

Issue: Group II Written Notice (leaving the workplace without permission);
Hearing Date: 12/06/04; Decision Issued: 12/07/04; Agency: DOC; AHO:
David J. Latham, Esq.; Case No. 7911; **Administrative Review: Hearing
Officer Reconsideration Request received 12/27/04; Reconsideration
Decision issued: 01/06/05; Outcome: No newly discovered evidence or
incorrect legal conclusion. No basis to change original decision;
Addendum Decision to address attorney's fees issued 12/22/04**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7911

Hearing Date: December 6, 2004
Decision Issued: December 7, 2004

PROCEDURAL ISSUES

Grievant filed two grievances – case 7911 and case 7912 – each of which involved a separate disciplinary action for a different offense. Neither party requested consolidation of the grievances. The hearing office elected to hear both cases concurrently in the same hearing. However, because there was no consolidation of the grievances, a separate decision must be issued for each grievance.

After presentation of the agency's case, the hearing officer met *in camera* with the agency's representative and grievant's attorney to suggest that a settlement of the two cases might be more beneficial to both parties. The parties negotiated for over two hours, with some assistance from the hearing officer. Despite efforts by both sides to resolve the grievances, a settlement could not be achieved. The hearing was then resumed and completed.

APPEARANCES

Grievant
Attorney for Grievant

Warden Senior
Five witnesses for Agency

ISSUES

Did grievant's conduct 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 grievance from a Group II Written Notice for leaving the workplace during working hours without permission.¹ 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 Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for three years as a Corrections Officer.

For several weeks during the spring of 2004, the agency had been investigating a case of possible fraternization between a female officer and an inmate. The investigators received information suggesting that grievant might have knowledge of the alleged fraternization. Just before his shift was scheduled to start on the evening of May 28, 2004, two investigators called grievant in for an interview. Grievant denied any knowledge of inappropriate behavior by the two subjects of the investigation. As grievant was about to sign a statement to that effect,³ one investigator told him that he had additional information not discussed during the interview. He cautioned grievant that once he signed the statement, there would be no room for negotiation. Grievant refused to sign the statement, stood up, said "I quit," and walked out toward the exit and parking lot.

One interviewer followed grievant out of the room and asked him if he was resigning and if so, grievant would have to turn in his identification card (ID) and chits.⁴ The facility's Chief of Security and a Captain were standing together behind the counter near the exit. The Chief called grievant over to the counter and asked grievant if he was resigning and grievant responded affirmatively. The Chief then told grievant that he would have to turn in his ID card and chits; grievant surrendered the items to the Chief.⁵ The Chief told grievant that he should confirm his resignation in writing and grievant agreed to return to the

¹ Exhibit 10. Group II Written Notice, July 1, 2004.

² Exhibit 11. Grievance Form A, filed July 26, 2004.

³ Exhibit 1. Investigative Interview, May 28, 2004.

⁴ Exhibit 2. Email from investigator to Chief of Security, June 2, 2004. A chit is a round brass tag used to check out weapons or keys.

⁵ Exhibit 3. Memorandum from Chief of Security to Senior Warden, June 2, 2004.

personnel office on the next scheduled office workday (June 1, 2004).⁶ Grievant did not work again after leaving the facility on May 28, 2004.⁷

On June 4, 2004, grievant met with a senior warden who told him that grievant could be disciplined and possibly discharged, or he could submit a written resignation. Grievant submitted a written resignation on June 7, 2004.⁸ By June 14, 2004, grievant had second thoughts about his decision to resign and requested to meet with the Chief Warden. The Chief Warden told him that the senior warden had misinformed grievant and that grievant should return on June 21, 2004. On June 21, 2004, the Chief Warden told grievant that he would permit grievant to retract his resignation and that a disciplinary meeting would be held on July 1, 2004. Grievant was not informed what the disciplinary meeting would be about.⁹ Grievant believed that the purpose of the disciplinary meeting would be to allow him to clear his name with regard to the allegation that he had knowledge of fraternization. On July 1, 2004, the Chief Warden advised human resources that he would allow grievant to retract his resignation.¹⁰

On July 1, 2004, grievant met with a different senior warden who conducted a disciplinary meeting with grievant and discussed what had occurred on the evening of May 28, 2004. He then issued to grievant two written notices that had been prepared beforehand – a Group II Notice for leaving the worksite during working hours without permission, and a Group III Notice for absence in excess of three days without proper authorization or satisfactory reason from May 29 through June 3, 2004.

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

⁶ May 28, 2004 was a Friday evening; because of the Memorial Day holiday, the next scheduled workday for employees in the Human Resources office was Tuesday, June 1, 2004.

⁷ Exhibit 6. 28-day cycle sheet.

