

Issue: Wrongful suspension and misapplication of policy; Hearing Date:
08/27/04; Decision Issued: 08/31/04; Agency: DOC; AHO: David J. Latham,
Esq.; Case No. 835



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 835

Hearing Date: August 27, 2004
Decision Issued: August 31, 2004

PROCEDURAL ISSUES

Grievant requested as part of the relief he seeks that a disciplinary action issued subsequent to his filing of this grievance be rescinded.¹ However, because the disciplinary action had not been issued when this grievance was filed, it is not an issue in this grievance.²

Following a pre-hearing conference during which a hearing date was established, the hearing officer mailed a Notice of Hearing to grievant at his correct, last-known address. Grievant failed to appear at the hearing and failed to call to explain why he was not attending the hearing. After waiting 15 minutes past the docketed hearing time, the Hearing Officer called grievant's mobile telephone. Grievant said he had been involved in an automobile collision. The hearing officer told grievant to take care of the accident and that the hearing would start after he arrived. Over the next three and a half hours, the grievant did not appear and did not call to explain his failure to appear. The hearing officer called grievant and twice left messages on his voice mail requesting that

¹ Exhibit 10. Group I Written Notice, issued November 26, 2003.

² For further explanation, see Exhibit 8, EDR Compliance Ruling of Director, Number 2004-611, July 14, 2004.

he call and advise his status. When grievant failed to return the calls, the hearing was conducted with those parties and witnesses who appeared on the docketed date and time.³ Grievant failed to submit either documentation or a witness list prior to the hearing. As of this date, grievant has not called the hearing officer to explain his failure to appear.

APPEARANCES

Warden
Three witnesses for Agency

ISSUES

Did the agency suspend grievant from work? If so, did the agency comply with applicable policy?

FINDINGS OF FACT

The grievant filed a timely grievance alleging that he had been wrongfully suspended from his duties on September 17, 2003.⁴ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. After a hearing officer had been appointed, the agency attempted to rescind its request for appointment of a hearing officer and issued a revised grievance form that denied qualification of the grievance for a hearing. Grievant sought a compliance ruling from the Director of the Department of Employment Dispute Resolution (EDR). The EDR Director concluded that the grievance should advance to a hearing.⁵

The Department of Corrections (DOC) (Hereinafter referred to as "agency") had employed grievant for 11 years as a utilities/trades lead worker in the Buildings and Grounds (B&G) department.⁶

Agency policy provides that all employees should maintain appropriate appearance and demeanor while in a duty status.⁷ Agency policy prohibits male

³ 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."

⁴ Exhibit 7. Grievance Form A, filed October 16, 2003.

⁵ Exhibit 8. EDR Compliance Ruling of Director, Number 2004-611, July 14, 2004.

⁶ Grievant is no longer employed by the agency. He last appeared for work on April 14, 2004. Grievant's physician released him to return to work on May 17, 2004 but grievant neither returned to work nor contacted the agency. Subsequently, the agency processed his removal from employment as job abandonment.

employees from wearing any type of earrings inside correctional centers. Female employees may not wear hoop or dangling earrings but may wear stud earrings. Hoop and dangling earrings constitute a potential safety hazard when working or when dealing with inmates who may be unpredictable. Grievant's ears are pierced and he wears earrings with silver hoops about the size of a quarter (25-cent coin). Grievant usually removed his earrings and left them in his automobile in the employee parking lot outside the correctional center. On one or two occasions, he had forgotten to remove them but, when someone reminded him that he still had his earrings on, he removed them and put them in his automobile.

On Wednesday, September 17, 2003, grievant had not removed his earrings before entering the facility. The Chief of Security and the B&G superintendent were conversing outside the B&G building at about 2:30 p.m. when grievant approached them. Another B&G employee was present in the area at this time. The Chief of Security reminded grievant of the earring prohibition and directed grievant to remove the earrings. Grievant said he was not a uniformed security officer and should be able to wear earrings. The Chief told grievant he could not come into the facility with earrings. The B&G superintendent (grievant's supervisor) then directed grievant to remove his earrings but grievant refused to comply. The B&G superintendent directed grievant to go to master control and await further instructions. The assistant warden was informed of the incident; he directed that grievant be sent home and return to work on the next regularly scheduled workday, which was Monday, September 22, 2003.⁸ Grievant was placed on administrative leave for his regularly scheduled workdays of September 18 & 19, 2003 and received his regular pay for week.⁹

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

⁷ Exhibit 4. Section 5-22.6.C, DOC Procedure Number 5-22, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, June 15, 2002.

