy is understandable. However, if grievant had called the residency prior to 8:00 a.m., explained that he had a very personal family emergency and requested a day off, it is highly probable that his request would have been granted. But, his failure to take this simple step raised suspicions that he might be trying to retroactively get leave to cover some other reason for taking the day off (such as going fishing, or some other non-emergency reason). Given grievant's prior counseling and disciplinary history, it was not unreasonable for the agency to be suspicious. At this point, the agency reasonably asked grievant to provide some credible explanation for his absence. Grievant's failure to provide even a general explanation or any form of documentation further raised suspicion. Grievant said during the second-step resolution meeting that he had proof of his emergency, but later recanted and failed to provide any such evidence.

Fourth, there have been inconsistencies in grievant's retelling of this situation that make him appear less credible. On one occasion, grievant stated that he had learned about the death of a relative while he was still out of town. If so, that would have been prior to 1:00 p.m. when he had to begin the three-hour drive to return home. However, during the hearing grievant testified that he only learned about the death when he returned home and found a message on his answering machine. A second inconsistency occurred when grievant testified during the hearing that he had access to telephones on March 15, 2002. However, during the second-step resolution meeting, he said he did not have access to a telephone on that date. A third inconsistency arose when grievant first denied that he had been counseled about leave notification procedures, and then later acknowledged counseling when the counseling memorandum (Exhibit 9) was introduced by the agency.

Finally, during the hearing, the hearing officer carefully explained to grievant that providing even a general but credible explanation would be very useful to the hearing officer in arriving at a decision. Notwithstanding this

explanation of the ramifications of remaining silent, grievant adamantly maintained that he was absent for a personal matter that he did not want to discuss. Grievant failed to provide even the simplest of documentation – such as an obituary for his deceased relative. Since newspapers are public records, providing an obituary would have helped grievant substantiate at least a portion of his story without invading his privacy. His failure to provide such documentation for the hearing further weakens the credibility of grievant’s story.

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for issued to grievant on March 20, 2002 is



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.<sup>11</sup>

[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]

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David J. Latham, Esq.  
Hearing Officer

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<sup>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.