

Issue: Group II Written Notice (unauthorized absence from the workplace);
Hearing Date: 06/30/05; Decision Issued: 07/01/05; Agency: VDOT; AHO:
David J. Latham, Esq.; Case No. 8091



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8091

Hearing Date: June 30, 2005
Decision Issued: July 1, 2005

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Acting Facility Manager
Representative for Agency
One Witness 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

Grievant filed a timely grievance from a Group II Written Notice issued for unauthorized absence from the workplace.¹ The second-step respondent unconditionally² reduced the discipline to a Group I Written Notice.³ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴ The Virginia Department of Transportation (VDOT) (Hereinafter referred to as “agency”) employs grievant as a tunnel control supervisor; she has been employed for six years.

The agency has a written policy that states, “Employees who need to make a request for any absence from the workplace shall contact the Supervisor on duty, or their designee, to obtain approval for their request. No leave can be considered approved without the request being approved through a Supervisor.”⁵ Grievant’s supervisor (assistant tunnel superintendent) issued a memorandum to his subordinate supervisors (including grievant) stating, inter alia, “When you forward a P-8 [Employee Leave Request form] to me it would be beneficial if you would forward a White Slip indicating who will be replacing you during your requested absence. I will initial all White Slips and you will document the Schedule and Overtime Book to indicate your replacement.”⁶

On January 1, 2005, grievant was scheduled to work from 2:00 p.m. to 10:00 p.m. During the afternoon, grievant’s husband called and asked grievant to come home early because they had personal problems to resolve. Grievant called another tunnel control supervisor (TCS) and asked if he could take her place for the last two hours of her shift. The other TCS agreed to do so and he worked in grievant’s place from 8:00 p.m. to 10:00 p.m. Grievant left work at 8:00 p.m. Grievant did not call her supervisor to request permission to leave. She completed an Employee Leave Request form documenting both the name of her replacement and that she had taken two hours leave. She left the Request form in a mailbox on her supervisor’s office door. Grievant also documented the Schedule and Overtime Book to indicate the name of her replacement. The

¹ Agency Exhibit 1. Group II Written Notice, issued January 21, 2005.

² Agency Exhibit 4. Letter from acting facility manager to grievant, March 14, 2005. [NOTE: At the hearing, there was some confusion about whether the reduction of discipline was conditional or unconditional. The hearing officer concludes that the reduction of discipline was unconditional for two reasons. First, the second-step response does not specifically state that the reduction was conditioned upon grievant’s withdrawal of her grievance; it states only that grievant may either conclude the grievance or advance the grievance. Second, the third-step respondent stated in his response that “the disciplinary action as he [second-step respondent] presented in his relief, to reduce the discipline to a Group I offense, was appropriate and *shall remain in your file.*” (Agency Exhibit 5. Letter from district administrator to grievant, April 12, 2005) (Emphasis and italics added)]

³ Agency Exhibit 8. Group I Written Notice, issued January 21, 2005.

⁴ Agency Exhibit 6. Grievance Form A, filed February 18, 2005.

⁵ Agency Exhibit 8. Leave Guidelines for 24-Hour Tunnel Operations.

⁶ Agency Exhibit 2. E-mail from assistant tunnel superintendent to TCSs, November 8, 2004.

assistant superintendent subsequently approved grievant's leave for the two hours at issue and she was paid for the time.⁷

The acting facility manager stipulated that, had grievant called her supervisor or another management person, her request to leave two hours early would have routinely been approved because grievant had found a willing replacement to work the last two hours of her shift.⁸ Grievant has not previously been counseled or disciplined about leaving the work site without supervisory permission.

On multiple occasions prior to January 2005, grievant's supervisor and the operations superintendent had advised supervisors in staff meetings that management employees should be called at home only in emergency situations.

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

⁷ Agency Exhibit 4. Employee Leave Request, January 1, 2004. [NOTE: It was stipulated by both parties that grievant incorrectly wrote the year as 2004 but that she actually meant 2005.]

⁸ Agency Exhibit 4. Letter from acting facility manager to grievant, March 14, 2005.

circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.⁹

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 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.¹⁰ Leaving the work site during work hours without permission is one example of a Group II offense. Unauthorized time away from the work area is a Group I offense.