⁸ Hurricane Isabel struck the area on Thursday, September 18, 2003. In preparation for the hurricane, inmates had been evacuated to other facilities. September 18 & 19, 2003, which would normally have been scheduled workdays for grievant, had been declared Code Red days and all non-essential personnel were given administrative leave for the two days. Of seven employees in the B&G department, one took leave, five worked on those days. Only three of the seven worked overtime hours during the week of September 17-23, 2003. See Exhibit 6. B&G Employee Work/Leave summary, September 17-23, 2003.

⁹ Exhibit 5. Grievant's FLSA Time Sheet from September 17-23, 2003. This document shows that grievant was credited with Code Red (CR) leave time on September 18 & 19, 2003.

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 misapplication of policy, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁰

In considering grievant's allegation that he was suspended, it is instructive to consider what a "suspension" is. The Department of Human Resource Management (DHRM) defines suspension as, "An employee's absence from work, *without pay*, that an agency imposes as part of a disciplinary action and/or to remove the employee from the workplace pending (1) an investigation related to his or her conduct, or (2) a court action."¹¹ (Italics added). The agency utilizes the same definition in its Standards of Conduct policy.¹²

Grievant failed either to appear for the hearing or to proffer any witnesses or documentary evidence to prove his claim that the agency misapplied policy by wrongfully suspending him. The undisputed evidence establishes that grievant was not suspended for the two days at issue herein. In fact, grievant was placed on Code Red administrative leave along with many other employees. Grievant was paid for both days of administrative leave and received his regular salary for the week of September 17-23, 2003. Therefore, by definition, the grievant has not borne the burden of proof to show that he was suspended because he was, in fact, paid for the two days at issue.

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

¹¹ Section II.E, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

¹² Exhibit 3. Section 5-10.6, DOC Procedure 5-10, *Standards of Conduct*, June 15, 2002.

Assuming that the assistant warden had not sent grievant home for two days, grievant might have been released as a nonessential employee. Alternatively, he might have been deemed essential and required to work on the two days. In either case, he would have received his regular pay for the two days. As it turned out, grievant did not work and nevertheless received two days pay without having to work for it. Accordingly, grievant was not affected adversely by staying home for two days with full pay.

Grievant claims that he would have been entitled to overtime pay. Overtime is worked only at the specific direction of a supervisor. Grievant has not shown that he would have worked overtime, even if the assistant warden had not placed him on administrative leave. In fact, only three of the seven B&G employees worked overtime. There is no evidence to show that grievant would have been given an overtime assignment. In any case, overtime pay is not an entitlement; it is pay given for time that is actually worked over 40 hours in a week. If an employee does not actually work overtime, regardless of the reason, he is not entitled to any pay because the employee has not *earned* the pay. Accordingly, grievant's request for overtime compensation is without merit.

Grievant also argues that he is not aware of a *written* rule that prohibits him from wearing earrings. This argument is not persuasive. Grievant knew the rule and had demonstrated his knowledge by complying with it on many prior occasions. In any case, grievant was given a direct, unambiguous instruction by his supervisor to remove the earrings but failed to comply. The supervisor's instruction was reasonable (for safety reasons) and therefore grievant was obligated to comply with the verbal instruction. Grievant's refusal to comply was insubordination – a Group II offense. Therefore, the assistant warden's decision to place grievant on administrative leave until the warden returned was amply justified.

DECISION

The grievant has not borne the burden of proof to show either that he was placed on suspension or that the agency misapplied policy. Grievant's request for relief is hereby DENIED.

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.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]

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.

David J. Latham, Esq.
Hearing Officer