Issue: Group II Written Notice with suspension (disregard of procedures, willful neglect of responsibilities, failure to act in a manner that promotes confidence in the integrity and efficiency of the hearing process and, failure to report for work or request leave); Hearing Date: 09/26/05; Decision Issued: 09/27/05; Agency: DMAS; AHO: David J. Latham, Esq.; Case No. 8171

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

## DECISION OF HEARING OFFICER

In re:

Case No: 8171

Hearing Date: September 26, 2005
Decision Issued: September 27, 2005

## APPEARANCES

Grievant
One witness for Grievant
Program Manager
Advocate 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 disregard of procedures, willful neglect of responsibilities, failure to act in a manner that promotes confidence in the integrity and efficiency of the hearing

process and, failure to report for work or request leave.[1] As part of the disciplinary action, grievant was suspended without pay for five days. 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 Virginia Department of Medical Assistance Services (Hereinafter referred to as "agency") has employed grievant as a hearing officer for 12 years.

Grievant had scheduled a hearing to begin at 1:00 p.m. on June 30, 2005 in a location 148 miles from his office.[3] Grievant sent written notice of the hearing date, time, and location to the parties and their attorneys more than one month prior to the hearing.[4] Grievant received approval from his supervisor to take annual leave on June 29 and July 1, 2005 – the days immediately preceding and following the hearing date, respectively. His supervisor was not aware that grievant planned to be out of state on June 29, 2005. She had, however, told grievant that she expected the hearing to be lengthy because attorneys were involved, it was a high-profile case,[5] and legal maneuvering was anticipated. The supervisor had met with grievant on multiple occasions to assure that the case was being handled correctly. She told grievant that she planned to be available at her desk all day on June 30th so that grievant could call her if he encountered any problems during the hearing. Because of the round-trip driving time, and the anticipated length of the hearing, the supervisor did not expect grievant to come to his office prior to traveling to the hearing site. It is not unusual that hearing officers will not come to the office on those days when they have to travel out of town for a hearing.

A few days before the hearing, grievant notified a court reporter that the hearing for June 30, 2005 would begin at 2:00 p.m.[6] Grievant believes he mistakenly confused the time of this hearing with another hearing that had been scheduled for 2:00 pm. As a result, the court reporter appeared for the June 30th hearing at 1:45 p.m. However, the parties to the hearing, their attorneys, and witnesses all appeared for the June 30th hearing at or before the scheduled 1:00 p.m. starting time.

Grievant's normal working hours are 9:00 a.m. to 5:30 p.m. (presumably with a 30-minute lunch period). On June 30, 2005, grievant began the day still under the mistaken impression that the hearing was scheduled for 2:00 p.m. He left his out-of-state location at about 6:00 or 7:00 a.m. and drove first to his residence, then to his office to obtain a Travel Request authorization to use a state trip vehicle.[7] He arrived in the office at about 11:20 a.m., and then drove to the Fleet Management site to obtain a trip vehicle. The Travel Request form

[1] Agency Exhibit 1. Group II Written Notice, issued July 22, 2005.
[2] Agency Exhibit 1. *Grievance Form A*, filed July 29, 2005.
[3] Agency Exhibit 2. Mapquest estimated distance from grievant's office to hearing site.
[4] Agency Exhibit 2. Letter from grievant to parties, May 24, 2005.
[5] Agency Exhibit 1. Attachment to Written Notice, July 22, 2005.
[6] Grievant Exhibit 2. Assignment Confirmation, August 4, 2005.
[7] Grievant Exhibit 4. Office of Fleet Management Services *Travel Request* for June 30, 2005.

reflects that grievant was issued the trip vehicle at 12:12 p.m.,[8] although grievant avers that he was issued the vehicle a few minutes before noon. After driving for approximately 50 minutes, grievant glanced at the outside of the hearing file and realized that the hearing was scheduled to start at 1:00 p.m. Because he was then almost 100 miles away from the hearing site, he tried to call his supervisor. The battery in his mobile phone was dead and the car adaptor did not work. He stopped and used a pay telephone to call his supervisor. When the phone rang but was not answered, grievant disconnected before the voice mail system activated.[9] He then made a collect call to an administrative support person who reports to the supervisor. Grievant told her he was going to be late to the hearing, gave her the names of the parties involved, and asked that she contact the parties to notify them that he would be late.[10]

At 1:15 p.m., the assistant attorney general assigned to the case called grievant's supervisor to inquire why grievant had not yet appeared for the hearing. During the next half hour, the supervisor twice called grievant's mobile phone and left messages for him to immediately call her; grievant did not return the calls. The assistant attorney general called the supervisor twice more during the next hour or so to inquire about grievant's status. The supervisor was unaware of why grievant had not appeared for the hearing or of his whereabouts. At one point during the trip grievant took a wrong turn and had to retrace his steps to get back on the correct route. Grievant arrived at the hearing site at about 2:40 p.m. Grievant then conducted the hearing, concluding it at about 6:00 p.m. He returned the trip vehicle to Fleet Management at 8:52 p.m.

