

Issue: Group II Written Notice (leaving worksite without permission); Hearing Date: 03/26/03; Decision Issued: 03/27/03; Agency: DMBE; AHO: David J. Latham, Esq.; Case No. 5667; **Judicial Review: Appealed to Richmond City Circuit Court on 04/15/03; Court ruling issued 05/15/03; Outcome: HO's decision found to be contradictory to law. HO's decision reversed; disciplinary action reinstated [CL CH03-652]**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5667

|                  |                |
|------------------|----------------|
| Hearing Date:    | March 26, 2003 |
| Decision Issued: | March 27, 2003 |

APPEARANCES

Grievant  
Director of Agency  
Attorney for Agency  
Student Advocate for Agency  
Four 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 timely filed a grievance from a Group II Written Notice for leaving the worksite during work hours without permission.<sup>1</sup> Following a denial of relief at the third resolution step, the agency head disqualified the grievance for a hearing.<sup>2</sup> The grievant then requested a qualification ruling from the Director of the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that the grievance is qualified for hearing because disciplinary actions automatically qualify for a hearing.<sup>3</sup>

The Virginia Department of Minority Business Enterprise (hereinafter referred to as agency) has employed the grievant for 19 years as a procurement advocate. Grievant's normal hours of work are from 8:00 a.m. to 5:00 p.m. Grievant has one other prior active disciplinary action – a Group I Written Notice issued for using annual leave without prior approval.<sup>4</sup> Grievant has not grieved the Group I Written Notice.

The Commonwealth's policy on annual leave provides, in pertinent part:

### **Leave must be approved**

An employee who wants to use his or her annual leave must receive approval for the desired time. The request for leave should be made as far in advance as possible.<sup>5</sup>

Grievant is aware of the above policy. She has also been instructed on previous occasions of the need to comply with this policy. A previous agency Director issued a directive to all employees stating, "Annual leave and sick leave must be pre-approved, except for emergencies. In the case of emergencies, you must notify your supervisor at the beginning of the work day."<sup>6</sup> A different previous agency Director counseled grievant in writing of the "need for you to keep me apprised when you are scheduled to be away from the office..."<sup>7</sup> The same Director counseled grievant again the following month after she had taken unapproved leave, stating, "As you have been instructed, annual leave must be approved prior to taking the time."<sup>8</sup> (Underscoring added)

---

<sup>1</sup> Exhibit 1. Written Notice, issued December 16, 2002.

<sup>2</sup> Exhibit 2. Grievance Form A, filed January 9, 2003.

<sup>3</sup> *Qualification Ruling of Director* No. 2003-027, February 21, 2003.

<sup>4</sup> Exhibit 13. Written Notice, issued December 16, 2002.

<sup>5</sup> Exhibit 3. Section II.B, Department of Human Resource Management (DHRM) Policy No. 4.10, *Annual Leave*, September 16, 1993.

<sup>6</sup> Exhibit 12. Memorandum to all employees from previous agency Director, June 10, 1994.

<sup>7</sup> Exhibit 5. Memorandum to grievant from previous agency Director, May 6, 1999. *See also* Exhibit 6. Memorandum to grievant from previous agency Director, May 10, 1999.

<sup>8</sup> Exhibit 7. Memorandum to grievant from previous agency Director, June 14, 1999.

On December 6, 2002, grievant called the Director's secretary and left a voice mail message stating that she would not be in to work that day. Grievant had neither requested nor obtained prior approval to use leave on that day from the Director. The Director determined that grievant's failure to request prior approval constituted an offense that required disciplinary action. He drafted a Group I Written Notice a few days later but did not issue it immediately. The Notice cited grievant for using annual leave without prior approval.

On December 12, 2002, grievant learned that one of the headlights on her car was burned out. During her lunch period, she went to a mechanic to have the headlight repaired. The mechanic did not have sufficient time to replace the light during grievant's brief lunch period, and grievant did not want to return late from her lunch period. The mechanic told her he could replace it if she returned after 4:00 p.m. that afternoon. Grievant returned to work and during the afternoon advised the Director's secretary that she would have to leave one hour early at 4:00 p.m. to get the headlight repaired.<sup>9</sup> She asked the secretary to relay this message to the Director and also asked if the Director was going to return to the office. The secretary told grievant that he was out but that he was expected to return to the office for a moment before going out of town to another meeting. She also asked grievant if she wanted the Director to call her when he returned to the office; grievant said she did not.

