

Issue: Group II Written Notice with suspension (leaving the work site without permission, misuse of state equipment, failure to comply with supervisory instructions, failure to comply with established written policy, unsatisfactory performance, and abuse of state time); Hearing Date: 03/31/06; Decision Issued: 04/04/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8303; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8303

Hearing Date: March 31, 2006
Decision Issued: April 4, 2006

APPEARANCES

Grievant
Representative for Grievant
Four witnesses for Grievant
Human Resource Analyst
Representative for Agency
Four 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 leaving the work site without permission, misuse of state equipment, failure to

comply with supervisory instructions, failure to comply with established written policy, unsatisfactory performance, and abuse of state time.¹ As part of the disciplinary action, grievant was suspended without pay for ten 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 Transportation (Hereinafter referred to as “agency”) has employed grievant as a transportation operator³ for 13 years.

The Department of Transportation (VDOT) and the Department of Corrections (DOC) have a Memorandum of Agreement for the utilization of inmate labor for transportation projects.⁴ The policy provides, *inter alia*, that inmate crews are prohibited from working within the political boundaries of any city or town, or within 200 yards of a school that is in session.⁵ The policy provides additional work location restrictions that, in essence, require inmates to be used only in rural areas where the chance for contact with the public is very limited. Established written agency policy requires that VDOT notify DOC each day where inmates will be located and provide the route or routes taken to get to the worksite.⁶ Grievant functions as a crew leader using inmates from a state correctional facility to perform a variety of highway maintenance activities. Typically, an inmate highway work crew consists of eight inmates and one armed corrections officer.⁷ Grievant utilizes an agency van to transport the work crew from the correctional facility to the work site in the morning and return them to the facility at day’s end. Grievant receives the same firearms training as corrections officers and is authorized to carry and utilize weapons when relieving a correction officer.⁸ He is certified by DOC to fire weapons if an inmate attempts to escape.⁹

On September 2, 2005, grievant was at the area headquarters where he picks up the state van. Grievant’s child telephoned him at the headquarters and reminded him that the elementary school was having a “Donuts for Dads” function that morning. Grievant then drove the van to the correctional facility and picked up the inmate work crew and armed corrections officer at about 7:50 a.m. The work crew was supposed to report to the work site at 8:00 a.m. at a rural location approximately seven miles northwest of the corrections facility. Instead of going to the worksite, grievant drove the inmates and correction officer in the opposite direction five and a half miles southeast to his child’s elementary school

¹ Agency Exhibit 2. Group II Written Notice, issued September 9, 2005.

² Agency Exhibit 2. Grievance Form A, filed October 26, 2005.

³ Agency Exhibit 4. Grievant’s Employee Work Profile Work Description, October 25, 2005.

⁴ Agency Exhibit 6. Memorandum of Agreement, February 4, 2005.

⁵ Agency Exhibit 6. Section 5, *ibid.* DOC must be kept informed of inmate location at all times in the event that they have to pick up an inmate during the day, and for routine checks on inmates. See also Agency Exhibit 10. Section D.3, DOC Operating Procedure Number 463, Supervision of Inmate Highway Labor, September 1, 1989, which states: “The foreman should notify the correctional facility of any major changes in location not previously scheduled.”

⁶ Agency Exhibit 9. Asset Management Best Practices, July 1, 2005.

⁷ Work crew corrections officers are armed with a 12-gauge shotgun and a .38 caliber handgun.

⁸ Agency Exhibit 12. Grievant’s Individual Training Record showing annual training from 1993 through 2005.

⁹ Agency Exhibit 11. VDOT Firearms Re-certification training records.

which is located inside the boundaries of a nearby city.¹⁰ He parked the van on the shoulder of a road directly adjacent to the school property. The van was parked approximately 100 yards from the school building adjacent to the school's softball field.¹¹ Neither grievant nor the corrections officer radioed in to report the van's location.

Grievant left the corrections officer in the van with the eight inmates and went inside the school to attend the "Donuts for Dads" function with his child. It happened that the VDOT assistant residency engineer arrived at the school with his child at about 8:15 a.m. He was surprised to see the VDOT van with inmates parked next to school property. He walked over to the van and ascertained from the corrections officer that grievant was the crew leader/driver. He then walked into the school, located grievant among the parents, and asked him to move the van out of the area. Grievant did not immediately comply with the first request to move the van citing a desire to see his child; the assistant residency engineer again insisted that grievant take the van away from the school and grievant complied. Grievant drove back to the area headquarters where he told his supervisor that the assistant residency engineer had "caught him" at the elementary school. He then drove the inmate work crew to the assigned work site arriving there about 9:00 a.m.

The assistant residency engineer returned to his office at about 9:20 a.m. where he notified grievant's supervisor, human resources, and the agency's public relations unit. The assistant residency engineer knew that among the people at school that day were neighbors, town officials who knew that he was employed by the agency, and a local newspaper reporter. Grievant was placed on pre-disciplinary leave until issuance of the Written Notice one week later.