Grievant did not call his supervisor either on June 30 or July 1, 2005 to explain what happened. The supervisor called grievant on July 1st and grievant then explained what had occurred. During this explanation, the supervisor learned for the first time that grievant had called the program support technician on the previous afternoon.

Grievant had driven from his current office to the hearing site for other hearings on several previous occasions. The hearing site was in grievant's territory when he had been assigned to that area of the state in the past.

## 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

[8] Grievant Exhibit 4. *Ibid.*

[9] The supervisor's telephone log did not record any unanswered incoming calls between 10:31 a.m. and 1:49 p.m. on June 30, 2005.

[10] Grievant Exhibit 1. Affidavit of Program Support Technician, August 4, 2005.

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 his evidence first and must prove his 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 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.[12] Failure to follow supervisory instructions, perform assigned work, or otherwise comply with established written policy and, failure to report to work as scheduled without proper notice to supervision are examples of Group II offenses.

Failure to report to work or request leave

The agency charged that grievant committed a Group II offense by not reporting to work or requesting leave on the morning of June 30, 2005. However, grievant's immediate supervisor had spoken with him on June 29, 2005 and

[11] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

[12] Agency Exhibit 5. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

understood from the conversation that grievant "would not be in to work on the morning of the hearing because he would use the morning to travel to the hearing site and have lunch before the hearing."[13] If the supervisor expected that grievant would be traveling on business during the morning, then there was no need for grievant to report to work or request leave. Moreover, it is undisputed that grievant came to work at 11:20 a.m., picked up the Travel Request form, left for the hearing, conducted the hearing, and returned the trip vehicle at 8:52 p.m. Thus, grievant worked 9.5 hours (9.0 hours if he took a 30-minute one-hour meal break after the hearing). Based on this undisputed amount of time worked, there was no need for grievant to have reported to work at 9:00 a.m. or to have utilized leave time. It is concluded that grievant did not commit a Group II offense by not reporting for work at 9:00 a.m. or requesting leave because he worked more than the required eight hours on June 30, 2005.

Disregard of procedures, willful neglect of responsibilities, and failure to act in a manner that promotes confidence in the integrity and efficiency of the hearing process

Much of the evidence is this case is undisputed. Grievant was to conduct a high-profile hearing; grievant was well aware of its importance from multiple prior discussions with his immediate supervisor. Grievant arrived at the hearing significantly late, even for what he erroneously believed was a later starting time. The agency was embarrassed by this avoidable snafu because the parties had placed multiple calls to the agency and the Office of Attorney General during an hour and a half period when no one knew why grievant had failed to appear for the hearing. Grievant's failure to arrive timely for the hearing was entirely within his control. If grievant had looked at his case file when he left home that morning, he would have known that the hearing was scheduled for 1:00 p.m. Grievant also failed to allow an adequate time to drive to the hearing site. Driving within the applicable posted speed limits, the trip required at least two hours and 40 minutes. Even if grievant thought the hearing started at 2:00 p.m., he should have planned to leave his office no later than 10:45 a.m. For a 1:00 p.m. starting time, grievant should have left the office at 9:45 a.m.

The agency contends that grievant should not have been looking at his file while driving because it is unsafe and could have resulted in injury or damage. Grievant's undisputed testimony is that he was not reviewing the file but that he merely looked at the outside of the case folder and noticed the hearing time. Glancing at the outside of a case folder is no different than looking at driving directions. Of course, one must be especially cautious about looking away from the road, even if only for a moment. The hearing officer takes administrative notice that most people have done this at one time or another. The agency has not shown that grievant's look at the folder was out of the ordinary or unsafe for the driving conditions grievant was in at the time he looked at the folder.

[13] Agency Exhibit 1. Attachment to Written Notice, July 22, 2005.

