

Issues: Group II Written Notice (failure to report to work as scheduled without proper notice and failure to follow a supervisor's instructions), Group II Written Notice (unauthorized use and misuse of state property, abuse of state time and resources), and Termination (due to accumulation); Hearing Date: 05/11/06; Decision Issued: 05/12/06 (**vacated 05/16/06**); Agency: VDH; AHO: David J. Latham, Esq.; Case No. 8265, 8309; Outcome: Order of Hearing Officer issued 05/16/06 - hearing request to be placed in abeyance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8265/8309

Hearing Date: May 11, 2006
Decision Issued: May 12, 2006

PROCEDURAL ISSUES

Grievant requested as part of her relief that the agency transfer her to an unspecified location and position. A hearing officer does not have authority to transfer an employee.¹ Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

Grievant was instructed to submit documents and a witness list to both the hearing officer and the agency advocate to arrive not later than May 5, 2006.² Grievant failed to submit either any documents or a witness list prior to the deadline. On the day before the hearing, grievant faxed a witness list to the hearing officer but did not send it to the agency advocate.³ On the day before the hearing, grievant requested a postponement, claiming that she was incapable of representing herself and had not been able to arrange for someone else to represent her. Grievant had not previously advised the hearing officer of any condition that would prevent her from representing herself. The hearing officer denied the request and conducted the hearing on May 11, 2006.

¹ § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

² Notice of Hearing, April 7, 2006.

³ None of the 21 witnesses on grievant's witness list appeared for the hearing.

Grievant failed to appear for the hearing and failed to call the hearing officer prior to the hearing. About 15 minutes before the end of the hearing, an agency employee notified the hearing officer that grievant had just called and said she was having a "car problem." Grievant did not say when or if she was going to come to the hearing. When all agency evidence had been presented, grievant had still not appeared and had not called again; the hearing was concluded.

APPEARANCES

Health Director
Advocate for Agency
Two witnesses for Agency

ISSUES

Did 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

The grievant filed timely grievances from two Group II disciplinary actions. The first Group II Written Notice was issued for failure to report to work as scheduled without proper notice and failure to follow a supervisor's instructions.⁴ The second Group II Written Notice was issued for unauthorized use and misuse of state property, and abuse of state time and resources.⁵ Because of the accumulation of active disciplinary actions, grievant was removed from state employment effective September 1, 2005. Following failure of the parties to resolve the grievances at the third resolution step, the agency head qualified the grievances for hearing.⁶ The Department of Health (hereinafter referred to as "agency") has employed grievant for 19 years. She was a health counselor at the time of removal. Grievant has one prior active disciplinary action – a Group I Written Notice for disruptive behavior.⁷

Employees who want to attend training courses or "in-service" training are required to fill out and sign a request form, and submit it to their supervisor. The request must then be reviewed and approved by four people – the supervisor, the business manager, the accounting manager, and the health director. Such

⁴ Agency Exhibit 1. Group II Written Notice, issued August 23, 2005.

⁵ Agency Exhibit 1. Group II Written Notice, issued September 1, 2005.

⁶ Agency Exhibit 8. *Grievance Forms A*, filed September 22, 2005 and September 30, 2005.

⁷ Agency Exhibit 6. Group I Written Notice, issued August 10, 2004.

approval is required in advance to assure that the training is necessary for the employee's job, that there is sufficient money in the budget to pay for the training, and that the training is consistent with agency goals. The Health Director had counseled grievant in 2004 for failing to request approval for training in advance. Grievant's supervisor had also counseled grievant in 2004 when she again failed to request advance approval for training.

On August 9, 2005, grievant did not report for work and instead attended a training session given by a non-agency organization. Grievant had never submitted an advance approval request form for this training course. Grievant's supervisor called grievant's work pager and late in the day, grievant called the supervisor. The supervisor directed grievant to come to the supervisor's office at 8:00 a.m. on August 10, 2005. Grievant did not report as directed. The supervisor located grievant elsewhere in the building at 8:30 and then met with her and the business manager to discuss the matter. Grievant was given an opportunity to provide a copy of any approval for training. Grievant admitted that she had not received written approval.

