

Issues: Group II Written Notice with 10-day suspension (failure to perform assigned work) and Group III Written Notice with termination (falsifying state records, misuse of state records, failure to perform assigned work); Hearing Date: 11/25/02; Decision Date: 12/09/02; Agency: Dept. of Environmental Quality; AHO: David J. Latham, Esq.; Case Nos. 5548/5549



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case Nos: 5548 & 5549

Hearing Date: November 25, 2002  
Decision Issued: December 9, 2002

**PROCEDURAL ISSUE**

The grievant filed separate grievances for each of two disciplinary actions administered by the agency. The agency requested that the two grievances be consolidated into one hearing; the Department of Employment Dispute Resolution approved the request.<sup>1</sup>

**APPEARANCES**

Grievant  
Attorney for Grievant  
Two witnesses for Grievant  
Regional Director  
Advocate for Agency

---

<sup>1</sup> See § 8.5, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

Two witnesses for Agency

## ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Performance policy? 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 perform assigned work; he was suspended for ten days as part of the disciplinary action.<sup>2</sup> Grievant also appealed from a Group III Written Notice issued for falsifying official state records, misuse of state records, and failure to perform assigned work.<sup>3</sup> Grievant was discharged from employment effective July 1 2002. Following a denial of relief at the third resolution step, the agency head qualified the grievances for a hearing.<sup>4</sup>

The Department of Environmental Quality (Hereinafter referred to as agency) has employed the grievant for nine years. He was a senior environmental inspector at the time of his dismissal.

### Group II Written Notice

This disciplinary action was taken on April 22, 2002 after it was discovered that grievant had failed to complete detailed inspection reports for 110 of 116 inspections he claims to have performed during fiscal years FY00 and FY01 (October 1999 through September 2001). On the same date, grievant signed a statement of facts admitting that he did not complete 110 of the required 116 inspection reports.<sup>5</sup> In the same statement, he contended that the inspections had been performed but that the reports had not been prepared. He further stated that his sleep apnea problem contributed to his inability to complete the reports.

Grievant's primary core responsibility (60 percent of his work profile) is to conduct inspections of targeted air emission sources, evaluate processes and operating parameters from those facilities, and to prepare an inspection report that fully describes and supports the compliance determination of the source.<sup>6</sup>

---

<sup>2</sup> Exhibit 1. Written Notice, issued April 22, 2002.

<sup>3</sup> Exhibit 10. Written Notice, issued July 1, 2002.

<sup>4</sup> Exhibit 1. Grievance Form A, filed May 20, 2002, and Grievance Form A, filed July 28, 2002.

<sup>5</sup> Exhibit 1. Statement of Facts, signed by grievant April 22, 2002.

<sup>6</sup> Exhibit 3. Grievant's Employee Work Profile, December 20, 2001.

The inspections and reports are required to comply with federal regulations of the Environmental Protection Agency (EPA).

While grievant was suspended from April 22 through May 3, 2002, the agency became concerned about whether grievant had actually conducted the inspections on which he failed to complete reports. As a result, the agency again suspended grievant from work on May 16, 2002 while it conducted further investigation into grievant's performance.

### Group III Written Notice

The agency's 18-page operations manual for air inspectors provides detailed procedures necessary for the conduct of stationary source inspections. There are two primary types of inspections. Partial compliance evaluations usually focus on a subset of regulated pollutants or emission units at a particular facility. A Full Compliance Evaluation (FCE) is required annually and is a comprehensive evaluation of the compliance status of a facility, addressing all known regulated pollutants at all identified emission units. Among the required elements of a full compliance evaluation are: review of all required reports and underlying records, assessment of control device and process operating conditions, visible emission observation, review of facility records and operating logs, and observation of major emission units while in operation.<sup>7</sup> Of 70 inspections grievant claims to have performed from October 1, 1999 through September 30, 2000, grievant did not enter 61 of them into the Comprehensive Environmental Data System (CEDS) until October and November 2000.

