

Issue: Wrongful termination and misapplication of policy; Hearing Date: 09/17/04; Decision Issued: 09/20/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 854



COMMONWEALTH of VIRGINIA  
*Department of Employment Dispute Resolution*

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 854

Hearing Date: September 17, 2004  
Decision Issued: September 20, 2004

PROCEDURAL ISSUE

On the next workday following this hearing, grievant telephoned the hearing officer and attempted to engage in an ex parte conversation to present additional testimony in this case. The hearing officer advised grievant that, once the hearing has been closed, such an ex parte conversation is improper and impermissible. The hearing officer ended the conversation and has given no weight or consideration to the information grievant attempted to present.

APPEARANCES

Grievant  
Two witnesses for Grievant  
Warden  
Advocate for Agency  
One witness 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? Has the agency misapplied policy?

## FINDINGS OF FACT

The grievant filed a timely grievance from the termination of his employment on May 13, 2004.<sup>1</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for three years. He was a Corrections Officer at the time of his separation from employment.

Agency policy provides that employees charged with a criminal offense either on or off the job must inform their organizational unit head on the next work day if received during non-working hours.<sup>3</sup> Policy also provides that an absence in excess of three days without prior authorization or satisfactory reason is a Group III offense.<sup>4</sup> Grievant received a copy of these policies when he was hired by the facility.<sup>5</sup>

On the evening of April 11, 2004, grievant was involved in a physical altercation with another person and broke his right hand. He was charged with malicious wounding and was held in custody overnight. When grievant was released on bond the following morning, he was placed under a restraint order prohibiting him from staying at his own home. For approximately the next ten weeks, grievant stayed at his sister's residence. After being released on April 12, 2004, grievant called a captain at the facility to report that he would be absent from work that day. The captain directed grievant to call a lieutenant. On April 13, 2004, grievant called the lieutenant and advised her that he had broken his hand. Grievant had already exhausted his available sick leave due to prior absences. The lieutenant directed grievant to call human resources and discuss the matter. Grievant did not tell either the captain or the lieutenant that he had been charged with a criminal offense.

Grievant spoke with an office services specialist in human resources on April 13, 2004. She directed him to contact the third-party administrator (Unum) to determine whether he would be covered under the Virginia Sickness and

---

<sup>1</sup> Exhibit 5. Letter from warden to grievant, May 13, 2004.

<sup>2</sup> Exhibit 3. Grievance Form A, filed June 11, 2004.

<sup>3</sup> Exhibit 6. Section 5-45.6.B, DOC Procedure Number 5-45 *Receipt of Writs, Summons, Subpoenas, and Criminal Convictions*, June 1, 1999.

<sup>4</sup> Exhibit 8. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

<sup>5</sup> Exhibit 7. Checklist signed by grievant, December 12, 2001.

Disability Plan (VSDP).<sup>6</sup> Grievant did not thereafter contact the human resources specialist or anyone else in human resources until after the termination of his employment. The office services specialist has no recollection that grievant gave her a different address or telephone number to contact him. If he had done so, the specialist normally and routinely would have placed a memorandum in grievant's personnel file; the file does not have such a memorandum.

The warden learned of grievant's continuing absence on May 6, 2004. She learned that grievant had not called his supervisor, the watch commander, or anyone else at the facility to report his ongoing absence between April 13 and 26, 2004.<sup>7</sup> Grievant next called on April 26, 2004 and advised the watch commander that he would be absent due to his broken hand and that he would return to work on May 7, 2004. He failed to provide any medical documentation to substantiate the reason for his absence. On May 6, 2004, the warden sent a letter to grievant at his only known address requesting that he call not later than May 12, 2004 or face removal from employment.<sup>8</sup> The certified letter was delivered to grievant's residence on May 8, 2004 and a notice of delivery left for him. After the letter carrier left a second notice of delivery on May 13, 2004, grievant obtained the letter from the post office.<sup>9</sup> Grievant failed to contact the agency within the deadline. On May 13, 2004, the warden notified grievant by letter that his employment had been terminated for failure to comply with the Standards of Conduct.<sup>10</sup> On May 17, 2004, grievant telephoned the warden; she informed him that he had already been removed from state employment. Subsequently, grievant provided the agency with physician excuses.<sup>11</sup>

Grievant contacted Unum regarding his disability claim. Unum sent a letter to grievant requesting that he call Unum's toll-free number as soon as possible to provide further information.<sup>12</sup> The letter also advised grievant that he was responsible for providing Unum with the requested information and for ensuring that grievant's physician promptly provide information to Unum. On May 7, 2004, Unum advised grievant that because grievant had not provided the requested information, his case was being closed.<sup>13</sup> In his May 17, 2004 conversation with the warden, grievant said he was unaware that Unum needed additional information to process his claim.