State policy provides that employees may make *incidental and occasional* personal use of the Internet or electronic communications systems (such as laptop computers).⁸ However, such use is prohibited if it interferes with the user's productivity or work performance, or if it interferes with the efficient operation of the computer system. However, agencies are permitted to promulgate more restrictive policies. In this case, the agency's policy is that computers are intended only for official state business. This policy is stated in agency policy "Information Technology Resources Policy and Procedures Manual," and is clearly stated in a banner that appears on computer screens each time they are turned on.⁹

In the period leading up to this incident, a number of employees reported to management that grievant had been frequently photocopying non-work items on the agency's photocopier. The agency knew that grievant had been taking graduate courses not related to her position. As a result of these complaints, it was decided to conduct a forensic examination of grievant's laptop computer. The examination was conducted by an Office of Information Management Information Systems Security Officer.¹⁰ Approximately one third of the material found on grievant's laptop computer was determined to be personal and not related to grievant's position or job.¹¹ The examination revealed that grievant had on her computer non-health training material not related to her work; personal letters to schools, insurance companies, and other businesses; various

⁸ Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communications Systems*, August 1, 2001.

⁹ Agency Exhibit 4. Report of Security Officer.

¹⁰ Agency Exhibit 4. *Ibid.*

¹¹ Agency Exhibit 4 & 5. Examples of non-work related material found on grievant's laptop computer.

graphics of animals and religious graphics; and Internet usage of many non-work sites such as Kelly Blue Book, women's clothing stores, Basics of IPOs, and the Magic Foundation.

The agency also examined an agency digital camera which grievant had used and found personal pictures of her automobile, parties, and friends or family members.¹² A review of signout logs revealed that grievant had checked out another laptop computer and a PowerPoint projector on various occasions and that there was no work-related reason for grievant to have used the equipment on those dates.

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 circumstances. In all other actions the grievant must present her evidence first and 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-

¹² Agency Exhibit 5. Photographs found on digital camera.

¹³ § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* 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 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.¹⁴ Examples of Group II offenses include: failure to follow a supervisor's instructions, failure to comply with established written policy, failure to report to work as scheduled with proper notice to supervision, and unauthorized use or misuse of state property. Abuse of state time is a Group I offense.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice or a Written Notice and up to ten days suspension. The normal disciplinary action for a second active Group II offense is a Written Notice and 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. Grievant has long service with the agency. However, the agency also considered as aggravating circumstances the fact that grievant had one additional active disciplinary action in 2004, that she had repeated prior instances of failing to be accountable in recent years, and that her misuse of state equipment and resources was way beyond merely occasional or incidental. Given the totality of the evidence, it is concluded that the agency's discipline was appropriate considering the circumstances of this case.

DECISION

The disciplinary actions of the agency are affirmed.

The Group II Written Notices issued on August 23, 2005 and September 1, 2005, and grievant's removal from state employment are hereby UPHELD.

APPEAL RIGHTS

¹⁴ Agency Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

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 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

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).

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

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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ORDER OF HEARING OFFICER

In re:

Case Nos: 8265/8309

Hearing Date: May 11, 2006
Order Issued: May 16, 2006

PROCEDURAL HISTORY

Grievant was instructed to submit documents and a witness list to both the hearing officer and the agency advocate to arrive not later than May 5, 2006.¹⁷ Grievant failed to submit either any documents or a witness list prior to the deadline. On the day before the hearing, grievant faxed a witness list to the hearing officer but did not send it to the agency advocate.¹⁸ On the day before the hearing, grievant requested a postponement, claiming that she was incapable of representing herself and had not been able to arrange for someone else to represent her. Grievant had not previously advised the hearing officer of any condition that would prevent her from representing herself. The hearing officer denied the request and conducted the hearing on May 11, 2006.

Grievant failed to appear for the hearing and failed to call the hearing officer prior to the hearing. About 15 minutes before the end of the hearing, an agency employee notified the hearing officer that grievant had just called and said she had been on the way to the hearing but having a "car problem." Grievant did not say when or if she was going to come to the hearing. When all agency evidence had been presented, grievant had still not appeared and had not called again; the hearing was concluded. Shortly before the end of the hearing, a psychiatrist transmitted to the agency a facsimile letter stating that

¹⁷ Notice of Hearing, April 7, 2006.

¹⁸ None of the 21 witnesses on grievant's witness list appeared for the hearing.

grievant was now under his care. He recommended that the grievance hearing be postponed.

In view of the medical documentation submitted by grievant's physician, the hearing officer will give consideration to the possibility of reopening the hearing at a later date.

Therefore, it is hereby ORDERED that the hearing request be placed in abeyance indefinitely until such time as grievant submits a written release from her psychiatrist certifying that grievant is fully capable of participating in her grievance hearing.

This hearing request is hereby removed from the Hearing Docket and is returned to the Hearing Coordinator until such time as grievant submits her psychiatrist's written certification. When the Hearing Coordinator is satisfied that grievant is able to participate fully in her grievance hearing, the Coordinator may reappoint the case to this hearing officer.

David J. Latham, Esq.
Hearing Officer