While grievant was suspended from work, the agency conducted further investigation of grievant's work during the years of 2000 through 2002. The matter was referred to the agency's Director of Audit, who undertook an independent review of grievant's activities. Among the issues were questionable inspection dates, the brevity of inspections at large emission sites, missing inspection notes for 14 facilities, delayed entry of data into the computer system, grievant's use of sick leave benefits when he was actually performing military service, and mileage on the state vehicle that could not be matched to dates of inspections.<sup>8</sup>

Grievant's supervisor requested grievant to provide a written response to these issues on June 21, 2002. Grievant responded with a lengthy memorandum on June 25, 2002.<sup>9</sup> The agency did not grant grievant access to his files making it difficult for him to respond to some of the detailed information requested by the supervisor. However, in his response, grievant acknowledged that his primary basis for ascertaining compliance was to rely on the companies'

---

<sup>7</sup> Exhibit 4. Agency's *Field Operations Manual for Air Inspectors*, September 14, 2001. (Also referred to as ASOP – Air Standard Operating Procedures)

<sup>8</sup> Exhibit 8. Memorandum from air compliance manager to grievant, June 21, 2002.

<sup>9</sup> Exhibit 9. Grievant's response to supervisor, June 25, 2002.

own records. He also admitted that when performing walk-throughs at some companies, he did not inspect or even look at all equipment. Grievant contends that several companies told him that his inspections were the most complete ever performed. However, grievant did not proffer any witnesses or affidavits to corroborate his assertions. Grievant contended that he had entered inspection dates into the CEDS system but that the system changed the dates. Agency witnesses testified that there have been problems with the CEDS software system but no one reported that the system was changing dates after entry.

During its investigation, the agency contacted several of the larger air emission facilities purportedly inspected by grievant to ascertain whether facility records corroborated that grievant actually performed inspections on the dates in CEDS. The following summarizes the results of the investigation:<sup>10</sup>

<u>Facility</u>	<u>Date Grievant claims to have inspected</u>	<u>Plant Records reflect:</u>
Plant 1	9-26-01	Grievant picked up records but did not conduct physical inspection tour.
Plant 2	9-26-01	Grievant picked up records but did not conduct physical inspection tour.
Plant 3	12-18-01	Grievant was not at plant on this date.
Plant 4	9-26-01	Grievant was on site but did not conduct a physical inspection tour.
Plant 5	9-29-00	Grievant was not at plant on this date. He was at site on 10-3-00 for only ten minutes. He did not examine records or conduct a physical inspection tour.
Plant 6.	8-29-00	Grievant was not at plant on this date. He was at site on 9-25-00 for 3 hours and conducted only a walk-by tour.
Plant 7	9-26-01	Grievant was at site for less than three hours, and did not inspect all facilities.
Plant 8	9-29-00	Grievant was not at plant on this date. He was on site 10-12-00 for three hours.

---

<sup>10</sup> To help preserve grievant anonymity, the plants are identified only by the tab number in Exhibit 25, the 235-page investigative report.

The Commonwealth's policy on military leave provides that certain employees "shall be granted up to 15 workdays (120 hours) of military leave with pay in a federal fiscal year for the duty required in their military orders." (Underscoring added)<sup>11</sup> The policy further provides that any military leave beyond 15 workdays per year is granted without pay.<sup>12</sup> Employees may use annual leave for personal purposes such as military days beyond 15 workdays per year.<sup>13</sup> Sick leave may **not** be used for purposes other than medically necessary reasons.<sup>14</sup>

The agency's auditor meticulously compared grievant's detailed military records with the agency's leave records during the period from 1999 through 2002.<sup>15</sup> A summary of the findings reveals that grievant submitted sick leave activity forms on at least 16 days when he was actually on military duty.<sup>16</sup> Thus, grievant was being paid by the military service, while at the same time he was drawing sick leave pay from the agency totaling nearly \$3,000.<sup>17</sup>