Grievant returned to the secretary a few minutes later to ask whether she should include the hour of leave on a previously prepared leave activity reporting form, or fill out a separate form. At 3:45 p.m., the Director returned to his office and was there for about three minutes before leaving the building. The secretary advised the Director that grievant wanted to leave at 4:00 p.m. The Director asked whether grievant had submitted a leave request form to which the secretary responded in the negative. After the Director had left the building, grievant gave her leave request form to the secretary and left at 4:00 p.m.

The Director subsequently prepared a Group II Written Notice citing the grievant for leaving the worksite during work hours without permission and failure to obtain approval for annual leave. The Director issued both the Group I and the Group II Written Notices to grievant during the same meeting on December 16, 2002.<sup>10</sup>

---

<sup>9</sup> Grievant avers that she spoke with the secretary shortly after 1:00 p.m.; the secretary maintains that grievant spoke with her about 3:30 p.m. However, the difference in time is not critical to the decision in this case.

<sup>10</sup> Issuance of a disciplinary action occurs on the date that the Written Notice is presented to the employee, not when the Notice is subsequently placed in the personnel file.

## 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. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.<sup>11</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 Human Resource Management (DHRM) 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. Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Leaving the work site during work hours without permission is an example of a Group II offense.<sup>12</sup>

---

<sup>11</sup> § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>12</sup> Exhibit 3. Section V.B.3, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

The agency has demonstrated by a preponderance of the evidence that on December 12, 2002, grievant left the work site during work hours without permission and failed to obtain prior approval to utilize annual leave to cover the period of her absence. Grievant does not dispute these facts. It is also undisputed that grievant was aware of both the Commonwealth's and agency's written policies requiring prior approval for leave, and that grievant had been counseled in writing about these policies.

However, there are circumstances in this case that require a rescission of the disciplinary action. The agency's written policy provides that annual leave does not require prior approval in the event of an emergency.<sup>13</sup> This portion of the policy does not define the word "emergency" or restrict it only to certain types of emergency. Webster's Ninth New Collegiate Dictionary defines emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Grievant felt that it was imperative that her headlight be repaired because she had to drive home and to an evening class during hours of darkness.<sup>14</sup> Driving without both headlights is a violation of the law.<sup>15</sup> Driving without proper illumination is also an obvious safety hazard. Grievant felt that this situation was of sufficient importance to fit within the general definition of an emergency because it required immediate action.

Grievant made a good faith effort to address the headlight problem during her lunch period but, through no fault of her own, was not able to effect repairs at that time. She then attempted to notify the Director but he was unavailable. Apparently the Director had not delegated authority to anyone else to approve leave during his absence. Grievant notified the Director's secretary but she had no authority to approve leave. Grievant explained the reason she had to leave one hour early and requested that the secretary advise the Director. Although the Director returned to the office, he was there for only three minutes and grievant did not know that he had returned.<sup>16</sup> Under the circumstances, grievant could not have done much else.

Although this hearing did not adjudicate the December 6<sup>th</sup> offense, it appears, based on the available evidence, that the Group I Written Notice was warranted. The agency has a legitimate interest in requiring its employees to comply with all state and agency policies. Since the grievant had previously been counseled in writing, issuance of a Group I Written Notice was an appropriate disciplinary action.

---

<sup>13</sup> Exhibit 12. Memorandum to all employees from former Director, June 10, 1994.

<sup>14</sup> Sunset occurred at 4:52 p.m. on December 12, 2002.

<sup>15</sup> Code of Virginia § 46.2-1030 requires all vehicles to be operated with lighted headlights from sunset to sunrise.

<sup>16</sup> If the Director had been absent for the entire afternoon, there would have been no opportunity for grievant to request permission for leave. It would appear patently unfair to prevent an employee from using accrued leave under the circumstances present herein merely because the only person authorized to approve a leave request is absent.

Accordingly, it is concluded that the December 12, 2002 incident did not constitute an offense warranting discipline under the Standards of Conduct because grievant made a bona fide attempt to obtain permission for leave, and because she faced a circumstance that can reasonably be interpreted as an emergency.

### DECISION

The disciplinary action of the agency is reversed.

The Group II Written Notice issued on December 16, 2002 for leaving the worksite without permission is hereby RESCINDED.

### 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.<sup>17</sup> 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>18</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>17</sup> An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>18</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.