It is undisputed that grievant did not receive permission to leave work early on January 1, 2005 – either from her immediate supervisor or any other management person. Grievant argues that her understanding of management instructions allowed her to leave early under the circumstances. First, she offered un rebutted testimony that management had on repeated occasions said that they should not be called at home except in emergency situations. Grievant observes, correctly, that this could not reasonably be classified an emergency situation. She had ample time to call another TCS and obtain his agreement to work the last two hours of her shift. Thus, when she left, the tunnel had the requisite amount of supervision and operations proceeded as usual. Since there was no emergency, grievant felt that she should not call management.

Second, grievant asserts that the assistant superintendent's November 2004 memorandum is ambiguous because it does not specifically state that the TCS must have obtained supervisory permission before leaving early – as long as a replacement takes her place and all the required paperwork is completed. The acting facility manager acknowledged both at the hearing and in his second-step response, that the assistant superintendent's November 2004 memorandum could be interpreted in more than one way. He directed the assistant superintendent to re-issue his e-mail with further clarification.

It is true that the November memorandum does not specifically state that supervisory permission must be obtained prior to taking the requested leave. However, neither does it say that one does not need to obtain such permission. The obvious intent of the memorandum is to stress that it would be beneficial to

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

¹⁰ Agency Exhibit 7. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

the assistant superintendent if the person requesting leave arranges for their own replacement before submitting a request. Since the memorandum is silent on the specific issue of obtaining advance supervisory permission, grievant must look to other agency policy. In this case, the agency's leave guidelines unambiguously state "No leave can be considered approved without the request being approved through a Supervisor."¹¹ The November 2004 memorandum does not override or contradict this policy. Accordingly, grievant knew, or reasonably should have known, that advance supervisory approval of leave is required. If grievant believed that the November 2004 memorandum contradicted agency policy, she was obligated to question her supervisor about it rather than making the assumption that she did.

Grievant contends that one of her witnesses (another TCS) falsified his testimony when he claimed that he always calls the assistant superintendent for permission before leaving work early. Grievant states that on some occasions the witness did not call the assistant superintendent and instead asked grievant to tell him that he had left early after finding a replacement. However, grievant never questioned the witness about this during his testimony. Since grievant had the opportunity to examine the witness on this issue but did not do so, it calls into question grievant's contention that the witness falsified his testimony.

Summary

In view of the fact that grievant obtained a replacement and complied with what she believed to be the instructions of her supervisor and management, her offense is not so severe as to constitute the Group II offense of leaving the work site without permission.¹² The Group I offense of unauthorized time away from the work area is an example of the offense listed as "abuse of state time."¹³ There is no evidence that grievant abused state time by using state time for personal business, or abusing sick leave. Rather, she requested annual leave and subsequently the supervisor approved that request, albeit retroactively. Under the circumstances herein, because there was neither intended nor actual abuse of state time, a Group I Written Notice appears unnecessarily harsh, especially since this was a first offense. The possible ambiguity in the November memorandum, grievant's compliance with all requirements as she understood them, the fact that grievant did not abuse state time, and the fact that this was a first offense, all constitute mitigating circumstances.

Certainly, corrective action is warranted. It is clear from agency policy that supervisory permission is always required *before* the requested leave may be taken. While such permission is usually granted in writing, a supervisor may also approve leave requests verbally. As the agency noted during the hearing, if

¹¹ Agency Exhibit 8.

¹² This Group II offense is more typically used in a situation where an employee leaves the work site without having obtained a replacement, thereby creating a vacancy and leaving undone work that the employee would have performed if present.

¹³ Agency Exhibit 7. Section V.B.1.b, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

grievant had simply called her supervisor (or another member of management if the supervisor was unavailable) she would routinely have received verbal approval. No classified employee of the Commonwealth may give herself permission to take leave; there must always be supervisory permission – in advance. Given the totality of the unique circumstances of this case, it is concluded that grievant should be counseled verbally and that such counseling session should be documented in writing.

DECISION

The disciplinary action of the agency is reversed.

The disciplinary action issued on January 21, 2005 is hereby **RESCINDED**. Grievant shall be counseled verbally and the counseling session shall be documented in writing.

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.¹⁴ 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.¹⁵

[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

¹⁴ 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).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.