

Issue: Group II Written Notice with suspension (failure to report to work without proper notification); Hearing Date: 03/30/05; Decision Issued: 03/31/05; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8023



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8023

Hearing Date: March 30, 2005
Decision Issued: March 31, 2005

PROCEDURAL ISSUES

Grievant requested as part of the relief she seeks an award of “hardship pay” because of financial difficulty caused by her three-day unpaid suspension. A hearing officer does not have authority to direct an agency to award “hardship pay.”¹ A hearing officer’s authority is limited to rescinding suspension which would restore the salary loss from a suspension. Moreover, the agency’s Salary Administration Plan does not include a provision for “hardship pay.”

During the hearing, grievant attempted to add a new issue – that the district manager caused this disciplinary action to be issued as retaliation for a grievance filed several years ago by grievant. Grievant did not raise this issue in her written grievance. A hearing officer may adjudicate only those issues that have been included in the written grievance and subsequently qualified for hearing. Because grievant did not include the issue of retaliation in her written grievance, it has not been qualified for hearing.

APPEARANCES

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

Grievant
Representative for Agency
Three 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

Grievant filed a timely grievance from a Group II Written notice for failure to report to work as scheduled without proper notice to supervision.² As part of the disciplinary action, grievant was suspended from work without pay for three work days.³ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.⁴ The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant as a drivers' license specialist senior for 28 years.

Established written policy permits management to adjust an employee's work schedule temporarily within a workweek to meet operational needs.⁵ It had been a long established policy (for at least seven or more years) that the Saturday after Thanksgiving holidays is a mandatory workday for all employees. Employees are instructed to look at the bulletin board regularly and at least once per week. In 2003, a memorandum from the district manager was posted on the bulletin board and given to all employees advising that the Saturday after Thanksgiving is a "...mandatory work day for ALL employees unless on pre-approved leave."⁶ Grievant's office manager posted on the bulletin board and distributed to all employees a follow-up memorandum again reminding all employees that "the Saturday after Thanksgiving is a MANDATORY workday."⁷ In October 2004, the district manager issued a memorandum that was posted on the bulletin board and distributed to all employees stating that mandatory

² Exhibit 2. Written Notice, issued December 17, 2004.

³ Although the Written Notice indicates that the grievant was suspended from December 18-21, 2004, her suspension was only three days; one of the four days was a scheduled absence for which grievant was paid.

⁴ Exhibit 1. *Grievance Form A*, filed January 12, 2005.

⁵ Exhibit 12. Department of Human Resource Management (DHRM) Policy No. 1.25, *Hours of Work*, effective September 16, 1993, revised November 10, 2004.

⁶ Exhibit 5. Memorandum from district manager to office managers and assistant managers, October 20, 2003.

⁷ Exhibit 6. Memorandum from office manager to staff, October 30, 2003.

workdays would include "The day after a holiday (unless on pre-approved leave)."⁸

At some point during late October or early November 2004, the Customer Service Management (CSM) Director (district manager's supervisor) visited the office and, after normal working hours, held a voluntary question and answer session with employees who chose to attend. The meeting was voluntary and not all employees attended. During the meeting, the CSM Director told the group that holiday schedule planning would be done much earlier in 2005. He told employees to go ahead with the plans they had already made for 2004.

On November 15, 2004, the assistant office manager posted on the bulletin board a copy of the employee work schedule for the Thanksgiving week.⁹ She also gave a copy to each employee or placed a copy in their individual mailbox if an employee was not present. The schedule reflects the Thanksgiving holidays of Thursday and Friday, and shows that every employee, including grievant, was scheduled to work on Saturday, November 27, 2004.

Grievant did not request pre-approved leave for November 27, 2004. She was scheduled to work on that date but neither reported for work nor called supervision to indicate that she would not be at work.¹⁰ Grievant went out of state to spend the long Thanksgiving weekend with her family. All other scheduled employees reported for work on November 27, 2004. During non-holiday weeks, grievant normally works every other Saturday. She worked on the Saturday preceding Thanksgiving (November 20) and therefore, if there had not been a holiday, she would not normally have worked on November 27th.

