

Issue: Group II Written Notice with termination (due to accumulation) (refusal to work); Hearing Date: 08/13/04; Decision Issued: 08/18/04; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 802



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 802

Hearing Date: August 13 & 17, 2004
Decision Issued: August 18, 2004

PROCEDURAL ISSUES

This hearing was conducted on August 13, 2004. After the testimony of all available witnesses, the hearing officer determined that the testimony of a missing witness was relevant and material to the case. The hearing was continued to August 17, 2004, at which time the witness's testimony was taken by telephone conference call among the parties, the hearing officer, and the witness. Following the brief testimony, the parties presented closing statements and the hearing was closed.

Grievant requested as part of his relief that three supervisory/management personnel be removed. A hearing officer does not have authority to transfer, assign, or remove any employee, or to take adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance).¹ Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

¹ § 5.9(b)2 & 5. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

APPEARANCES

Grievant
Assistant for Grievant
Three witnesses for Grievant
Director – Environment of Care
Advocate for Agency
Three witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 refusal to work.² Due to an accumulation of prior active disciplinary actions, grievant was removed from state employment effective June 7, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.³

The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a utility plant specialist II (boiler operator) for 21 years.⁴ Grievant has four prior active disciplinary actions; all four are Group I Written Notices for unsatisfactory tardiness and/or attendance.⁵

Grievant worked in the power plant which produces steam to service several buildings on a large state campus. The Power Plant Director has 14 employees divided into five teams.⁶ One of the teams, which includes the utility plant manager, works day shift on a permanent basis. The other four teams work

² Exhibit 1. Written Notice, issued June 7, 2004.

³ Exhibit 1. *Grievance Form A*, filed June 18, 2004.

⁴ Exhibit 4. Grievant's Employee Work Profile, October 7, 2002.

⁵ Exhibit 5. Group I Written Notices, issued: July 1, 2003, February 20, 2004, April 6, 2004 and, April 16, 2004.

⁶ The normal complement of employees is 15 – three per team. However, one employee had recently left employment and management was seeking to hire a replacement.

a rotating shift according to a schedule prepared at least one month in advance.⁷ In September 2003, employees expressed a desire to have a longer weekend. Following a discussion and vote among the employees, it was agreed that whichever team was scheduled to work from 3:00 p.m. to 11:00 p.m. on Friday would work a double shift that day. In other words, although the printed schedule reflected a 3:00 p.m. report to work time, that team would actually report to work at 7:00 a.m. and work through to 11:00 p.m. This meant that each team would have to work a double shift every fourth Friday. The new procedure was outlined in a memorandum from the utility plant manager and distributed to all employees through their individual mailboxes.⁸ The procedure has worked effectively after everyone adjusted to it during October and November.

When this procedure was implemented in September 2003, it was agreed that the team leader and only one of the two other team members had to work the double shift. Typically, the two remaining team members alternated so that they had to work the double shift only every other month. Grievant had to work the double shift in October, November and December because his team was short one person. A third team member was hired as a wage employee in late December 2003. Beginning in January, the newly hired team member expressed an interest in earning extra money by working the double shift in grievant's place. When team members want to switch places, the procedure requires that they notify the team leader or the plant director so that the schedule can be amended accordingly. Grievant and his coworker did that during the months of January through March 2004.

Grievant was suspended from work from April 9-15, 2004 due to his third Group I Written Notice, and from April 17-May 27, 2004 due to his fourth Group I Written Notice. He returned to work on May 28 and worked four days through May 31, 2004. His team was scheduled off work from June 1-3, 2004. On the evening of May 31st, grievant's team member reminded him that grievant was scheduled to work a double shift on Friday, June 4, 2004. He suggested grievant check the schedule and then let the team member know whether grievant wanted to him to work the double shift. Grievant was offended that a wage employee was reminding him to work and said, "It's not your place to tell me what to do; that's the supervisor's job." Grievant added that he was not going to work anymore overtime for anyone. Grievant did not check the work schedule. He did not tell any supervisor that he wanted to switch with the other team member, and did not tell the other team member that he wanted to make a switch.

