

Issue: Group III Written Notice with termination (sleeping while on duty);
Hearing Date: 08/23/04; Decision Issued: 08/24/04; Agency: VDOT; AHO:
David J. Latham, Esq.; Case No. 824



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 824

Hearing Date: August 23, 2004
Decision Issued: August 24, 2004

PROCEDURAL ISSUE

Following a pre-hearing conference during which a hearing date was established, the hearing officer mailed a Notice of Hearing to grievant at her correct, last-known address. Grievant failed to appear at the hearing and failed to call to explain why she was not attending the hearing. After waiting 15 minutes past the docketed hearing time, the Hearing Officer called grievant's last-known telephone number and left a message requesting that grievant call him; to date, she has not returned the call. Grievant failed to submit either documentation or a witness list prior to the hearing. The hearing was conducted, as scheduled, with those parties and witnesses who appeared on the docketed date and time.¹

APPEARANCES

Human Resource Representative

¹ Section IV.A, *Rules for Conducting Grievance Hearings*, effective July 1, 2001, provides: "At the hearing officer's discretion, a hearing may proceed in the absence of one of the parties; a hearing so conducted will be decided on the grievance record and the evidence presented at the hearing."

Representative for Agency
Four 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 grievance from a Group III Written Notice issued for sleeping on duty.² Grievant was removed from employment effective April 2, 2004 as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³

The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant as a bridge-tunnel patroller for three years. Grievant has three prior active disciplinary actions: a Group I Written Notice for failure to follow established guidelines,⁴ a Group I Written Notice for unsatisfactory attendance/tardiness,⁵ and a Group III Written Notice for sleeping while on duty.⁶

During the night of March 9, 2004, grievant was working on the midnight shift (10:00 p.m. to 6:00 a.m.), to which she had been assigned since November 2003. Patrollers who work the midnight shift are rotated every two hours among various positions (toll booth, gate posts) to vary their work routine. From 4:00 a.m. to 6:00 a.m., grievant was assigned to the gate that controls access to the facility. Grievant was assigned to sit in her patrol vehicle just inside the gate and control the ingress and egress of people through the gate. She would open the gate for authorized employees and keep the gate closed for unauthorized and homeless people who came through the area.

At about 5:00 a.m., grievant's supervisor made a routine round of all posts he supervises. He drove up to and stopped alongside grievant's vehicle and observed her sitting motionless in her vehicle, with her head on her chest. The supervisor sounded his vehicle's horn twice but grievant remained motionless. The supervisor got out of his vehicle, went to the driver's door of grievant's vehicle and tried to open the door but it was locked. Grievant still remained motionless. Finally, the supervisor rapped on the window. Grievant raised her

² Exhibit 1. Written Notice, issued April 1, 2004.

³ Exhibit 4. Grievance Form A, filed April 18, 2004.

⁴ Exhibit 3. Group I Written Notice, issued March 18, 2003.

⁵ Exhibit 3. Group I Written Notice, issued July 23, 2003.

⁶ Exhibit 3. Group III Written Notice, issued July 30, 2003.

head, eyes closed, rubbed her face a few times, and again lowered her head on chest, still sleeping. The supervisor twice called his own supervisor on the radio to come to the gate. Even though grievant had a radio in her vehicle, she did not awaken during either radio transmission. The supervisor returned to his truck to await the arrival of his supervisor. Grievant finally awoke and stepped out of her vehicle shortly before the supervisor arrived. Grievant told her to wait in her vehicle until his supervisor arrived.

Because of grievant's prior record of active disciplinary actions, including one for sleeping while on duty, the agency decided that grievant should be removed from state employment.

One other employee who had been found asleep on duty was disciplined with a Group III Written Notice and suspended for ten days – the same discipline given to grievant on her first occurrence of sleeping during work hours. Grievant's prior disciplinary actions had been issued by two different supervisors for whom she worked prior to her assignment to the night shift.

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 his evidence first and must prove his claim by a preponderance of the evidence.⁷

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. 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. Sleeping during work hours is a Group III offense.⁸

The agency's undisputed evidence demonstrates that grievant was found sleeping during work hours – a Group III offense. Although grievant failed to present any testimony or evidence on her own behalf, she argued in her grievance that her supervisor lied about the incident. There is no evidence to corroborate grievant's allegation. The Traffic Control Supervisor (the supervisor to whom grievant's supervisor reports) corroborated the supervisor's account of what occurred.

The weight of the evidence supports a conclusion that it is more likely than not that grievant's version of the event was the untruthful version. She maintains that when her supervisor drove up to the gate, she assumed that he would open the gate himself. When she realized that he was not going to do so, she got out of her vehicle, opened the gate and the supervisor left. In her grievance she made no mention of the grievant speaking to her, or the Traffic Control Supervisor coming to the gate in response to the supervisor's radio calls. Because the Traffic Control Supervisor completely corroborates the supervisor's account of the event, grievant's version is not credible.

Grievant (who is Caucasian) alleges that her supervisor (who is black) is more lenient toward black employees when they fail to answer their radio or open the gate for the supervisor. The Traffic Control Supervisor testified that he has not seen or heard any evidence to support grievant's allegation. Because of grievant's allegation of racial discrimination, the Civil Rights Compliance Officer conducted an investigation. He concluded that grievant had not established any

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

⁸ Exhibit 2. Section V.B.3.h, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

discrimination and that management had properly applied the Standards of Conduct.⁹

The agency has consistently applied the Standards of Conduct policy; grievant has failed to demonstrate any misapplication of the policy.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued on April 1, 2004 for sleeping during work hours, and grievant's removal from employment effective April 2, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

Grievant has failed to prove that the agency either misapplied policy or acted in a discriminatory manner.

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

⁹ Exhibit 7. Report of Civil Rights Compliance Officer, June 3, 2004.

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.¹⁰ 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.¹¹

[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

¹⁰ 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).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.