

Issue: Group II Written Notice with suspension (inappropriate use of State time and provided misleading, inaccurate information); Hearing Date: 01/12/05; Decision Issued: 01/18/05; Agency: DOF; AHO: David J. Latham, Esq.; Case No. 7938



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 7938

Hearing Date: January 11, 2005

Decision Issued: January 18, 2005

**PROCEDURAL ISSUES**

The grievance procedure provides that a written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute.<sup>1</sup> In the instant case, the Written Notice was issued on March 15, 2004; therefore, the time limit for filing the grievance was April 14, 2004. Grievant filed his grievance on April 19, 2004 – four days after the time limit had expired. Nevertheless, the agency head qualified the grievance for a hearing, and at the hearing, the agency did not raise the late filing as a defense. Therefore, in this case only, the agency is deemed to have waived the 30-day requirement.

In conjunction with the disciplinary action at issue herein, the agency rescinded the previously granted privilege of commuting to work in an agency vehicle and began requiring grievant to submit a daily record of his work activities.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.<sup>2</sup> The privilege of commuting to work in a state vehicle

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<sup>1</sup> §2.2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>2</sup> §5.9(b)7. *Ibid.*

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 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 grievance from a Group II Written Notice for inappropriate use of state time and providing misleading and inaccurate information.<sup>3</sup> Grievant was suspended without pay for four workdays 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 hearing.<sup>4</sup> The Department of Forestry (Hereinafter referred to as "agency") has employed grievant as a natural resources specialist for 26 years.

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<sup>3</sup> Agency Exhibit 1. Written Notice, issued March 15, 2004.

<sup>4</sup> Agency Exhibit 1. *Grievance Form A*, filed April 19, 2004.

In 2002, grievant was counseled in writing regarding misleading Activity Reports.<sup>5</sup> Grievant was given written counseling in 2003 for misrepresenting leave time and working out of his home without prior permission from his supervisor.<sup>6</sup> A general memorandum to all employees in the region emphasized the work hours of 8:15 a.m. to 5:00 p.m. and that employees are not permitted to work out of their homes with prior supervisory approval.<sup>7</sup>

Grievant is assigned a state vehicle that is equipped with a radio and transmitter for communication with the regional office and coworkers. His regularly scheduled work hours are 8:15 a.m. to 5:00 p.m. Employees are not permitted to take their state-owned vehicles on overnight trips outside the county to which they are assigned unless they have obtained prior supervisory approval. On March 4, 2004 grievant did not respond to radio calls between 8:15 and 8:30 a.m. At 8:45 a.m., grievant's supervisor observed grievant on a highway driving towards his residence. He followed grievant to his residence and asked where he had been. Grievant said he had just returned from an overnight stay in a town two counties away. He stated that he had gone to the area to pick up materials for a project. When the supervisor asked to see the materials, grievant said he must have left them at his girlfriend's office.<sup>8</sup> The supervisor then requested grievant to accompany him back to where he had been the day before in order to verify his work activities.

During the drive to the town, the supervisor asked grievant to write down his work activities of the preceding day and the morning of March 4, 2004 up to the point when the supervisor encountered grievant. At the office of grievant's girlfriend, grievant asked for the information he had given her the previous day. She responded that she did not remember grievant giving her any information the previous day but suggested that perhaps it was at her house. They drove to the girlfriend's house where grievant and his girlfriend went inside to retrieve the information. A few minutes later they came out of the house and the girlfriend said she had the material in storage at her office. They returned to her office where the girlfriend took a notebook from a storage box. When the supervisor asked if grievant had given her the notebook the previous day, she hesitantly responded that he had.

Grievant stated that he had obtained the notebook from a Mr. R. at R's office the previous day. They drove to an office pointed out by grievant. The supervisor asked grievant whom he had spoken with the day before. Grievant said he could not remember. The supervisor entered the office pointed out by grievant and spoke with all three employees. The employees acknowledged knowing grievant but said he had not been there the previous day. The supervisor asked if Mr. R was in; the three employees responded that Mr. R. had

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<sup>5</sup> Agency Exhibit 12. Memorandum from Regional Forester to grievant, September 30, 2002.

<sup>6</sup> Agency Exhibit 12. Memorandum from Regional Forester to grievant, February 17, 2003.

<sup>7</sup> Agency Exhibit 6. Memorandum from Regional Forester to all personnel, August 27, 2002.