Grievant began experiencing difficulty sleeping and first saw a physician about his problem in August 2001. The physician referred grievant for a sleep study test that was conducted in October 2001. The study revealed that grievant has a "moderate sleep apnea/hypopnea syndrome" for which the physician prescribed the use of CPAP (continuous positive air pressure) equipment.<sup>18</sup> In the early part of 2002, grievant concluded that he could not tolerate the CPAP equipment and decided to opt for surgical reconstruction of his upper airway. The surgery took place on May 30, 2002. Grievant had mentioned his sleeping problems to two coworkers in December 2001. He first told his supervisor about the sleep apnea diagnosis on April 11, 2002, when he contended that apnea causes him to be sleepy during the day. Because grievant utilizes a state vehicle and drives regularly to perform his job, the agency requested a physician's statement regarding his condition. In a letter to whom it may concern, grievant's oral surgeon approved grievant for driving as long as he used his CPAP equipment properly.<sup>19</sup> This was the first and only medical information grievant had submitted to the agency prior to this hearing.

---

<sup>11</sup> Exhibit 16. Section III, DHRM Policy No. 4.50, *Military Leave*, effective September 16, 1993.

<sup>12</sup> Exhibit 16. Section IV, *Ibid.*

<sup>13</sup> Section II, DHRM Policy 4.10, *Annual Leave*, September 16, 1993.

<sup>14</sup> Exhibit 16. Section II, DHRM Policy No. 4.55, *Sick Leave*, effective September 16, 1993.

<sup>15</sup> Exhibits 13 & 14. Grievant's agency leave records, and military activity records, respectively, for the period from 1999 through 2002.

<sup>16</sup> Exhibit 15. Summary of leave record exceptions.

<sup>17</sup> The date of May 13, 1999 appears to have been erroneously included in the summary. The matter of improperly received sick leave benefits has been referred to the Virginia State Police.

<sup>18</sup> Exhibit 26. Letter from sleep study physician to grievant's physician, October 27, 2001.

<sup>19</sup> Exhibit 6. Letter from grievant's oral surgeon, April 25, 2002.

## 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>20</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>21</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.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

---

<sup>20</sup> § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>21</sup> Now known as the Department of Human Resource Management (DHRM).

occurrence normally should warrant removal from employment.<sup>22</sup> Examples of Group III offenses include falsifying any records including reports, time records, leave records, or other official state documents. Group II offenses are less severe but include acts and behavior such that an accumulation of two Group II offenses would normally warrant removal from employment. Group II offenses include failure to perform assigned work or otherwise comply with established written policy.

### Group II offense

The agency has demonstrated, by a preponderance of the evidence, that grievant failed to complete 110 of 116 inspection reports over a period of two years. Moreover, grievant signed a written admission that he had failed to complete such reports. The primary core responsibility of grievant's job is to inspect emission sources and write reports concerning his findings. A failure to write the required reports over a two-year period is not only a failure to perform assigned work but a clear dereliction of duty. There is no evidence that grievant would ever have completed the reports had his failure not been uncovered. Therefore, grievant's failure to complete reports was a Group II offense.

Grievant attributes his failure to sleep apnea. However, grievant did not see a physician about his condition until August 2001. His condition was diagnosed in late 2001 and surgically corrected in May 2002. Grievant's supervisor was unaware of grievant's medical problem until April 2002, although grievant contends he had mentioned it to coworkers and his supervisor in late 2001. Assuming for the sake of argument, that grievant had mentioned sleeping problems to his supervisor in late 2001, grievant never provided any medical documentation to the agency and never sought any accommodation for his problem. More importantly, his sleeping difficulty in late 2001 does not explain why grievant was failing to write reports in 1999, 2000 and early 2001.

A potentially mitigating circumstance is the fact that grievant's supervisor (the Air Compliance Manager) failed to recognize for over two years that grievant was not writing reports. It is difficult to believe that the Manager had no procedure or quality assurance process in place to ascertain whether subordinates were actually performing their work, but such was the case here. Air quality inspectors enter into the CEDS system the date on which they perform an inspection. Grievant entered dates into the CEDS system for the inspections he performed, and the Manager relied on those dates as being accurate. He also assumed that, if the inspection had been performed, the inspector had also written the requisite report. In fact, the Manager gave grievant annual performance evaluations stating that he met expectations for the core responsibility of completing inspections and reports. Thus, the Manager unwittingly ratified grievant's failure to perform his job.

