Issue: Group III Written Notice with termination (absence in excess of 3 days without proper notification to supervisor, and failure to notify supervisor of charges filed by minor); Hearing Date: 03/01/04; Decision Issued: 03/12/04; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 551

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 551

Hearing Date: March 1, 2004
Decision Issued: March 12, 2004

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Assistant Attorney General for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the 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 for an absence from work in excess of three days without proper authorization or contact with a supervisor, and for failure to promptly notify his supervisor of charges filed against him by a minor female.[1] The Written Notice did not include as a reason for dismissal the allegations made by the minor female, or the court admissions of misconduct by grievant. As part of the disciplinary action, the grievant was removed from employment effective September 3, 2003. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Virginia Department of Social Services (Hereinafter referred to as "agency") has employed the grievant as a child support enforcement specialist for seven years. His work did not involve direct contact with children.

In early November 2002, grievant had an encounter with a 13-year-old female at his residence during which they drank alcohol and smoked marijuana provided by grievant. The following morning grievant discovered that his car was missing. He called police to report the vehicle as stolen and learned that the female had taken his car and been involved in a collision. Subsequently, the female told police that grievant had taken indecent liberties with her. Grievant was arrested on November 16, 2002 and then released. On November 18, 2002, grievant advised his supervisor that his car had been stolen and wrecked. On the advice of his attorney, grievant did not tell his supervisor of the indecent liberties charge because they were only allegations, not convictions. In mid-December 2002, a juvenile court proceeding was conducted but no charges were placed against grievant at that time. During December 2002 and early January 2003, grievant's attorney discussed the possibility of a plea bargain with the commonwealth's attorney. By mid-January 2003, grievant became dissatisfied with his attorney and retained a different attorney (his current attorney). On February 5, 2003, a grand jury indicted grievant on two counts of taking indecent liberties with a minor; grievant was arraigned on March 11, 2003.[3] He was also subsequently charged with two counts of aggravated sexual battery.

On March 27, 2003, during his lunch hour, grievant went to the police station to obtain a police report regarding the November 2002 collision his vehicle had been involved in. While at the police station, police recognized his name as having an outstanding capias warrant. Grievant was arrested and incarcerated until April 3, 2003. After his arrest on March 27, 2003, grievant attempted to call his supervisor from jail. Jail inmates are allowed to make only collect telephone calls. The agency's telephone system has a blocking

[1] Exhibit 3. Written Notice, issued September 3, 2003.
[2] Exhibit 4. Grievance Form A, filed September 9, 2003.
[3] Exhibit 8. Virginia Courts Case Information, Circuit Court - Criminal Division

mechanism that notifies callers that the agency does not accept collect calls.[4] Grievant then called his sister and asked her to notify his office that he could not come to work. Grievant's sister called his office and initially reported that grievant was ill and could not report to work. On March 28, 2003, grievant's sister again called his office and acknowledged to his supervisor that grievant had been incarcerated.[5] Grievant did not call his supervisor at home because he did not know the telephone number and did not have access to a telephone directory in jail.

Grievant expected, and told his sister each day, that he believed he would be released from jail the next day. However, grievant's attorney was out of town for several days and therefore grievant was incarcerated until April 3, 2003, when he was released on his own recognizance under a signature bond. On the following day, grievant returned to work and disclosed to his supervisor everything that had occurred (including the indecent liberties charges). Both grievant and his supervisor then met with the district supervisor and discussed the matter. Grievant asserted that he expected to be exonerated of the charges against him because the female had fabricated her story. On the advice of the Human Resources division, grievant was suspended from work effective April 4, 2003.