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).

⁸ Exhibit 7. Memorandum from district manager to office managers and assistant managers, October 6, 2004.

⁹ Exhibit 4. Employee Work Schedule, November 22-27, 2004.

¹⁰ Exhibit 11. Employee Time Sheet, signed November 29, 2004.

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.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.2 of the Commonwealth of Virginia's DHRM *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.¹² Failure to report to work as scheduled without proper notice to supervisor(s) is one example of a Group II offense.

The agency has demonstrated, by a preponderance of evidence, that grievant failed to report to work as scheduled on November 27, 2004 and that she did not notify supervision that she would not report to work. Grievant acknowledges having committed this offense.

Grievant asserts that the Employee Handbook does not contain a policy or procedure that supports a mandatory work day after a Thanksgiving holiday. However, the Employee Handbook,¹³ in addressing Hours of Work, refers employees to DHRM Policy 1.25. That policy, as noted above, permits management to adjust employee hours of work in order to accommodate

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

¹² Exhibit 3. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹³ Employee Handbook, <http://www.dhrm.state.va.us/resources/manuals.html>, July 2004.

operational needs. Thus, the agency was in compliance with policy when it scheduled November 27, 2004 as a mandatory workday.

Grievant contends that she relied on a memorandum from the district manager's supervisor which states, *inter alia*, "Thanksgiving - is a 20 hour work week..."¹⁴ However, it is clear from reading the entire memorandum that it was a guideline for calculating overtime pay; it was not intended to limit the number of hours to be worked during Thanksgiving week. This is further corroborated by the employee work schedule which shows that all employees worked either 22 or 23 hours during the Thanksgiving week. Accordingly, grievant's reliance on this memorandum is misplaced. Grievant also relied on the Director's verbal statement to continue with plans already made. However, grievant never notified her supervisor or management that she had made plans for November 27th. Therefore, management had no reason to believe that grievant would not be available for work on that date. If grievant had notified management that she wanted to take leave on November 27th, management could have either approved or disapproved her leave request.

Grievant avers that she did not receive the holiday reminder memoranda distributed in 2003, the similar memorandum in 2004, or the work schedule for Thanksgiving week. Despite the management admonition to employees to check the bulletin board at least weekly, grievant testified that she never looks at the bulletin board. Interestingly, grievant acknowledges receiving the allegation memorandum issued by her manager, but claims she never bothered to read it and therefore did not submit a written response to the allegation.¹⁵ Also of interest is the fact that on November 22, 23, & 24, 2004, grievant worked the hours scheduled for her. Grievant had no explanation for how she was able to work her scheduled hours (which varied from those of several other employees) if she did not read the schedule.

Grievant acknowledged during the second resolution step meeting that the employee work schedule always changes during holiday weeks.¹⁶ With this knowledge, it was incumbent upon grievant to check the posted work schedule prior to each week containing a holiday to assure that she worked as scheduled. Management distributes directives via memoranda given individually to employees (or placed in their individual mailboxes) and by placing a copy on a bulletin board that employees are directed to read. Grievant adamantly stated that "I never read the bulletin board." If grievant fails to read management directives and memoranda, after having been told to do so, she does this at her own peril. Grievant must be held to have knowledge of the employee work schedule because she was told to read the bulletin board. Therefore, if grievant

¹⁴ Exhibit 1. Memorandum from CSM Director to district managers, November 5, 2004.

¹⁵ Exhibit 10. Memorandum from manager to grievant, December 6, 2004.

¹⁶ Exhibit 1. Second resolution step response, February 7, 2005.

decided to ignore her supervisor's instruction to read the bulletin board, she is nonetheless responsible for complying with the schedule posted thereon.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and three-day suspension 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
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.¹⁷ 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.¹⁸

[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 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).

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.