The agency faults grievant for a misjudgment in failing to contact his supervisor. Grievant avers that he attempted to call the supervisor but there was no answer before he disconnected. The supervisor maintains that her telephone log does not reflect a call from a pay telephone during the period when grievant purportedly called her. While grievant cannot corroborate his attempt to call, neither can the agency prove that he did not make such an attempt. It is possible that in his panic, he dialed a wrong number. In any case, grievant did call another employee and gave her the information necessary to contact the parties to the hearing. His failures to contact the supervisor, leave her a message, or tell the support person to notify her were misjudgments. Likewise, grievant's failure to call the supervisor after the hearing was a poor judgment. He should have taken the initiative to promptly contact his supervisor to report what had occurred.

The agency speculated that grievant deliberately planned to exceed the speed limit while driving a state vehicle, and that he was attempting to review the case file while driving; however, the agency offered no proof of these allegations. Grievant did not admit to either allegation. Speculation about grievant's intent without corroboration is insufficient to carry the burden of proof.

Grievant argues that, while he was neglectful, it was not willful. The agency has not demonstrated that grievant's failure to appear for the hearing on time was intentional. The preponderance of evidence is that, some days before the hearing, grievant erred when he told a court reporter that the starting time for the hearing was 2:00 p.m. By giving such erroneous information to another person, that time apparently became imprinted in grievant's mind and he carried it forward to the day of the hearing. This was not intentional but rather a mistake of fact that grievant failed to recognize until it was too late. Accordingly, grievant was indeed neglectful, but not willfully neglectful.

However, given the high-profile nature of this case, and the controversy that preceded the hearing, grievant's neglect was significant. Grievant should have been more alert to the importance of the case. He should, for example, have double-checked the starting time of the hearing the day before the hearing to assure that he was allowing sufficient travel time to arrive in a timely manner. Grievant knew, or reasonably should have known, from his previous trips to the hearing location that he would need substantially more travel time than he actually allowed. His failure to allow adequate travel time was neglectful. Once grievant recognized his error, he should have assured that his supervisor was put on notice of his late arrival. It is understandable that grievant may have panicked when he realized that he would be late, however, it would have taken only a moment to instruct the program support person to notify the supervisor of what was happening. Had grievant done so, the supervisor would have been able to cover for grievant in a more knowledgeable manner rather than being left totally in the dark. This resulted in both the supervisor and the agency being placed in an awkward and embarrassing situation. For these reasons, the totality of grievant's actions constituted unsatisfactory work performance.

Mitigation

The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has long service (12 years), an otherwise satisfactory performance record, and no previous disciplinary action. The agency considered these factors to be sufficiently mitigating that it decided to impose a five-day suspension rather than the maximum 10-day suspension.

There are other factors that warrant consideration. In mitigation, grievant has repeatedly expressed remorse and embarrassment for his error in arriving late for the hearing. The fact that grievant had erroneously notified the court reporter of a 2:00 p.m. starting time corroborates that his assertion that on June 30th he was initially under the impression that the hearing started at 2:00 p.m. There is no evidence that grievant's late arrival was intentional. He has previously been late to a hearing only once in 12 years when a traffic accident caused a delay beyond his control. In addition, when grievant realized his error he immediately took corrective action to ameliorate the situation by arranging to have the program support person alert the parties that he would be late. On the other hand, factors that support the offense include the fact that, even though grievant thought the hearing began at 2:00 p.m., he nonetheless arrived about 40 minutes after that time. Thus, grievant failed to properly plan his travel so as to arrive before what he believed to be the scheduled start time of the hearing. Further, grievant neither contacted his supervisor nor asked the program support person to notify the supervisor of what was occurring.

Summary

The totality of the circumstances in this case demonstrate that grievant was neglectful in his handling of this case. However, the agency has not demonstrated that grievant's neglect was intentional. In fact, the second-step respondent to the grievance characterized grievant's actions as misjudgments. While misjudgments are subject to corrective action under the *Standards of Conduct*, a mistake in judgment is, by definition, not intentional. The agency has shown that grievant's error regarding the hearing time was compounded by his failures to properly plan his departure time and, to allow an adequate amount of travel time. Grievant's actions were unsatisfactory work performance which constitutes a Group I offense.

## DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued on July 22, 2005 is hereby REDUCED to a Group I Written Notice. Because a Group I offense does not normally warrant a suspension, the agency must reimburse grievant for the five-day

suspension. The Group I Written Notice will remain active for a period of two years.

## 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

[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).

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

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