On April 23, 2003, a local television station broadcast a story naming grievant and inferring that the agency had been dilatory by failing to suspend him until five months after the accusations were made. As a result, agency management had to deal with multiple telephone calls from local news media. Grievant was tried on June 9, 2003 and found not guilty on three charges (the fourth charge was not prosecuted); the agency learned of the disposition of the charges on the same day. The grievant thereafter remained suspended from work. The district manager advised grievant on August 6, 2003 that the agency intended to remove him from employment on August 15, 2003.[6] Grievant was disciplined and removed from employment on September 3, 2003.[7] The five-month delay in administering discipline resulted from a decision to await the outcome of the criminal trial and, from management's conclusion that there was "no feeling of immediacy" in grievant's case because he was suspended from work.[8]

APPLICABLE LAW AND OPINION

[4] The hearing officer verified the collect call blocking mechanism during the hearing by attempting to place a collect call to the agency. When the agency's telephone number is dialed, a recording advises the caller that "This number does not allow collect calls."

[5] Before the sister's second telephone call, the supervisor had learned from another supervisor that grievant was incarcerated and when he confronted the sister with this knowledge, she acknowledged that grievant was in jail.

[6] Exhibit 2. Memorandum from district manager to grievant, August 6, 2003.

[7] Exhibit 3. Written Notice, issued September 3, 2003.

[8] Testimony of the district manager.

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.[9]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management 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 occurrence normally should warrant removal from employment. One example of a Group III offense is an absence in excess of three days without proper authorization or a satisfactory reason.[10] The policy also provides that the

[9] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

[10] Exhibit 5. Section V.B.3.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

offenses listed in the Standards of Conduct are only *examples* of unacceptable behavior; the list is not all-inclusive.[11]

A hearing officer, like any tribunal, has the authority to adjudicate only those charges actually brought before him.[12] "The *Grievance Procedure Manual* lists the specific issues that qualify for hearing. Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[13] In a hearing involving the grievance of a disciplinary action, only the misconduct cited on the Written Notice and attachments are subject to adjudication. The *Standards of Conduct* includes a due process requirement in its disciplinary procedure. That requirement provides that employees facing removal from employment must be given notification of the offense, an explanation of supporting evidence, and a reasonable opportunity to respond.[14] As the agency has cited two specific offenses in the Written Notice, the hearing officer's decision is likewise limited solely to the grounds invoked by the agency.[15] Accordingly, the hearing officer will first address the two charges made by the agency.

Absence in excess of three days without proper authorization or contact with a supervisor

The Written Notice cites only March 27, 2003 (the date of grievant's arrest) as the date of offense. However, the offense description expands the date of offense to include March 27 through April 3, 2003 – the dates of his incarceration and absence from work. The language of the example offense in the *Standards of Conduct* makes clear that agencies expect employees to arrange for absences in advance (by requesting leave) or to have a satisfactory reason for absences that have not been arranged in advance. If, for example, an employee is seriously injured, hospitalized, and unable to communicate for

[11] Exhibit 5. Section V.A., *Ibid*. states: "The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section." *See also* Exhibit 6. Section IV.A. Virginia Department of Social Services, *Standards of Conduct*, October 1, 2000 for similar language.

[12] Va. Code § 2.2-3005.C.6 provides, "Hearing officers shall have the following powers and duties: *For those issues qualified for a hearing*, order appropriate remedies." (Italics added)

[13] Section I, EDR *Rules for Conducting Grievance Hearings*, effective July 1, 2001.

[14] Exhibit 6. Section V.F.2. Virginia Department of Social Services *Standards of Conduct*, October 1, 2000, provides that: "Prior to any disciplinary suspension, demotion (role change), and/or transfer and prior to a disciplinary removal action, the employee must be given oral or written notification of the offense, an explanation of the evidence in support of the charge, and a reasonable opportunity to respond (usually five work days)."

[15] While the Commonwealth's grievance procedure is not subject to appeal in the federal courts (absent a constitutional issue), the case of *O'Keefe v. United States Postal Service*, 318 F.3d 1310, (U.S. Ct. App.)(2002) contains useful guidance regarding the issue of due process in an administrative law proceeding. *O'Keefe* cites *McIntire v. Fed. Emergency Mgmt. Agency* 55 M.S.P.R 683, 688 (1992) for the principle that an adjudicator may not consider allegations of misconduct related to the charges "because they were not specified in the agency's proposal notice."

several days, the hearing officer would interpret that to constitute a satisfactory reason for an unplanned absence. In this case, grievant was unexpectedly incarcerated and unable to directly contact his supervisor for the reasons stated in the Findings of Fact.

