

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions and leaving the worksite without permission); Hearing Date; 05/26/06; Decision Issued: 05/31/06; Agency: Dept. of Rehabilitative Services; AHO: David J. Latham, Esq.; Case No. 8249; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8249

Hearing Date: May 26, 2006
Decision Issued: May 31, 2006

APPEARANCES

Grievant
Attorney for Grievant
Director of Occupational Therapy
Representative for Agency
Two 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

Grievant filed a timely grievance from a Group II Written Notice issued for failure to follow supervisory instructions and leaving the worksite without

permission.¹ Because grievant has two other active Group II Written Notices, he was suspended from work for 30 work days (in lieu of removal from state employment) as part of the disciplinary action. 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 Rehabilitative Services (Hereinafter referred to as “agency”) has employed grievant as a rehabilitation engineer for 30 years. Grievant has two prior active Group II Written Notices, both for failing to follow supervisory instructions.³

Grievant is an exempt employee under the Fair Labor Standards Act. He is expected to occasionally work beyond his regular 40-hour per week schedule (9:00 a.m. to 5:30 p.m., 30 minutes for lunch) if agency work needs require it. Grievant’s supervisor has advised him that he should not routinely expect to receive compensatory time off if he works more than 40 hours in a particular week. She specifically advised him that, if he wanted compensatory time off, he must make a specific request for such time off and be granted approval by the supervisor.⁴ On October 14, 2005, grievant submitted a leave form because he arrived for work at 11:10 a.m. However, he submitted the form for 1.7 hours rather than 2.2 hours. He was taking credit for a half hour of overtime he had worked on another day. Grievant had not requested the use of compensatory time for the time worked.

Grievant and his wife both have medical conditions which sometimes result in grievant being late to work. In the past, grievant has had difficulty remembering to notify his supervisor that he would be late arriving at work. Grievant and his supervisor had worked collaboratively in the past to adjust his schedule but the late arrivals persisted.⁵ The supervisor counseled grievant in May 2004 regarding late arrivals.⁶ In June 2005, grievant suggested the use of a time clock with weekly time clock cards to accurately record his arrival/departure times and the agency agreed. The card records times of arrival and departure for one week. Grievant is required to submit his time card to his supervisor each Monday for the preceding week.⁷ Grievant had failed to turn in his time card on the due date approximately 12 times prior to November 2005. During the months preceding November, the supervisor met almost daily with grievant on work issues and reminded him regularly whenever he was late turning in his time card. Grievant failed to submit his time card for the week ending October 28, 2005 until November 7, 2005 – one week after the due date.

¹ Agency Exhibit 10. Group II Written Notice, issued December 2, 2005.

² Agency Exhibit 1. Grievance Form A, filed December 5, 2005.

³ Agency Exhibit 8. Group II Written Notices, issued on August 20, 2004 and, January 7, 2005.

⁴ Agency Exhibit 1. E-mail from supervisor to grievant, November 24, 2003. See also E-mail from supervisor to grievant, December 10, 2003.

⁵ Agency Exhibit 1. E-mail from supervisor to grievant, April 13, 2004.

⁶ Agency Exhibit 1. Counseling meeting minutes, May 11, 2004.

⁷ Agency Exhibit 1. Memorandum from supervisor to grievant, June 16, 2005. See also Memorandum from supervisor to grievant, July 17, 2005.

In the past when grievant left work early, he had failed to notify his supervisor. She had told him on more than one occasion to notify her personally if he had to leave work early for any reason.⁸ On November 3, 2005, grievant was scheduled to attend a recycling meeting at 1:00 p.m. Shortly before 12:30 p.m., grievant received a page indicating that he had an “emergency at home.” Grievant told a coworker that he was going home and expected to return within half an hour. He also asked the coworker to advise his supervisor about this situation if grievant had not returned by 1:00 p.m. Grievant went home (a ten-minute drive) and found that a contractor had accidentally cut a water line in his yard. Grievant shut off the water and then made arrangements to have the water line repaired. He returned to work and the meeting at 1:50 p.m. Although grievant has a mobile telephone, he did not call his supervisor at any time to report that he was going home, or that he would be delayed in returning to work. Grievant’s coworker became busy with a client and forgot to advise the supervisor about grievant leaving the facility.

Other employees have complained that grievant appears to be treated more leniently with regard to the above issues.

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

⁸ Agency Exhibit 1. E-mail from supervisor to grievant, December 10, 2003.

circumstances. In all other actions the employee must present his evidence first and must prove his 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. 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.¹⁰ Failure to follow supervisory instructions, and leaving the work site during work hours without permission are each Group II offenses.