Because the matter was not resolved, the other team member assumed grievant planned to work the double shift. He reported his conversation with grievant to the utility plant manager. On June 4, 2004, grievant did not report for work at 7:00 a.m. Accordingly, in view of what the other team member had reported about grievant refusing to work anymore overtime for anyone, the utility

⁷ Exhibit 3. Work schedule, November 2003 – June 2004.

⁸ Exhibit 1. Memorandum from utility plant manager to all shift personnel, September 11, 2003.

plant manager called in the other team member to work the double shift that day. Grievant was given the disciplinary action on June 7, 2004 and removed from employment the same day.

Others have been disciplined when they failed to report as scheduled.

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, such as claims of retaliation, the grievant must present her evidence first and prove her claim by a preponderance of the evidence.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

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

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 *Standards of Conduct* Policy 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.¹⁰ Refusal to work overtime hours as required is one example of a Group II offense.

The agency has borne the burden of proof to demonstrate that grievant was aware of the policy requiring that his team work a double shift every fourth Friday. Moreover, he had worked double shifts during the fall of 2003. Beginning in January 2004 he made arrangements with a coworker to take his place and properly notified supervision each time so that the swap could be approved and noted on the work schedule. The agency has further proven that grievant knew that he was scheduled to work a double shift on June 4, 2004 because a coworker specifically reminded him of it on May 31, 2004. Grievant acknowledges stating that he wasn't going to work the scheduled double shift. Under these circumstances, it must be concluded that grievant's statement, in conjunction with his failure to report to work as scheduled, constitutes a refusal to work overtime hours as required – a Group II offense.

Grievant argues that he should have been notified in writing, and by a supervisor, that he was supposed to work a double shift. Grievant's argument is not persuasive. If a team member is unexpectedly absent and it becomes necessary to draft another team member to fill the vacancy for this unscheduled absence, a written memorandum is sent to the replacement to assure that they understand the date and time of the overtime assignment.¹¹ However, working the double shift on Friday is not unexpected; rather, it is a *scheduled* event known well in advance to all employees. Accordingly, based on the September 11, 2003 instructional memorandum, and the advance scheduling, there is no need for individual written notices. Moreover, grievant knew this because the monthly double shift procedure had been in effect since September 2003 and no individual written notices had been previously issued to grievant.

Grievant argued that he was unaware whether the double shift policy was still in effect when he returned on May 28, 2004 following his suspensions of several weeks. This argument is also unpersuasive. First, grievant was not told that the policy had been changed. Therefore, there was no reason for him to think that it had been changed during his absence. Second, if grievant had a question about whether the policy was still in effect, he had four workdays within which to ask a supervisor or manager about it. Finally, on the night of May 31, 2004, grievant's coworker reminded grievant that he was scheduled to work a double shift on June 4, 2004. Notwithstanding this direct reminder, grievant still

¹⁰ Exhibit 6. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹¹ Exhibit 1. Memorandum to grievant, January 27, 2004.

did not question a supervisor about the policy, did not request his supervisor to swap him with the coworker, and thereafter did not report to work as scheduled.

The Standards of Conduct provides that a Group II Written Notice following three active Group I Written Notices normally should result in discharge.¹² In this case, grievant had accumulated *four* active Group I Written Notices prior to the issuance of the Group II Written Notice. The agency could have removed grievant from employment upon the issuance of the fourth Group I Written Notice but it elected to give him another chance. As no basis for mitigation has been demonstrated, the appropriate disciplinary action following grievant's *fifth* active disciplinary action is removal from employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and the removal of grievant from state employment on June 7, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

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

¹² Exhibit 6. Section VII.D.2.b(2), *Ibid*.

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.¹³ 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.¹⁴

[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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.