It is important to note that the agency did not use the language of the *Standards of Conduct* (SOC) in charging grievant with this offense.[16] Instead, the agency stated, "…without proper authorization or *contact with a supervisor*." An agency is not required to use the language of the SOC examples. In fact, there are times when the example language should not be used because the offense that occurred is not among the examples. However, in writing the offense to exclude the "satisfactory reason" language, the agency apparently did not conclude that grievant's reason was unsatisfactory. As the agency elected to focus instead on grievant's alleged failure to contact his supervisor during an absence in excess of three days, the hearing officer is likewise obligated to address only this allegation.

The undisputed evidence established that on the first day of his incarceration, grievant asked his sister to contact his supervisor that day, and she did so. His sister spoke with the supervisor every work day of his absence and thereby made a reasonable effort to keep his employer advised of his absence so that the supervisor could make alternative arrangements to handle the most pressing aspects of grievant's work. Thus, although grievant did not have advance authorization for his absence, he did make contact with his supervisor (albeit indirectly) on each day of his absence. His surrogate acknowledged to the supervisor on the second day of absence that grievant was in jail, although the supervisor had already independently verified grievant's incarceration. Given these circumstances, it cannot be concluded that grievant was absent in excess of three days without contact with his supervisor as charged in the Written Notice.

Failure to report the events resulting in grievant's incarceration and court action

The agency suggests that grievant should have reported the female's allegations against him as soon as he was arrested on November 16, 2002. This argument is not persuasive for three reasons. First, grievant was not charged with any specific offenses at the time of his initial arrest. The agency's evidence reflects that the matter was not brought before a grand jury until February 5, 2003. Grievant's undisputed testimony established that between November 2002 and February 2003, his attorney and the Commonwealth's attorney were negotiating the possibility of a plea bargain arrangement. During this time, grievant's attorney instructed him not to discuss the case with anyone. For these reasons, grievant did not advise the agency of the female's allegations until he learned that formal charges had been filed. There is no evidence to show that grievant became aware of the charges until he was arrested on March 27, 2003.

[16] Exhibit 6. Section IV.B.3.a *Ibid*. "Absence in excess of three days without proper authorization or a satisfactory reason."

Second, the agency has not provided evidence of any policy that requires an employee to report a mere allegation made against them by another person. The agency cites language in the *Standards of Conduct* that requires reporting conditions that adversely affect an employee's ability to perform work satisfactorily.[17] An allegation of wrongdoing may or may not affect an employee's ability to work satisfactorily. In this case, grievant avers that prior to the afternoon of March 27, 2003 the allegation did not affect his work. The agency's district manager corroborated grievant's assertion when she testified that grievant performed satisfactorily between November 2002 and March 27, 2003 and that there was no discernible adverse affect on his performance.

Third, grievant's ability to perform his work was affected beginning on March 27, 2003 when he was arrested and jailed. On the first day after release from jail, grievant reported to his supervisor and district manager, and advised them of his arrest and the specific charges against him. Of course, the agency was already on notice of this information because on March 28, 2003, it accessed Virginia Court Case Information via the Internet. Thus, as of this date, the agency knew that grievant had been arrested and knew the nature of the charges against him. Therefore, it is concluded that grievant reported as promptly as possible the events that resulted in his March 27- April 3, 2003 incarceration and eventual court action in June 2003.

The Written Notice asserts that grievant's failure to report earlier than April 4, 2003 the events resulting in his incarceration and court action undermined departmental effectiveness, created turmoil among staff, and resulted in the loss of productivity over a period of days. The agency has not borne the burden of proof to show that departmental effectiveness was undermined in any way prior to March 27, 2003. In fact, the district manager's testimony was that there was no effect on grievant's performance prior to that date. The agency alleged turmoil among staff but did not have any staff testify other than the supervisor and district manager. Their testimony indicated that there was the usual amount of gossip and talk among staff that one would anticipate in a case like this. In fact, the district manager testified that no one was unable to complete their work assignments, resigned their employment, or complained that they were unable to work with grievant. The agency has not shown that grievant's five-and-a-half-day incarceration affected productivity any more than if he had been out ill for five and a half days.