Grievant admits that it was his responsibility to notify his supervisor that he had to leave, and to report that he would not return in time for the meeting.¹¹ Grievant notes that he and the primary presenter at the meeting had discussed the substance of her presentation the previous day. Because he was already familiar with the content of her presentation, he believes his absence from the meeting was not critical. Assuming that this is true, it nevertheless does not absolve grievant of his responsibility to notify his supervisor that he would be late to the meeting. Grievant maintains that his coworker was to blame because the coworker forgot to notify the supervisor. This excuse does not remove grievant's responsibility. When grievant relies on another person to complete a task for which grievant has responsibility, grievant remains responsible – as he admitted during the hearing. Grievant could easily have called his supervisor either from his home telephone or from his mobile telephone. His failure to directly notify his supervisor, particularly in view of prior counseling about this issue, was a failure to follow supervisory instructions.

Grievant asserts that he had attempted to turn in his time card on the due date (October 31st) but that his supervisor was busy with another employee and that he was unable to hand it directly to her. He put the time card on his desk and forgot about it until he discovered it several days later. Grievant contends that one of his medical conditions causes him to forget unimportant things and that is why he forgets to turn in his time cards each Monday. However, grievant's supervisor has repeatedly stressed the importance of submitting his time card when due so that leave records can be timely updated. Moreover, grievant's physician has stated that while grievant's condition may cause him to have

⁹ § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

¹⁰ Agency Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

¹¹ Agency Exhibit 1. Grievance Form A, filed December 5, 2005.

memory lapses, “I doubt it would interfere with his job performance.”¹² If grievant continues to forget to timely submit his time card, it would appear that he considers this task to be unimportant notwithstanding the repeated instructions from his supervisor. While grievant may consider this to be an unimportant task, he knows that the agency considers it to be important. It is therefore within grievant’s control to prioritize this task as important and comply with his supervisor’s instructions.

Another of grievant’s medical conditions had been adversely affecting his ability to sleep resulting in fatigue and forgetfulness. However, about one year ago, grievant began using a therapeutic device that largely alleviated this problem and allowed him to obtain a more normal amount of sleep. Accordingly, this particular medical condition should not have been a factor in October and November 2005.

Grievant argues that his subtraction of half an hour from his late arrival on October 14th should not be considered part of the discipline because it was not mentioned on the Written Notice. However, this incident was included in the due process notice given to grievant and grievant specifically addressed it in his response to the due process notice. This was another example of grievant’s failure to follow supervisory instructions – the overarching offense cited on the Written Notice. Moreover, the due process notice and grievant’s response were included in the 33 pages of attachments referred to on the Written Notice. Therefore, grievant was on notice that this incident was part of the offense that precipitated the disciplinary action.

Grievant also argues that the second step respondent removed from the disciplinary action grievant’s failure to notify his supervisor that he would be late for the November 3rd meeting, and that this issue should not be considered in the hearing. However, this argument is not persuasive for three reasons. First, the second step respondent only *recommended* dismissal of that incident. Second, by pursuing his grievance to a hearing, grievant effectively rejected the recommendation. Third, a hearing conducted by a hearing officer is *de novo*, and requires the hearing officer to review all facts afresh and independently as if no determinations have yet been made.¹³

In his written grievance, grievant complains that the agency has ignored the advice of his physicians. However, under cross-examination, grievant admitted that the agency had accommodated every request made by his physicians.¹⁴ Therefore, grievant’s written complaint about this issue is given no evidentiary weight.

Mitigation

¹² Agency Exhibit 3. Statement from physician, November 14, 2005.

¹³ Section VI.B, EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

¹⁴ Agency Exhibit 3. Letter from supervisor to grievant, October 25, 2004.

The normal disciplinary action for a second active Group II offense is removal from state employment. 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 both long service and otherwise satisfactory work performance. It is undisputed that grievant is technically proficient in his job, that he has performed his job well over the years, and that he has been recognized both by the agency and by outside organizations for his accomplishments. Aggravating factors include the fact that grievant now has three active Group II Written Notices, all for the same offense of failing to follow supervisory instructions. The agency considered both mitigating and aggravating circumstances and reduced the normal discipline from termination of employment to a 30-day suspension. Given the totality of the evidence, it is concluded that the agency's discipline was measured and appropriate considering the circumstances of this case.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and 30-day suspension for failure to follow supervisory instructions is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.¹⁵ 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.¹⁶ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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 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).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.