⁸ Exhibit 8. Grievant's written resignation, June 7, 2004.

⁹ The agency asserted that grievant had been given a written predisciplinary notice but grievant denied receiving notice of the charges against him; the agency did not proffer a copy of the predisciplinary notice.

¹⁰ Exhibit 9. Note written by Human Resource Manager, July 1, 2004 at bottom of grievant's written explanation (submitted on June 14, 2004) of why he had submitted a written resignation one week earlier.

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 his evidence first and must prove his claim by a preponderance of the evidence.¹¹

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 (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹² The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.¹³ Leaving the work site during working hours without permission is one example of a Group II offense.

The undisputed evidence demonstrates that grievant resigned from employment on the evening of May 28, 2004. In fact, the agency presented four

¹¹ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹² DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Exhibit 13. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

witnesses (both investigators, the Chief of Security, and a Captain) who testified credibly, directly, and adamantly that grievant said he quit. Moreover, in the presence of one investigator and the Captain, the Chief of Security attempted to confirm grievant's intention by asking him if he was resigning; grievant responded affirmatively. All four witnesses are positive that grievant intended to resign and did resign his position at that time. When asked, grievant voluntarily surrendered his ID card and chits to the Chief.

The employment relationship between any employer and its employee may be terminated by either party. The employer may discharge an employee at any time it chooses.¹⁴ At the instant that the employer communicates to an employee that he is discharged, the employee becomes an ex-employee and is no longer subject to the employer's control, regulations, rules or policies. Similarly, an employee may terminate the employment relationship at any time by communicating to the employer that he no longer wants to work. The employee may use any language that is understood by both employee and employer to signal an end to the employment relationship. An employee may submit a resignation either verbally or in writing. While most employers prefer to have written resignations, the lack of a written resignation does not void an otherwise clear and unambiguous verbal resignation. In this case, the agency's own evidence established by a substantial preponderance that grievant verbally resigned by both his words and his actions. Thus, grievant's resignation became effective at about 6:05 p.m. on the evening of May 28, 2004.

Once grievant had notified the employer that he was quitting or resigning, the employment relationship ended. When the employment relationship ended, grievant was no longer subject to the employer's control, regulations, rules, or policies. More specifically, grievant was no longer subject to the Standards of Conduct policy because he had ended the employment relationship. It follows, therefore, that after grievant had resigned by saying, "I quit," he no longer required the employer's permission to leave the facility. At that point in time, he had become an ex-employee and was free to leave without permission. Moreover, the employer had required grievant to surrender his ID card and chits, effectively prohibiting him from entering the facility.

The agency agreed to allow grievant to retract his resignation on June 21, 2004 (although there was no documentation of this until July 1, 2004). Between May 28 and June 21, 2004, grievant was not employed because he had resigned on May 28, 2004 and was not permitted to retract his resignation until June 21, 2004. Since the agency had no jurisdiction over grievant during the 24 days during which his resignation remained effective, the agency cannot discipline grievant for an alleged offense that occurred during that period of time. Of course, as stated above, grievant did not commit an offense because he did not require anyone's permission to leave after he resigned.

¹⁴ Even employees of the Commonwealth may be discharged at any time without notice if an offense is sufficiently egregious.

When, on June 21, 2004, the agency agreed to allow grievant to retract his resignation, he became reemployed and again became subject to the agency's control, regulations, rules, and policies. However, the agency may not apply its policies retroactively to the period of unemployment. The agency argues that grievant was not "taken off the books" during the 24-day period of unemployment. Taking an employee "off the books" is a paperwork decision that is totally within the agency's control. The agency's decision, for whatever reason, to not remove grievant from its books has no effect on grievant's decision to end the employment relationship by resigning from his position.

Accordingly, it is concluded that the agency disciplined grievant for an offense that did not occur because grievant did not require permission to leave after he resigned. Moreover, grievant was not employed at the time the alleged offense occurred and, therefore, the agency had no jurisdiction over his actions during that time.

DECISION

The decision of the agency is reversed.

The Group II Written Notice issued on July 1, 2004 for leaving the worksite during working hours without permission is hereby RESCINDED.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.¹⁵ 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.¹⁶

[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

¹⁵ 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).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7911

Hearing Date:	December 6, 2004
Decision Issued:	December 7, 2004
Reconsideration Request Received:	December 27, 2004
Response to Reconsideration:	January 6, 2005

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.¹⁷

OPINION

The agency's request for reconsideration was received 20 calendar days after the date of the original hearing decision. In order to be timely filed, the request should have been received by the hearing officer not later than December 22, 2004. While the request is dated December 21, 2004, it was not received until December 27, 2004. It is presumed that the Christmas holiday burden on the U.S. Postal Service may have been partially responsible for the delayed delivery. However, even if the increase in holiday mail had not been a factor, it is unlikely that the agency's request would not have been received by the deadline of December 22, 2004. Normally, the agency's request would

¹⁷ § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

be denied as untimely. However, given the unique circumstances herein, and because the request can be addressed briefly, the hearing officer will respond to the agency's request.¹⁸

The agency argues that grievant's discipline should be upheld because "he resigned (without proper notice) during a shift that he was expected to work." The agency further argues that grievant failed to be at work when scheduled to work.