The agency also asserts that if grievant had reported the allegations earlier, it would have been able to take expeditious and appropriate action. Presumably, the agency means that it could have suspended grievant in November 2002 if he had reported the allegation at that time. However, the

[17] Exhibit 6. Section II.D. Virginia Department of Social Services, *Standards of Conduct*, October 1, 2000, states: "If a condition exists which is adversely affecting an employee's ability to perform work satisfactorily, the employee shall report it promptly to their supervisor. This shall include personal or work-related circumstances."

agency has not demonstrated that there is any policy or requirement that an employee report what was merely an allegation. Because the news media portrayed the agency in an unfavorable light, the agency undoubtedly would have preferred that grievant report the allegation earlier. However, the agency has not shown that grievant was under an affirmative duty to report sooner than he did. The agency further asserts that it might have been more prepared to respond to negative media attention if grievant had reported the allegation earlier. This argument is not persuasive. The agency knew about the allegations on March 28, 2003 but the news media did not report the incident until April 23, 2004. Accordingly, the agency had ample time to prepare a response to media questions.

Aggravating or mitigating circumstances

The agency did not list any aggravating or mitigating circumstances on the Written Notice. It also did not put grievant on notice in the August 6th due process letter that there were any other factors considered in its decision to remove him from employment. However, at the hearing, the district manager stated that the agency had considered the fact that grievant admitted in court that he had provided marijuana and alcohol to the underage female. The agency's position was that grievant's admission of these actions was so incompatible with his role as a Child Support Enforcement Specialist, that grievant should no longer be employed with the agency. While the hearing officer does not disagree with the agency's position, the fact remains that this was not the basis for dismissal stated on the Written Notice. As a matter of jurisdiction, the hearing officer may adjudicate only those bases for dismissal that are listed on the Written Notice.

As noted in the *O'Keefe* case supra, only charges fairly set out in the Written Notice may be used to justify punishment because due process requires that a grievant have an opportunity to make an informed response to the charges. A hearing officer may not substitute what he considers to be a better basis for removal than what was identified by the agency on the Written Notice.[18]

Summary

The agency did not advise grievant, in either the due process letter or the Written Notice, that he was being removed for reasons of incompatibility between his role and the actions he admitted to in court. Agencies must comply with the due process requirements of the *Standards of Conduct* in fact, as well as in form.[19] In this case, grievant was never told that the reason for discipline was his

[18] *O'Keefe* citing *Shaw v. Dep't of the Air Force*, 80 M.S.P.R 98, 106-07 (1998) ("The Board cannot adjudicate an adverse action on the basis of a charge that could have been brought but was not. Rather the Board is required to adjudicate an appeal solely on the grounds invoked by the agency, and it may not substitute what it considers to be a more appropriate charge.")

[19] In some cases, agencies correctly reference a grievant's actions in the Written Notice but may mischaracterize the nature of the offense. For example, where an employee loudly slammed a door, he was cited on the Written Notice for destruction of property by loudly slamming the door. Although no destruction of property was shown at the hearing, there was sufficient evidence to

conduct with the minor female. For the reasons previously discussed, the offenses cited on the Written Notice do not warrant removal from employment.

Prompt Issuance of Disciplinary Action

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[20] Management should issue a written notice as soon as possible after an employee's commission of an offense.[21] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

In the instant case, it is understandable that an agency would delay imposition of discipline unt

Grievant is reinstated to his position, or if filled, to an objectively similar position. Grievant is entitled to the restoration of full benefits and seniority and full back pay, from which interim earnings must be deducted.

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. Address your request to:

> Director
> Department of Human Resource Management
> 101 N 14th St, 12th floor
> Richmond, VA 23219

3. If you believe 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. Address your request to:

> Director
> Department of Employment Dispute Resolution
> 830 E Main St, Suite 400
> Richmond, VA 23219

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.[22] You must file a notice of appeal with the clerk of the circuit court in the

[22] 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

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]

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David J. Latham, Esq.
Hearing Officer

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that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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