

Issue: Group III Written Notice with termination (absence in excess of 3 days without authorization or satisfactory reason); Hearing Date: 01/18/05; Decision Issued: 01/20/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 7944; **Administrative Review**; **Hearing Officer Reconsideration Request received 02/04/05; Reconsideration Decision issued 02/07/05; Outcome: No newly discovered evidence of incorrect legal conclusions. No basis to reconsider; Administrative Review: EDR Ruling Request received 02/04/05; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7944

Hearing Date: January 18, 2005
Decision Issued: January 20, 2005

APPEARANCES

Grievant
Attorney for Grievant
Warden
Advocate for Agency
Two witnesses 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?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for absence in excess of three days without proper authorization or a satisfactory

reason.¹ Grievant was removed from employment effective August 14, 2004 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 a hearing.² The Department of Corrections (DOC) (Hereinafter referred to as “agency”) has employed grievant for eight years as a Power Plant Operator. Grievant has one other disciplinary action – a Group II Written Notice for failure to follow a supervisor’s instructions.³

The supervisor’s policy, which is the same policy followed by the agency, is that an employee is required to call his supervisor (or the supervisor’s supervisor) two hours before his shift starts on the day of an expected absence from work. Grievant was aware of this policy. An exception to the general rule is that employees who are on an extended absence due to serious injury or illness (as documented by a physician’s certificate) need not call every day during the period excused by the physician. Power plant employees are required to list in the front of the logbook a telephone number where they can be reached by supervision.

Grievant last worked on August 4, 2004. On August 5, 2004, grievant was scheduled to work from 8:00 a.m. to 4:00 p.m. At 5:30 a.m., he called a coworker and told him that he would not be coming in due to back pain. Grievant did not call his supervisor and the coworker did not tell the supervisor about grievant’s call. On August 6, 2004, grievant was scheduled to work from 12:00 a.m. to 8:00 a.m. but he did not show up for work and did not call anyone to advise that he would not be working. Because grievant sometimes lives in a room at the facility, a coworker went to his room but grievant was not there. A call was placed to grievant’s home telephone but there was no answer. Grievant’s supervisor, who worked the day shift on August 6, 2004, had not heard from grievant, and was unable to contact him because there was no answer at his home phone number. Because the supervisor did not know if grievant was going to come in on his next scheduled shift (August 7 from 12:00 a.m. to 8:00 a.m.), he crossed grievant off the schedule and substituted another employee.

At about 7:00 p.m. on the evening of August 6, 2004, grievant called a coworker at the power plant to ask when he was next scheduled to work. The coworker advised him that he had originally been scheduled to work the midnight shift starting later that evening but that the supervisor had crossed him off because he had not heard from grievant and could not contact him. Later the same evening, grievant called the coworker a second time and requested the

¹ Exhibit 1. Group III Written Notice, issued August 14, 2004. [NOTE: Although the notice lists August 14th as the date of issuance, the evidence establishes that the agency mailed the written notice to grievant on August 23, 2004.]

² Exhibit 1. Grievance Form A, filed September 7, 2004.

³ Exhibit 4. Group II Written Notice, issued June 14, 2004. [NOTE: Grievant had filed a grievance of this disciplinary action but withdrew his grievance before the matter came to hearing.]

supervisor's home telephone number. Grievant called the coworker a third time at 8:50 p.m. to see if there was another number for the supervisor. During this third call, grievant told the coworker that his home telephone had been out of order. Grievant's telephone had been out of order for several days but he did not tell the supervisor or anyone else how to contact him. Grievant did not tell the coworker that he would not be reporting to work on August 8, 9, 13, or 14, 2004. Grievant's supervisor had scheduled vacation from August 7-22, 2004; he left to drive to his out-of-state vacation after leaving work late in the afternoon of August 6, 2004.

Grievant was scheduled to work 12-hour shifts from midnight to noon on August 8 & 9, 2004 but did not appear for work or call anyone to say he would not be coming in. Grievant was next scheduled to work on August 13 & 14, 2004 but did not report for work or call anyone.⁴

The agency permitted grievant to utilize sick leave to cover the absences so that he would be paid for the missed time. However, the pay accommodation granted to grievant did not alter grievant's failure to notify management of the absences. Because of grievant's unscheduled absences, other employees had to work double shifts to assure power plant coverage 24 hours per day.

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.

⁴ Exhibit 3. Logbook entries for August 13 & 14, 2004.

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 employee must present his evidence first and must prove his claim by a preponderance of the evidence.⁵

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 include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.⁶ 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.⁷ An absence in excess of three days without proper authorization or a satisfactory reason is one example of a Group III offense.

