

Issue: Group II Written Notice with termination (unauthorized use of State property, leaving the worksite without permission, refusal to work mandatory overtime); Hearing Date: 02/13/03; Decision Issued: 02/18/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 5643



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5643

Hearing Date: February 13, 2002
Decision Issued: February 18, 2003

PROCEDURAL HISTORY

On October 16, 2002, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

Unauthorized use or misuse of State property (abandonment of State vehicle with keys, radio, and cellular phone left inside), leaving the worksite without permission, and refusing to work mandatory overtime – all during a Condition Orange Alert Status. Accumulation of the following “active” Written Notices. 2/21/01, Group II, Sexual Harassment, 3/20/01, Group I Inadequate or Unsatisfactory Job Performance; 5/15/01, Group II, with demotion, Failure to follow a supervisor’s instructions.

On November 12, 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 he requested a hearing. On January 23, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 13, 2003, a hearing was held at the Agency’s regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Traffic Control Supervisor
Bridge Tunnel Patrol Supervisor
Security Officer III

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal.

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 Virginia Department of Transportation employed Grievant as a Bridge Tunnel Patroller until October 16, 2002. On February 21, 2001, Grievant received a Group II Written Notice for failure to comply with the Agency’s Sexual Harassment Policy. He received a Group I Written Notice on March 20, 2001 for inadequate or unsatisfactory job performance. And he received a Group II Written Notice on May 15, 2001 for failure to follow supervisor’s instructions.¹

Grievant’s worksite had only one employee assigned to perform patrol duties. One of Grievant’s duties included operating a wrecker to move disabled vehicles blocking traffic. On September 17, 2002, Grievant’s shift was scheduled to end at 2 p.m. The person replacing Grievant was ill and could not work. Agency supervisors attempted to find a replacement, but were unable to do so. The Patrol Supervisor called Grievant and told Grievant to continue working until 6 p.m. Grievant hung up on the Patrol Supervisor. The Patrol Supervisor assumed the connection failed and instructed another employee to contact Grievant and have Grievant call the Patrol Supervisor. Grievant called the Patrol Supervisor a few minutes later. The Patrol Supervisor again

¹ Agency Exhibit 7.

instructed Grievant to remain at the worksite until 6 p.m. Grievant expressed a desire not to do so but did not indicate he would leave the worksite. Grievant did not say he intended to leave to care for a disabled child.

At approximately 4 p.m., an employee called Grievant by radio to notify him to respond to a disabled vehicle. Grievant did not respond. A supervisor made several other attempts to contact Grievant, but Grievant did not respond. Agency staff were concerned about whether Grievant was all right. The Patrol Supervisor went to Grievant's worksite and discovered that Grievant had abandoned the worksite. Grievant had placed his cell phone and hand-held radio inside the wrecker. The wrecker² was unlocked with the keys in the ignition. Employees had been instructed in July 2001 not to leave keys in vehicles.³ Grievant had signed out at 2:30 p.m. without telling anyone he was leaving and without waiting for his replacement.

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." DHRM § 1.60(V)(B).⁴ 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." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Leaving the work site during work hours without permission" is a Group II offense.⁵ "Failure to follow a supervisor's instructions" is also a Group II offense.⁶ Grievant was instructed by a supervisor to remain at his worksite until 6 p.m. He knew he was obligated to follow that instruction because it was the Agency's normal practice to require employees to extend their shifts for an additional four hours if an immediate replacement could not be found. Instead, Grievant left his worksite without permission and in direct disregard of his supervisor's instructions. Grievant abandoned a wrecker worth several thousand dollars along with a cell phone and radio. He left the Agency unable to quickly respond to emergencies at Grievant's worksite.

² The wrecker was purchased in 1995 at a cost of \$61,930. Agency Exhibit 5.

³ Agency Exhibit 6.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ DHRM § 1.60(V)(B)(2)(c).

⁶ DHRM § (V)(B)(2)(a).

Accumulation of a second active Group II Written Notice “normally should result in discharge.”⁷ In addition to the Group Written Notice giving rise to this grievance, Grievant has two active Group II Written Notices and one active Group I Written Notice. Based on the accumulation of disciplinary action, there exists a sufficient basis to uphold Grievant’s removal from employment.⁸

Grievant argues that he left the worksite in order to care for a disabled child. Grievant did not testify to this fact, but if the Hearing Officer assumes it to be true, Grievant’s behavior remains unexcused. Had Grievant notified Agency supervisors that he was leaving to care for a child, the supervisors could have taken action to relieve Grievant such as having a supervisor replace Grievant. Grievant simply left the worksite without any explanation or notice.

Grievant contends the Agency is discriminating against him based on his race and is retaliating against him for winning a prior⁹ grievance. No credible evidence was presented suggesting the Agency took any action against Grievant because of his race¹⁰ or because of his participation in a grievance.

Grievant seeks monetary damages. The Hearing Officer does not have the authority to award damages and there is no basis to conclude Grievant is entitled to any damages.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

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.

⁷ DHRM § 1.60(VII)(D)(2)(b).

⁸ Grievant submitted documents showing some of his coworkers had nominated him for an outstanding employee award. These documents are insufficient to support mitigation of the disciplinary action taken against Grievant.

⁹ See Grievant Exhibits D and E.

¹⁰ Grievant offered a document purporting to be a determination made by the U.S. Equal Employment Opportunity Commission concluding that the Commission had found evidence suggesting Grievant was demoted because of his race and retaliated against because of his race. The facts surrounding this document were not presented. It does not appear to relate to any actions by the Agency regarding this grievance. The Hearing Officer has no reason to believe the Determination is accurate.

Administrative Review – This decision is subject to four 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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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.

Carl Wilson Schmidt, Esq.
Hearing Officer