The hearing officer found as fact (based primarily on the testimony of the agency's own witnesses) that grievant resigned his employment and then subsequently left the facility. The agency has not shown that employees are required to resign in any particular manner or at any particular time. Therefore, the agency's assertion that grievant "resigned without proper notice" is without foundation. There is no specified "proper notice" for a resignation – it may be written or oral, lengthy or short. Whatever words are used, the only requirement is that the words clearly communicate the employee's intent to resign. Without any doubt, the words "I quit" are sufficient to communicate a resignation.

The employment relationship between employer and employee is mutually dependent. Either party may end the employment relationship at any time. Just as an employer may discharge an employee at any time, the employee may resign at a time of his choosing. In this case, grievant declared, "I quit" during the interview. As soon as grievant made this declaration, the employment relationship was severed. As of this instant, the employer no longer had jurisdiction over grievant's subsequent actions. Therefore, the agency cannot retroactively discipline grievant because he left the facility *after* he resigned.¹⁹

If grievant had not asked to rescind his resignation, the agency would be unable to discipline him. The agency cannot use its decision to permit rescission of the resignation as a method to retroactively punish grievant for something that it could not have punished him for had he not returned to work. When an agency voluntarily allows an employee to rescind a resignation, it takes the employee as he is on the date of return to work. Whatever occurred between the resignation and the return to work is irrelevant. Allowing a rescission of resignation is no different, in essence, from hiring a new employee – you take the employee as you find him on the date of hire (or rescission), warts and all.

The agency was not obligated to permit grievant to rescind his resignation. If the agency felt that grievant was an unsatisfactory employee, it could have simply denied his request to rescind and grievant would have remained an ex-employee. By allowing grievant to rescind his resignation, the agency effectively allowed the situation to return to the status quo at the instant just *before* grievant quit. At that point grievant had not committed the alleged offense for which the agency now seeks to discipline him.

¹⁸ NOTE: The decision to respond to the agency's untimely request applies only to this one case and has no precedential value in any other case.

¹⁹ Similarly, the agency may not discipline an employee for failing to report for work when the employee resigns five minutes before his scheduled reporting time.

DECISION

The agency has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered the agency's argument and concludes that there is no basis to change the Decision issued on December 7, 2004.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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.²⁰

David J. Latham, Esq.
Hearing Officer

²⁰ 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).

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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISIONS OF HEARING OFFICER

In re:

Case Nos: 7911 & 7912

Hearing Date:	December 6, 2004
Decision Issued:	December 7, 2004
Addendum Issued:	December 22, 2004

APPLICABLE LAW AND PROCEDURE

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.²¹ For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.²²

DISCUSSION

Following issuance of the hearing officer's decisions ordering reinstatement of the grievant, grievant submitted a petition for attorney's fees and costs. Grievant's petition includes attorneys' fees for services rendered by his attorney prior to the

²¹ Va. Code § 2.2-3005.1.A.

²² §7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. See also §VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

October 21, 2004 qualification of his grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.²³ The hearing officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the hearing officer and other associated *hearing* expenses including grievant's attorneys' fees.²⁴ Attorney's fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorneys' fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process. Therefore, grievant's attorney fees for services performed prior to October 21 are not included in the award.

The petition also requests attorney fees for attorney travel time. Time spent traveling to and from a hearing does not involve legal work, counsel or attorney work product and is, therefore, not compensable. Accordingly, the time billed as travel is not included in the award.

AWARD

For the two grievances, conducted as one hearing, the grievant is awarded attorneys' fees incurred from November 2, 2004 through December 6, 2004 as listed on the attorney's invoice submitted with the petition, minus the amount billed for travel time. To wit, the award is 19.4 hours at the hourly rate charged by the attorney.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.²⁵

David J. Latham, Esq.
Hearing Officer

²³ Va. Code § 2.2-3004.A. See also §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

²⁴ Va. Code § 2.2-3005.1.B.

²⁵ §7.3(c) EDR *Grievance Procedure Manual*, effective August 30, 2004 provides that either party may petition the circuit court for an order requiring implementation of the final decision (including the attorney fees addendum).