

Issue: Group II Written Notice with termination (due to accumulation) (failure to report back to work); Hearing Date: 02/01/05; Decision Issued: 02/02/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 7966



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7966

Hearing Date: February 1, 2005
Decision Issued: February 2, 2005

APPEARANCES

Grievant
Director of Program Services
Advocate for Agency
One witness 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? Did the agency discriminate against or harass the grievant?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written notice for failure to report back to work without proper notice to supervision.¹ Due to an accumulation of prior active disciplinary actions, grievant was removed from state employment effective November 15, 2004.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.³

The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a Direct Service Associate for 17 years. Grievant has one prior active disciplinary action – a Group II Written Notice for failure to report back to work after lunch.⁴ He also has one inactive prior disciplinary action – a Group II Written Notice for unauthorized time away from the workplace issued on May 4, 2001.⁵

Grievant had obtained advance approval to use leave time beginning at 2:30 p.m. on November 1, 2004. On that date, grievant began his regularly scheduled lunch period of 45 minutes at 10:45 a.m. He went to a building on campus and ate his lunch. He then drove off campus to a store to purchase cigarettes and at about this time he developed a migraine headache. He drove to a nearby friend's house to see if the friend had medication for his headache. The friend did not have medication and grievant drove home. At some time between 2:00 and 2:30 p.m., grievant called his supervisor to tell her he had a headache. Grievant had a mobile telephone with him throughout the day on November 1, 2004. He could have called his supervisor at any time to let her know that he had a headache and that he had to go home. He did not call her until after 2:00 p.m. because it did not occur to him.

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

¹ Exhibit 1. Written Notice, issued November 15, 2004.

² Grievant was removed from employment due to the accumulation of two active Group II Written Notices, pursuant to Exhibit 4, Section VII.D.2.b(1), Department of Human Resource Management Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

³ Exhibit 2. *Grievance Form A*, filed November 19, 2004.

⁴ Exhibit 3. Group II Written Notice, issued May 28, 2003.

⁵ Although the Written Notice issued in 2001 is inactive for the purpose of accumulation of discipline, it is admissible during a hearing as evidence to demonstrate a pattern of same or similar behavior for which he has received discipline.

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 her evidence first and prove her claim by a preponderance of the evidence.⁶

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 of the Commonwealth of Virginia's Department of Personnel and Training Manual *Standards of Conduct* Policy 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 should warrant removal from employment.⁷ Leaving the work site during work hours without permission, and failure to report to work as scheduled without proper notice to supervisor(s) are two examples of Group II offenses.

The agency has demonstrated, by a preponderance of evidence, and grievant does not dispute, that he left the work site without permission following his lunch period on November 1, 2004. Further, it is undisputed that grievant failed to report back to work after his lunch period without giving notice to his supervisor until after his workday had essentially ended. Grievant's actions and failure to notify supervision constitute a Group II offense.

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

⁷ Exhibit 7. Section V.B.1, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

Grievant asserts that he incurs migraine headaches about once or twice a month. Although grievant has not presented medical documentation to the agency to support this claim, the agency did not contest his assertion. However, even assuming that grievant had a headache that was sufficiently disabling to require him to go home, the offenses that caused him to be disciplined were his leaving the work site without permission and his failure to properly notify his supervisor. Had grievant properly and promptly notified his supervisor that he had a headache and had to go home, it is probable that he would have been allowed to use sick leave and given permission to leave.

However, one notable inconsistency in grievant's recitation of events calls into question the credibility of his testimony. Grievant said that his headache began as he drove to a store to purchase cigarettes. Since he had sufficient money to purchase cigarettes, he could have purchased an over-the-counter headache medication but he did not. Instead he maintains that he drove to a friend's house, and then home, in search of medication. If grievant had a headache that prevented him from working, it would have only been logical to purchase a headache remedy while he was in the store purchasing cigarettes. The fact that he did not purchase a headache remedy suggests that his testimony about why he left work without permission may have been less than truthful.

Grievant claimed in his grievance that he was subject to discrimination. In fact, the center director who disciplined grievant is the same race as grievant. During the hearing, grievant acknowledged that he is not claiming discrimination based on race or any other protected classification. Grievant used the term discrimination to indicate that he believed he was not treated fairly by the center director. He feels that she harassed him by nitpicking about minor infractions. For example, she counseled him about being outside smoking when he was not supposed to be, and about talking with others when he should have been working. Grievant did not offer any witnesses to corroborate his claim of nitpicking. Grievant also objected to his reassignment to a different shift, however, grievant knew when he was hired that he could be reassigned to other shifts dependent upon agency needs.

From grievant's testimony, it appears that the center director counseled grievant about inappropriate behaviors that she had observed – one of the functions of a supervisor. While grievant may not have appreciated being counseled about these issues, he would not have been counseled if he had followed policies and procedures. Accordingly, it is concluded that grievant has not borne the burden of proof to demonstrate that he was the subject of harassment.

Grievant also mentioned in a written attachment to his grievance a Notice of Improvement Needed/Substandard Performance that he had received on August 17, 2004. The Grievance Procedure provides that a written grievance

must be initiated within 30 days of the date the employee knew of the event that formed the basis of the dispute.⁸ Grievant filed his written grievance on November 19, 2004 – more than 90 days after the Notice of Improvement Needed. Accordingly, the time limit to grieve the Notice of Improvement Needed had expired.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and grievant's removal from employment on November 15, 2004 are 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

⁸ §2.2, *EDR Grievance Procedure Manual*, effective August 30, 2004.

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 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

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 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.