

Issue: Group I Written Notice (providing misleading and inaccurate information and falsification of documented activities); Hearing Date: 01/11/05; Decision Issued: 01/18/05; Agency: DOF; AHO: David J. Latham, Esq.; Case No. 7920



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7920

Hearing Date: January 11, 2005

Decision Issued: January 18, 2005

PROCEDURAL ISSUE

In conjunction with the disciplinary action at issue herein, the agency rescinded the previously granted privilege of commuting to work in an agency vehicle and began requiring grievant to submit a daily record of his work activities. Grievant requested as part of the relief he seeks that the rescission of commuting privileges and requirement to keep a daily work record be ended. Hearing officers may not direct the methods or means by which an agency carries out work activities.¹ The privilege of commuting to work in a state vehicle is granted to very few state employees. Privileges may be removed for agency-determined business reasons. Similarly, an agency not only has the right to monitor work activities, but it would be derelict if it did not assure that employees work during the time they are being paid to work.

Although the timing of these restrictions and their mention on the written notice make them appear to be punitive in nature, the agency had legitimate business reasons for implementing the restrictions when they did. The agency could have implemented the same restrictions in the absence of disciplinary action, and, in the absence of some other qualifying factor, the restrictions would not qualify for a hearing. Such decisions are internal management decisions

¹ §5.9(b)7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

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."

APPEARANCES

Grievant
One witness for Grievant
Deputy State Forester
Advocate for Agency
Two 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 I Written Notice for providing misleading and inaccurate information and falsification of documented activities.² During the resolution steps, the second- and third-step respondents offered to rescind the written notice but grievant rejected the offers. Following failure of the parties to resolve the grievance at the third resolution step, the agency head denied to qualify the grievance for hearing.³ Grievant requested a ruling from the Department of Employment Dispute Resolution (EDR) as to whether his grievance qualified for a hearing. The EDR Director ruled that the grievance does qualify for hearing.⁴ The Department of Forestry (Hereinafter referred to as "agency") has employed grievant as a natural resources specialist for 26 years.

In 2002, grievant was counseled in writing regarding misleading Activity Reports.⁵ Grievant was given written counseling in 2003 for misrepresenting leave time and working out of his home without prior permission from his supervisor.⁶

Grievant is assigned a state vehicle that is equipped with a radio and transmitter for communication with the regional office and coworkers. His

² Agency Exhibit 7. Written Notice, issued April 2, 2004.

³ Agency Exhibit 7. *Grievance Form A*, filed April 30, 2004.

⁴ Agency Exhibit 8. Ruling No. 2004-864, *Qualification Ruling of Director*, November 5, 2004.

⁵ Agency Exhibit 12. Memorandum from Regional Forester to grievant, September 30, 2002.

⁶ Agency Exhibit 12. Memorandum from Regional Forester to grievant, February 17, 2003.

regularly scheduled work hours are 8:15 a.m. to 5:00 p.m. At about 8:30 a.m. on February 17, 2004, grievant's supervisor was traveling to another county. He heard a radio call for grievant which went unanswered. At that time, the supervisor was only a short distance from grievant's residence and so he drove past the house to determine whether grievant was home. From the county road, the supervisor was able to look down the grievant's driveway (about 100 yards) and observed that both grievant's green personal vehicle and the white state vehicle were parked in the driveway.⁷ The supervisor pulled to the side of the road at a location where he was able to observe grievant's driveway and parked there for about 45 minutes. During that time, neither vehicle left the residence and the supervisor did not see grievant.

The supervisor took no action that day other than to notify his supervisor of what he had observed. When the grievant later turned in his Activity Reporting form and his Time Report for that date, he indicated he had worked a full eight hour day from 8:15 a.m. to 5:00 p.m.⁸ A leave log, maintained in the regional office indicates that grievant had called in the morning to report that he had to go to a dental appointment and would be on leave.⁹ At about 3:00 p.m., grievant called in to report that the dental appointment had been cancelled.

On March 25, 2004, the Regional Forester met with grievant and gave him an opportunity to provide a detailed accounting of his activities for February 17, 2004.¹⁰ After reviewing grievant's account and all other available information, the Regional Forester gave grievant a detailed memorandum outlining the discrepancies in grievant's account and told grievant that he planned to issue a Group III disciplinary action. On April 2, 2004, grievant submitted a handwritten note contending that he had met with a landowner for two hours on the morning of February 17, 2004. As a result the Regional Forester issued a Group I Written Notice to grievant.

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

⁷ Grievant Exhibit 2. Map and photographs of grievant's property.

⁸ Agency Exhibit 9. Activity Reporting and Time Report forms.

⁹ Agency Exhibit 10. Leave Record.

¹⁰ Agency Exhibit 9. Regional Forester's notes.

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 grievant must present his evidence first and prove his claim by a preponderance of the evidence.¹¹

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 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.1 of the Commonwealth of Virginia's Department of Personnel and Training Manual *Standards of Conduct* Policy No. 1.60 provides that Group I offenses include acts and behavior that are the least severe.¹²

Black's Law Dictionary defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything." The word "falsify" means being intentionally or knowingly untrue.

The agency has shown that grievant's Activity Report for February 17, 2004 does not reflect that he spent two hours speaking with a landowner who lives half a mile from his home. However, grievant offered un rebutted testimony that the abbreviated notations on the Activity Report do not constitute a detailed accounting of every activity performed.

¹¹ § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

¹² Agency Exhibit 13. Section V.B.1, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

Of more concern are the other documentation discrepancies. Grievant has not provided a satisfactory explanation for having called in on leave on February 17, 2004 and then canceling it later that afternoon. More significantly, grievant had initially provided a verbal recitation of his activities on March 23, 2004 that did not include a two-hour visit to a landowner. It was only after grievant learned that he might be subjected to severe disciplinary action that he recalled this visit. Grievant's belated recollection of this visit cannot be fully corroborated as having occurred on February 17, 2004. Although the landowner testified on grievant's behalf that such a visit did occur, he cannot be certain what date the visit occurred on. Of particular importance is that both grievant and the landowner testified that grievant drove to the landowner's property in his personal green pickup truck. However, from 8:30 to 9:15 a.m., grievant's supervisor observed that grievant's green truck (as well as the state vehicle) was parked in grievant's driveway the entire time.

Accordingly, the agency has proven, by a preponderance of evidence, that grievant has provided misleading and inaccurate information regarding his work activities. It cannot be concluded with certainty that grievant deliberately falsified his documentation. It may be that grievant is disorganized, or does not maintain accurate, contemporaneous accounting of his daily activities. It may also be that grievant is deliberately being vague about his activities to conceal personal activities during work hours. In any case, the agency has a right to know with certainty what the grievant is doing each day from 8:15 to 5:00 p.m. Now that the vague and inaccurate information provided by grievant has raised agency suspicions, it is incumbent upon him to maintain detailed records of his work activities in the event that they are again brought into question.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice is 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 **15 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 15 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 15-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.