Grievant had used the VSDP for a prior absence from March 5-20, 2004.

---

<sup>6</sup> The VSDP contains an exclusion that denies payment of benefits if a disability results from commission of a felony. *VSDP Handbook 2004*, p. 28.

<sup>7</sup> Grievant avers that he called the lieutenant on April 16 but, in any case, grievant admits that he did not contact anyone at the agency between April 16 and April 26, 2004.

<sup>8</sup> Exhibit 5. Letter from warden to grievant, May 6, 2004.

<sup>9</sup> Exhibit 9. Photocopies of envelopes containing warden's letters of May 6 and 13, 2004.

<sup>10</sup> Exhibit 5. Letter from warden to grievant, May 13, 2004.

<sup>11</sup> Exhibit 2. Four notes from physician.

<sup>12</sup> Exhibit 11. Letter from Unum to grievant, April 20, 2004.

<sup>13</sup> Exhibit 10. Letter from Unum to grievant, May 7, 2004. See also Exhibit 4. Unum Detail Action Report, May 10, 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 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 a claim of misapplication of policy, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>14</sup>

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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group III offenses

---

<sup>14</sup> § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.<sup>15</sup> 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 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.<sup>16</sup> An absence in excess of three days without proper authorization or a satisfactory reason is one example of a Group III offense.

The agency removed grievant from employment due to having an absence in excess of three days without proper authorization or a satisfactory reason. The undisputed evidence establishes that grievant was absent substantially in excess of three days. By his own admission, he did not contact anyone at the agency between April 16 and 26, 2004. He did not provide any medical documentation to support his absence during this time. Even when requested to provide evidence and information to the disability plan administrator, grievant failed to do so and the administrator eventually closed grievant's claim for lack of medical documentation. Grievant had the burden of proof to 1) provide appropriate medical information to support his absence and, 2) to keep his employer properly informed about his absence. When he failed to do so, the agency wrote to grievant to give him one last chance to explain his situation but grievant failed to respond within the established time limit.

While grievant's failure to respond in a timely manner was partially attributable to the fact that he was temporarily residing with a relative, it was grievant's failure to notify the agency of his address change that resulted in his late receipt of the warden's letter. Grievant was responsible to assure that he notified the agency of an address change or assure in some other way that he obtained his mail each day. Accordingly, because grievant failed to maintain proper communication with either the agency or the disability administrator, the agency has shown by a preponderance of evidence that grievant was absent substantially in excess of three days without proper authorization or a satisfactory reason for not obtaining such authorization.

Grievant contends that Unum's difficulty in obtaining medical information was between Unum and the physician. However, Unum's letter of April 20, 2004 makes clear that grievant is "responsible for ensuring that we receive the requested information."<sup>17</sup>

Grievant suggests the human resources specialist was untruthful in stating that grievant had not given her an address and telephone number change. However, the specialist's testimony was credible and grievant has not offered any reason that the specialist would have to falsify her testimony. Grievant also

---

<sup>15</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>16</sup> Exhibit 8. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

<sup>17</sup> Exhibit 11. *Ibid.*

maintains that he told the watch commander about his criminal charge but she denies it. Grievant has not shown that the watch commander has any reason to be untruthful about this.

Grievant claims that the warden did not give him notice that he would be subject to termination. However, the warden's letter of May 6, 2004 was just such a notice. Grievant was given a week to contact the warden but failed to do so. The agency was unaware that grievant was not staying at his address of record. It is incumbent on grievant to notify the agency of a change of address; he failed to do so. In lieu of notification, grievant is responsible to get his mail on a daily basis so that the agency can maintain a line of communication with him.

Grievant contended that he spoke with another specific human resources employee on multiple occasions during his absence. However, that employee was not hired by the agency until June 2004 – approximately three weeks after grievant had been removed from employment. Grievant averred that he had notified the watch commanders about being charged with a criminal offense; both watch commanders denied that grievant ever told them. If grievant had told them, both would have immediately notified the warden. Because of the various inconsistencies between grievant's testimony and that of the agency witnesses, grievant's credibility is tainted. Accordingly, where there are differences in testimony, those differences have been resolved in favor of the agency.

### DECISION

The decision of the agency is affirmed.

The grievant's removal from employment effective May 13, 2004 is hereby UPHELD.

Grievant has not demonstrated that the agency misapplied policy.

### 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>18</sup> 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.<sup>19</sup>

[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

---

<sup>18</sup> 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).

<sup>19</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.