

Issue: Group II Written Notice (failure to follow supervisor's instructions, perform assigned work, and leaving worksite without permission); Hearing Date: 01/14/04; Decision Issued: 01/15/04; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 484



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 484

Hearing Date: January 14, 2004  
Decision Issued: January 15, 2004

APPEARANCES

Grievant  
Human Resource Manager  
Representative for Agency  
Two 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 appeal from a Group II Written Notice issued for failure to follow a supervisor's instructions, failure to perform assigned work, and

leaving the work site without permission.<sup>1</sup> During the grievance resolution process, the third-step respondent offered to reduce the disciplinary action to a Group I Written Notice for unsatisfactory performance; grievant rejected the offer and requested that the matter be qualified for hearing. 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 Virginia Department of Transportation (Hereinafter referred to as "agency") has employed the grievant as a transportation maintenance crew member for five years. Grievant's normal work hours are from 7:00 a.m. to 3:30 p.m.

All crew members are advised when hired that they might be required to work overtime due to inclement weather, emergency operations, or other unforeseen situations. Prior to August 25, 2003, grievant had worked overtime when necessary. On August 25, 2003, the supervisor met with grievant's work crew (four members including grievant) at the beginning of the day to outline the day's work assignments. As usual at the end of the meeting, the supervisor gave the crew an opportunity to remind him whether any of them had approved leave time for part of the day. One crew member reminded the supervisor that he had to leave during the afternoon for a physician's appointment.

The day's assignment was the removal and replacement of a water drainage pipe running under a side road from one culvert to the other culvert. This task can usually be completed in one day if there are no unforeseen problems. At about 9:45 a.m., the crew severed a natural gas pipeline while excavating the old drain pipe. Grievant called his supervisor on a cell phone. The supervisor drove to the site and then notified the gas utility company. When he arrived, the grievant said they needed a trench box to prevent the sides of the five-foot-deep excavation from caving in. The supervisor assessed the situation, called his manager, and then advised grievant that a trench box was not available. He instructed the crew to excavate the sides of the trench to form a slope that would not cave in. The crew was dissatisfied and requested that the manager come to the work site. The manager came to the site at about 1:15 p.m., evaluated the situation, and repeated the instruction to slope the walls of the excavation. He also arranged for another crew of four employees to come to the site and help complete the assignment because the gas leak and the trench box debate had delayed work by several hours.

One of the crew then began driving a Gradall (hydraulically powered bucket excavator) into position to begin the additional excavation. Grievant noticed a shovel lying in the path of the Gradall. He picked it up and threw it approximately 15 feet to the side of the road. The manager immediately called grievant aside and counseled him that throwing tools is unacceptable because of

---

<sup>1</sup> Exhibit 2. Written Notice, issued August 27, 2003.

<sup>2</sup> Exhibit 1. Grievance Form A, filed September 23, 2003.

the risk of injury to others and because it might damage the tool. Grievant said it would not happen again.

The second maintenance crew arrived at the work site at about 2:45 p.m. One of grievant's crew members asked the manager whether he would have to work overtime. The crew member explained that he had to pick up a grandchild from school. The manager said that he might have to work a little overtime. The manager left the work site at about 3:20 p.m. and returned to his office. He then received a call from the supervisor who reported that grievant's crew said they did not want to work with the other crew, and that they planned to leave the work site soon. The manager told the supervisor to tell the crew that they were to stay there until work was completed. The supervisor relayed that instruction and told grievant and his crew that they were expected to work overtime to get the excavation filled in. At about 4:15 p.m., the supervisor drove to the end of the road to assure that detour barricades had been set up properly. While the supervisor was gone, grievant and his fellow crew members packed up their equipment and left the work site without permission. Grievant did not ask permission to leave. The supervisor and the other work crew stayed at the site until about 8:00 p.m. to complete the drainpipe installation and back-filling of the excavation.<sup>3</sup>

The other three members of grievant's maintenance crew were also given Group II Written Notices for leaving the work site without permission.

### 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 . . .

---

<sup>3</sup> Although barricades were placed at both ends of the road, and there was some work to be completed the following day, it was necessary to fill in the excavation overnight in the event that pedestrians, cyclists, motorcycle riders, ATVs, or errant motorists used the road during nighttime hours.

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.<sup>4</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 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 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 No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses, and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions, failure to perform assigned work, and leaving the work site during work hours without permission are Group II offenses.<sup>5</sup>

Grievant left the work site because a friend had given him tickets to see a country music band at a nightclub that evening. Grievant avers that he told the supervisor about the tickets during the early morning meeting on August 25, 2003. However, the supervisor testified credibly that the grievant did not tell him about the country music tickets. Grievant could have brought his fellow crew members to the hearing to testify about what they heard during the meeting. However, grievant did not ask the crew members to attend, and did not request the Hearing Officer to issue Orders for their attendance. When a party has the opportunity to present witnesses who might corroborate his testimony, but fails to bring such witnesses, the Hearing Officer must presume that the testimony of the absent witnesses would not have helped that party.

The supervisor's testimony was consistent with the memorandum he wrote on the day after the incident.<sup>6</sup> It was also consistent with the more detailed description he later wrote for the third-step respondent.<sup>7</sup> Because grievant's

---

<sup>4</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

<sup>5</sup> Exhibit 3. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>6</sup> Exhibit 2. Memorandum from supervisor to grievant, August 26, 2003.

<sup>7</sup> Exhibit 1. Memorandum from supervisor, November 3, 2003.

version of events varied significantly from the supervisor's, the hearing officer recalled the supervisor for further testimony. The supervisor's rebuttal of grievant's version continued to be clear, consistent and unshakable. Moreover, certain aspects of the supervisor's testimony were corroborated by his manager's testimony. Given these factors, and grievant's failure to bring any witnesses to corroborate his version, it is concluded that the agency has demonstrated, by a preponderance of evidence, that the grievant did commit the offenses for which he was disciplined.

Of course, it is possible that grievant told his supervisor about the tickets and the supervisor misunderstood, or does not remember the conversation. However, grievant admits that he did not mention the tickets or country music during the rest of the day. He also did not raise this issue when the supervisor told him that he would have to stay until the job was completed even if that meant working overtime. If grievant placed such great importance on hearing a country music band, it would seem logical that he would have mentioned this to his supervisor before leaving the work site. Since he did not mention the tickets before leaving, this calls into question the credibility of his story about the tickets.

During the hearing, grievant attempted to focus on the work site's condition overnight. He alleges that a portion of the excavation was not completely filled in and that it represented an unsafe condition. The hearing officer advised grievant that the work site's condition has no relevance to the offense for which grievant was disciplined.

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on August 27, 2003 for failure to follow supervisory instructions, failure to perform assigned work, and leaving the work site during work hours without permission is hereby UPHELD.

### 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>8</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>9</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>8</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>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.