The agency has shown that grievant failed to work his scheduled shifts or call a supervisor to provide a satisfactory reason on five days – August 6, 8, 9, 13, & 14, 2004. Grievant attempted to call his supervisor on the evening of August 6, 2004 but the supervisor had already gone out of state to begin a two-week vacation. Grievant did not call his supervisor's superior – the Buildings and Grounds Superintendent – on any of the days at issue to advise that he would not be coming to work.

On August 16, 2004, grievant faxed to the agency a physician's note indicating that he had been seen by a physician on August 10, 2004.⁸ Grievant contends that he had first faxed this note on August 10th. Grievant did not call anyone at the facility to determine whether his fax had been received. He submitted a note from an administrative assistant who states that she faxed the note on that date. The first date that the agency received the note was August

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

⁶ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁷ Exhibit 9. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

⁸ Exhibit 1. Faxed note from physician.

16, 2004. However, even if grievant had faxed the note on August 10th, that does not excuse his failure either to report for work or to notify a supervisor that he could not report for work as scheduled.

Grievant contends that he called his supervisor on the evening of August 6, 2004 and that the supervisor's girlfriend answered the telephone. He claims he heard the supervisor in the background and that someone then hung up the telephone. Grievant's contention is not credible for two reasons. First, the supervisor testified that he had left to drive out of state shortly after leaving work on the afternoon of August 6, 2004. Second, and more significantly, the undisputed testimony of grievant's coworker (corroborated by his logbook entry) is that grievant called back asking if there was a different number for the supervisor. It stands to reason that grievant would not be asking for an alternate telephone number if someone had answered the telephone at the supervisor's residence. It is more likely than not that grievant asked for another number because there was no answer at the supervisor's residence when grievant called the number.

Grievant also alleges that during his third telephone call to the coworker at 8:50 p.m. on August 6, 2004, the coworker told grievant that the supervisor had just called him and changed grievant's work schedule again. This allegation is not credible for two reasons. First, both the coworker and the supervisor deny that they spoke on that evening or that the schedule was changed again. Second, the coworker has only been employed for a little over one year and grievant offered no reason that the coworker would falsify his testimony.

Accordingly, the agency has demonstrated, by a preponderance of evidence, that grievant was absent for a period of five workdays without prior authorization or notice to his supervisor or agency management. The issue is not whether grievant was ill during the period of his absence. Based on the available evidence, it is presumed that grievant had back pain during this absence. The issue that resulted in the termination of grievant's employment was his failure to keep management properly informed that he would be absent on each of the days at issue. Discussing with a coworker that one is having back pain is not a substitute for advising supervision. Even though grievant's supervisor was on vacation during a part of this period, grievant could have called the Buildings and Grounds Superintendent. Moreover, grievant knew that his telephone was inoperative and that the facility would be unable to contact him but he failed to provide an alternate telephone number where he could be contacted.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice for being absent in excess of three days without proper authorization or a satisfactory reason, and grievant's removal from employment, are hereby UPHELD.

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.⁹ You must file a notice of appeal with the clerk of the circuit court in the

⁹ 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁰

[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

that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7944

Hearing Date:	January 18, 2005
Decision Issued:	January 20, 2005
Reconsideration Request Received:	February 4, 2005
Response to Reconsideration:	February 7, 2005

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.¹¹

OPINION

Grievant submitted a handwritten appeal of the hearing decision. Grievant failed to comply with the requirements cited above because he did not provide a copy of his request either to the other party, or to the EDR Director. Moreover, an attorney represented grievant during the hearing. Neither grievant nor his attorney has notified the hearing officer that the attorney's services have been terminated. Nonetheless, in this case only, the hearing officer elects to respond to grievant's out-of-compliance request because it can be addressed succinctly.

¹¹ § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Grievant claims to have new evidence (phone calls) that could not have been discovered at the time of the hearing. However, grievant fails to explain what these phone calls were, when they occurred, to whom and from whom the calls were made, and what relevance (if any) these calls have to his grievance. Grievant also failed to offer any evidence that these calls could not have been discovered prior to the hearing. Second, grievant cites Va. Code §8.01-4182 in his request; however, the current Code does not contain such a section. Grievant does not explain why he cited this code section or what it refers to. Finally, grievant alleges misconduct by the hearing officer. However, grievant provides no evidence to explain or support his allegation.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's request and concludes that there is no basis to change the Decision issued on January 20, 2005.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.¹²

David J. Latham, Esq.
Hearing Officer

¹² 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).