<sup>8</sup> Grievant's girlfriend lives in the town where grievant had stayed overnight.

never had an office in that building and that his office was located elsewhere. When the supervisor returned to his vehicle and confronted grievant about the discrepancies in his story, grievant claimed that he had just obtained the notebook from a room just inside the door. Grievant claimed he had spoken with someone other than the three employees in the office. Grievant and his supervisor returned to the office where the three employees said there was no one else working in the office the previous day.

The supervisor attempted to verify two other locations to which grievant said he had gone the previous day but was unable to do. Grievant claimed he had gone to visit a friend at work but the friend was not there. He also claimed that he had gone to a VDOT (Virginia Department of Transportation) shop to get windshield washer fluid for his state vehicle. However, grievant said he did not speak to anyone at the shop, found the employees were busy, and instead of washer fluid he put water in his windshield washer tank.

On March 9, 2004, grievant met with his supervisor and the Regional Forester. Grievant was given another opportunity to explain his whereabouts on March 3, 2004. Grievant again maintained that he had gone to the locations that he detailed to his supervisor on March 4, 2004. During this meeting, grievant was advised that a Group II disciplinary action and suspension were being considered. He was given two days to provide any mitigating circumstances.

On March 11, 2004, grievant gave the Regional Forester two letters that he had written – one on March 8<sup>th</sup> and the other on March 11<sup>th</sup> – that he said explained the real purposes of his trip to the girlfriend's town. The letter of March 8<sup>th</sup> is addressed to grievant's girlfriend, who works for the town parks department, and addresses a site examination for tree planting at a city park.<sup>9</sup> The agency does not have a request from the town parks department for a site examination; grievant said his girlfriend had only made a verbal request to him. The letter of March 11<sup>th</sup> references grievant's visit with a Mr. S. on "Wednesday of last week" (March 3<sup>rd</sup>) and addresses tree planting issues at a recreation complex.<sup>10</sup>

Grievant told the Regional Forester that he had not told his supervisor about these two projects and his actual activities of March 3, 2004 because he believed the supervisor would have disapproved of grievant's involvement in the projects. He also felt that his supervisor had an overbearing and intimidating attitude towards grievant. Grievant told the Regional Forester that another employee located in the county was aware of the projects but that employee denied knowledge of the projects.

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<sup>9</sup> Agency Exhibit 1. Letter from grievant to girlfriend, March 8, 2004.

<sup>10</sup> Agency Exhibit 1. Letter from grievant to Mr. S., March 11, 2004. Mr. S testified on grievant's behalf that grievant had visited with him on March 3, 2004 from 10:30 – 10:40 am, and again from 5:00 – 6:00 p.m.)

## 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 grievant must present his evidence first and prove his claim by a preponderance of the evidence.<sup>11</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 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 that are more severe in nature and are such that an accumulation of two Group II offenses normally

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<sup>11</sup> § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

should warrant removal from employment.<sup>12</sup> Failure to follow a supervisor's instructions is a Group II offense.

The agency has shown, by a preponderance of evidence, that on March 4, 2004 grievant failed to follow his supervisor's direct instructions to write a detailed and accurate accounting of his work activities on the preceding day. Instead, grievant wrote a list of activities, none of which could be verified. This fictitious list of grievant's work activities constituted an official report requested in the course of business. The Standards of Conduct provides that the falsification of any report constitutes a Group III offense.

Grievant has acknowledged that he did not tell his supervisor about his true activities of March 3, 2004. He did not want to tell him what he had actually been doing because he was afraid that the supervisor would disapprove of the activities. It is understandable that grievant may have had concerns about his relationship with his supervisor. However, that does not excuse grievant's deliberate and knowing falsification of a report, or his failure to follow his supervisor's instruction. The supervisor's request was for an accounting of grievant's work activities on the prior day. This is a reasonable and valid request for any supervisor to make because supervisors are obligated to assure that subordinates perform the work they are paid to perform. Grievant's giving false information resulted in a waste of both his time and the supervisor's time attempting to verify activities that could not be verified because they never occurred. Accordingly, the agency has proven offenses that warrant the issuance a Group II Written Notice.

If grievant has concerns about his relationship with his supervisor, he can discuss those concerns with the supervisor's superiors, or with Human Resources, or he can request mediation through the Department of Employment Dispute Resolution.

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and four-day suspension are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

### APPEAL RIGHTS

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

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 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 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.<sup>13</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>14</sup>

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<sup>13</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>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



[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]

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David J. Latham, Esq.  
Hearing Officer