---

<sup>22</sup> Exhibit 17. DHRM Policy No. 1.60 *Standards of Conduct*, effective September 16, 1993.



The current Manager was new to his job in 2000. Grievant failed to write his reports during that year and his Manager gave grievant a satisfactory performance evaluation for that year. Thus, for the following year of 2001, grievant may have been misled into concluding that not writing reports was satisfactory because his supervisor had not faulted him for it in the previous year. However, while grievant may have been inadvertently misled in 2001, his failure to write reports in 2000 was a conscious decision on his part not to perform assigned work. Moreover, the fact that the Manager was derelict<sup>23</sup> in performing his oversight responsibilities does not excuse grievant from performing the primary function of his position. Grievant knew full well that his primary responsibility was to inspect and write detailed reports on air emissions sources. Grievant cannot escape his duty and responsibilities on the basis that “someone else failed to do their job and that excuses me too.” Accordingly, grievant has not demonstrated sufficient mitigation to overcome the Group II offense.

### Group III offense

The Group III Written Notice and termination of employment resulted from four offenses.

1. The first offense is falsification of official state records, to wit, entering Level II inspection dates into the CEDS system when facility records reflect that grievant did not perform inspections on those dates. The agency contacted eight plants and found that grievant was not at four of the plants on the dates he entered into CEDS. He did go to three of the four plants on other dates within the following month. Grievant faults the CEDS system for the incorrect dates. However, even assuming that grievant is correct about the CEDS software, the investigation revealed other significant deficiencies.

First, grievant did not conduct complete physical inspections at any of the eight facilities and made only partial physical inspections at two plants. Seven of the eight plants are classified as major or potentially major emission sources because of the extensive size of the facilities.<sup>24</sup> A preponderance of testimony established that large, major emission plants require a minimum of one full workday in order to complete the annual Full Compliance Evaluation (FCE).<sup>25</sup> Grievant argued that the ASOP manual does not require a “tour,” but his rationale is not persuasive. While the manual does not use the term “tour,” a complete reading reveals that a thorough inspection would include a physical inspection of all potential air emissions equipment. Grievant also seeks comfort in the ASOP language that states, “An on-site visit may not be necessary based

---

<sup>23</sup> The Air Compliance Manager was given a Notice of Improvement Needed/Substandard Performance form as result of his failure in this matter. Whether that was a sufficient action is beyond the scope of this hearing and decision.

<sup>24</sup> See Exhibit 25, Agency’s Investigative Report.

<sup>25</sup> Some of these facilities require 1.5 to 2.0 days for an FCE.

upon factors such as..."<sup>26</sup> However, this subsection must be read in its entirety. The last sentence states, "Examples of source categories that may not require on-site visits to assess compliance include, but are not limited to, gas-fired compressor stations, boilers in large office and apartment buildings, peaking stations, and gas turbines."<sup>27</sup> It is clear that these examples are miniscule sources of air emissions compared to the huge industrial plants that grievant was supposed to be inspecting.

Second, grievant claims to have conducted FCEs at four of the eight plants on September 26, 2001. He was at Plant 7 for almost three hours, leaving less than five hours to perform FCEs at the remaining three plants. In fact, plant contacts reveal that grievant only picked up records at the four plants and did not conduct any inspections. Grievant's rationale, found in his grievance form, is that he relied on records to ascertain compliance. Grievant apparently believes that no one would deliberately falsify records and data in order to evade being penalized by the EPA. Sadly, the fact is that the profit motive in private industry drives some managers to do just that. The *raison d'être* of the Department of Environmental Quality is to help ferret out those who violate air emission regulations, whether accidentally or by design. While grievant was fostering good customer relations by inspecting only records, he failed to consider that some customers may have been pleased only because they were violating regulations behind his back. As the only line of defense between deliberate polluters and public health, grievant was obligated to fully comply with the FCE inspection protocol. Grievant failed to do so, and then entered information into CEDS implying that he had complied. This amounts to a falsification of official state records.

