

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow instructions, failure to follow established written policy, unsatisfactory attendance); Hearing Date: 03/03/05; Decision Issued: 03/07/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8000



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8000

Hearing Date: March 3, 2005
Decision Issued: March 7, 2005

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Human Resource Manager
Representative for Agency
Three 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 grievance from a Group II Written Notice issued for failure to follow supervisory instructions; failure to comply with established written policy; and, unsatisfactory attendance.¹ Because of the accumulation of prior disciplinary actions, grievant was removed from employment effective November 5, 2004.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³

The Virginia Department of Transportation (VDOT) (Hereinafter referred to as “agency”) has employed grievant as a toll collector for 14 years. Grievant has three active prior disciplinary actions: a Group I Written Notice for unsatisfactory attendance,⁴ a Group II Written Notice for failure to follow supervisory instructions, failure to report to work as scheduled, and unsatisfactory attendance,⁵ and, a Group I Written Notice for unsatisfactory attendance.⁶

As a toll collector, grievant’s regular attendance is particularly important. The position of toll collector is designated an “essential personnel” position.⁷ When a toll collector has frequent or unscheduled absences, toll booth operations can be adversely affected because replacement workers may not be readily available. This can result in closing a toll booth thereby reducing the number of open toll booths to the motoring public and causing unnecessary traffic backups. Alternatively, the agency may have to incur overtime expense to pay another toll collector to work a double shift.

Grievant has a history of attendance problems going back at least five years. In an effort to accommodate grievant, the agency had allowed her to work at the location of her choice and had given her weekends off. She was disciplined for excessive absenteeism in 1999, 2000, 2003, and twice more in 2004 prior to the discipline at issue herein.⁸ When grievant was disciplined in July 2004, she was advised in writing that she must provide documentation for any absence. When grievant was disciplined in September 2004, her supervisor issued to grievant a Notice of Improvement Needed/Substandard Performance. Grievant was instructed in that notice to provide medical documentation for any absence involving illness. She was also advised that failure to comply with this requirement could result in being placed on leave without pay. Moreover, she

¹ Agency Exhibit 2. Group II Written Notice, issued November 5, 2004.

² Agency Exhibit 3. Section VII.D.2.b.(1), Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

³ Agency Exhibit 1. Grievance Form A, filed December 3, 2004.

⁴ Agency Exhibit 7. Group I Written Notice, issued October 10, 2003.

⁵ Agency Exhibit 6. Group II Written Notice, issued July 29, 2004.

⁶ Agency Exhibit 4. Group I Written Notice, issued September 2, 2004.

⁷ Agency Exhibit 6. Attachment to Written Notice, July 29, 2004.

⁸ In addition to the active disciplinary actions cited above, grievant received a Group I Written Notice for excessive absenteeism on December 2, 1999, a Group I Written Notice for excessive absenteeism on September 30, 2000 and, a Notice of Improvement Needed/Substandard Performance for excessive absenteeism on March 7, 2003.

was advised that continued unplanned absences would result in disciplinary action up to and including termination of employment.

During the 12-month period preceding her discharge (October 25, 2003 – October 24, 2004), grievant was absent from work on 39 occasions.⁹ Grievant exhausted her sick leave and annual leave balances, and had to be placed on leave without pay status on six different occasions during the 12-month period. After being disciplined in September 2004, grievant incurred unscheduled absences on October 13 and 15, 2004. When grievant notified a supervisor on October 15th that she could not work, the supervisor reminded her that she had exhausted her leave and would have to submit medical documentation to cover her absence. She failed to submit documentation for the October 15th absence.

Grievant has diabetes mellitus and, following her removal from employment, was diagnosed with vertigo. Grievant's supervisor gave her a due process notice advising that she could be removed from employment unless she could provide documentation or evidence by November 4, 2004.¹⁰ Grievant met with her supervisor and the human resource manager two days later and was given the opportunity to provide information on her behalf. She was thereafter notified by mail that she was removed from employment.¹¹

Employees may ask their supervisor for leave balances (annual leave, sick leave, family/personal leave) at any time. Grievant often asked for her leave balances and they were provided to her, usually verbally, when the supervisor checked the balances in the agency's FMS II computer system. Employees have been notified on their paycheck stubs that they can also access their leave balances at any time via the Internet and the Commonwealth's Payline system.¹²

Grievant's record of frequent and unplanned absences exceeded that of anyone else who worked in the toll road collection department in recent years. Some years ago, an employee with a similar record of excessive absenteeism was also removed from employment. No other employee in recent years had exhausted their leave balances such that it became necessary to be placed in a leave without pay status. The disciplinary action taken in this case was discussed and evaluated in advance by toll road supervision and management as well as by human resource representatives from the toll road, the district office, and the agency's central office.

APPLICABLE LAW AND OPINION

⁹ Agency Exhibit 8. Grievant's Leave Balances computer report.

¹⁰ Agency Exhibit 2. Memorandum from supervisor to grievant, November 2, 2004.

¹¹ Agency Exhibit 2. Letter from supervisor to grievant, November 5, 2004.

¹² Payline is the computer record of an employee's complete pay history and leave history. Payline is available to any state employee via Internet 24 hours per day, seven days per week.

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 employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹³

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. 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 should warrant removal from employment.¹⁴ Failure to comply with established written policy and, failure to comply with established written policy are two examples of Group II offenses. Unsatisfactory attendance is a Group I offense.

¹³ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

¹⁴ Agency Exhibit 3. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

The agency has demonstrated, by a preponderance of evidence, that grievant's absences were excessive, many unplanned, and exceeded the absence record of other employees in the toll road department. The agency had attempted to accommodate grievant by allowing her to work at her location of choice and by allowing her to work a Monday-Friday work schedule. When this proved ineffective, the agency began to place grievant on written notice through the disciplinary process beginning in 1999. Grievant's excessive absenteeism continued and, during the past year, accelerated to the point where three disciplinary actions were issued in 2004. The agency has shown that the most recent disciplinary action was warranted due not only to her continued unacceptable absences but also due to grievant's failure to comply with written instructions to provide medical documentation of her absence. Therefore, the agency has shown that a Group II Written Notice was warranted.

Grievant makes much of the fact that, on occasion, she had requested a printed copy of her leave balances but was sometimes unable to get one from supervisors that she asked. The agency witnesses who testified indicated that they had given grievant leave balances verbally when requested but acknowledged that written copies were not always provided. This issue is a red herring. Grievant's leave balances are not at issue in this case. What is at issue is that grievant's frequent and often unscheduled absences were excessive, disruptive to operations, and resulted in overtime being paid to other employees to cover for grievant's absences.

At the hearing, grievant proffered a physician's excuse for October 15, 2004. She asserts that she submitted this excuse by placing it in her supervisor's mailbox at work on October 18, 2004. Neither grievant's supervisor, the operations manager, the toll road director, nor the human resource manager had ever received or seen this excuse prior to the day of the hearing. Grievant did not mention during the grievance resolution meetings that she had ever submitted such an excuse. However, even if grievant did submit this excuse in October 2004, her removal from employment would nonetheless have to be upheld. While removal of the failure to follow supervisory instructions charge would reduce the Written Notice to a Group I, the accumulation of three active Group I Written Notices and one active Group II Written Notice still normally results in removal from employment.¹⁵

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on November 5, 2004 and grievant's removal from employment effective November 5, 2004 are hereby UPHELD.

¹⁵ Agency Exhibit 3. Section VII.D.1.b.(2) and VII.D.2.b.(2), *Ibid*.

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.¹⁶ You must file a notice of appeal with the clerk of the circuit court in the

¹⁶ 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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁷

[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

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.