2. The agency cited as a second offense entering into CEDS a completion date for a Leak Detection and Repair (LDAR) review for a facility that is not subject to LDAR reviews. Grievant maintains that this was an unintentional error. The agency has not proven otherwise. Therefore, the agency has not met its burden of proof with regard to this alleged offense.

3. The third offense is misuse of state records because grievant failed to submit leave slips for leave taken in 2001 and because he exceeded the amount of allowable military leave. The agency has demonstrated by a preponderance of evidence that grievant was reimbursed by the agency for sick leave benefits when he was actually on military leave. This is a clear abuse of the Commonwealth's leave policy. When employees exceed 120 hours of military leave, they are required to utilize annual leave or compensatory leave (if they have available balances of such leave), or take unpaid leave. Grievant submitted leave slips for sick leave, thereby obtaining reimbursement to which he was not entitled.

---

<sup>26</sup> Exhibit 4. Section III.C.b, *Ibid.*

<sup>27</sup> Exhibit 4. *Ibid.*

Grievant argues that there is a memorandum permitting the use of sick leave in lieu of unpaid military leave. However, grievant failed to submit such a memorandum. Moreover, the most recent revision of the Commonwealth's Sick Leave policy provides that sick leave is available only for medically necessary reasons. Grievant has provided no evidence to the contrary.

Grievant also argues that he was unaware that he had exceeded his 120-hour military leave allowance. He contends that the leave register furnished to him by the agency was not current.<sup>28</sup> The agency acknowledges that it was not current in posting leave activity reporting slips to its computer system and that the register may not have been current. However, each employee is responsible for tracking their use of leave and assuring that they do not exceed available leave balances when submitting a leave request. Moreover, if grievant believed that he still had military leave available because of the leave register balance, there would have been no reason to utilize sick leave. Thus, it is more likely than not that grievant knew he had exhausted his military leave balance, and submitted sick leave in order to obtain reimbursement to which he was not entitled. Accordingly, it is concluded that grievant falsified state records by using sick leave on days when he was not sick, but was actually on military duty.

4. The fourth offense for which grievant was cited was his failure to perform assigned work. Specifically, he failed to complete any inspections during the first two quarters of fiscal year 02 (October 2001 through March 2002). The grievant's work profile requires that 30 percent of his assigned inspections be completed by the end of the second quarter. It is undisputed that grievant failed to complete any inspections between October 1, 2001 and March 31, 2002. He contends that his sleep apnea problems during this period kept him from performing his job. However, during this entire period, grievant never advised his supervisor, human resources, or anyone else in a position of authority that he was unable to perform his job. He never submitted any medical documentation to human resources or sought any form of accommodation. Therefore, the agency has shown, by a preponderance of evidence that grievant failed to perform his assigned work. Grievant has not proven sufficiently mitigating circumstances to overcome his offense.

### Conclusion

The agency has met its burden of proof to demonstrate that the Group II Written Notice was warranted by grievant's offense. With regard to the Group III Written Notice, the agency did not prove the second-cited offense, and the fourth offense is a Group II offense. Nonetheless, the agency has proven two separate counts of falsifying state records – both of which are Group III offenses.

The grievant's primary defense is his sleep apnea condition. It is undisputed that grievant did have such a condition and that it has subsequently

---

<sup>28</sup> Exhibit 27. Grievant's leave registers for April, May and September 2001.

been corrected with surgery. However, grievant has not demonstrated that this condition had affected his work during 1999 and 2000, or that it so incapacitated him in 2001 that he was unable to perform his job. However, even if one were to conclude that grievant had some impairment from this condition, he failed to advise the agency or seek any accommodation from the agency. Moreover, such an impairment does not excuse the falsification of state records.

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on April 22, 2002 for failure to perform assigned work is hereby UPHELD.

The Group III Written Notice issued on July 1, 2002 for falsifying state records and failure to perform assigned work is hereby UPHELD.

The termination of grievant's employment on July 1, 2002 is hereby UPHELD.

### 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.<sup>29</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]

---

David J. Latham, Esq.  
Hearing Officer

---

<sup>29</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.