The superintendent of the correctional facility (who happens to be grievant's father) testified that he was concerned when he learned that the inmate van had been parked adjacent to school property inside the city limits. If the superintendent had known of the inmates' location, he testified that he would have sent a vehicle to pick up the inmates and his corrections officer to take them out of the area. The corrections officer was also given corrective action by DOC for failing to radio in the change in location.

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

¹⁰ Agency Exhibit 7. Map of area showing locations of area headquarters, assigned work site, elementary school and relevant mileage figures.

¹¹ Although grievant's father estimated the distance to be 150-175 yards, an aerial photograph (Exhibit 13) of the location reveals that the van was parked 100 yards from the school building.

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 employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹²

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.¹³ Leaving the work site without permission, misuse of state equipment, failure to follow supervisory instructions and, failure to comply with established written policy are examples of Group II offenses. Unsatisfactory work performance and abuse of state time are Group I offenses.

The agency has demonstrated by a preponderance of evidence, and grievant has admitted, that he parked an agency van with eight inmates and an armed corrections officer adjacent to an elementary school property in order to attend a school function with his child. In so doing, grievant committed multiple

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

¹³ Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

offenses in violation of the Standards of Conduct. First, he left the preassigned route to the work site without permission from a supervisor. Second, he failed to follow supervisory instructions to take the inmate work crew to the work site and arrive there at 8:00 a.m. Third, he utilized a state vehicle for his own personal use by driving in the opposite direction from the work site in order to spend time at a personal function at a school. Fourth, he failed to follow the written policy requiring him to notify DOC where the inmates were located. Fifth, he abused state time by attending a personal function which should have been charged to his available leave.

In addition, grievant took a van full of inmates inside the city limits in violation of written policy. Moreover, grievant left the van parked by the side of the road next to school property with only a single corrections officer so that he could attend a personal function inside the school. Written policy provides that areas inside the city limits and, areas within 200 yards of a school are prohibited work areas for inmate crews. Grievant argues that the inmates were not working at the school location and that they remained locked in the van while he was in the school. Although the policy addresses *work* areas, it is clear from the entire context of the policy that inmates should be kept away from populated areas. The policy designates as approved work areas only rural areas where public safety is not jeopardized. The agency cites multiple reasons for this policy. In populated areas, inmates may become emboldened to attempt escape, taunt passersby, or otherwise engage in disruptive behavior. Similarly, working in populated areas increases the chances for victims to see and possibly attempt retaliation against an inmate, and for the exchange of contraband. Should it become necessary for the corrections officer or grievant to shoot at an escaping inmate, danger to the public is dramatically increased when inmates are in a populated area. The bottom line is that there was no work-related reason for the van full of inmates to be parked next to school property; it should have been at a rural work site more than ten miles away.

Grievant argues that "others have done the same thing." However, grievant failed to offer any testimony or evidence of any specific incident in which another employee had driven a van full of inmates and an armed corrections officer into a populated area of the city and parked next to a school. Grievant offered the testimony of a witness who, while driving a state truck, had stopped at her bank to get spending money while en route to a work-related function out of town where she expected to have to buy lunch. In that case, it was not unreasonable for the employee to obtain money while en route. She did not drive many miles out of her way to stop at the bank, was on state business, and did not have inmates in the truck. Another witness for grievant testified that he had driven a state vehicle to a location where a family member was having car trouble and then returned to work. The employee did not have inmates in the state vehicle during this trip. Because his trip was unauthorized, corrective action was initiated against that employee in the form of written counseling. Therefore, the two examples offered by grievant are different from and significantly less serious because neither example involved a van full of inmates and an armed corrections officer.

Grievant's supervisor offered un rebutted testimony that if grievant had requested leave time to attend his child's function at the school, the supervisor would have approved the leave. In fact, he would have approved the leave on the morning of the incident if grievant has asked for an hour or so to attend the function. Grievant had ample leave time available, knew that leave could be used for this purpose, and knew that he could have requested leave. The supervisor also confirmed that those employees who have failed to radio in a change in location of inmates have been counseled.

A DOC Training Captain testified that inmate crews are required to have both a corrections officer and a VDOT inmate crew leader so that the crew leader can back up the corrections officer. In the instant case, if an inmate in the van had required assistance, or if there had been a traffic accident involving the van, the corrections officer could not have helped the inmates because grievant was not available to handle the weapons while the corrections officer attended to inmates. Thus, grievant's extended absence from the van while he was inside the school significantly increased the risk of danger to both the public and inmates if there had been any unusual occurrence.

Grievant argued that he and other employees have, on occasion, stopped inmate vans near rural convenience stores to obtain food and drink. While this practice is also a violation of policy, it is not nearly as egregious as the multiple offenses grievant committed in this case. The policy permits inmate labor to be used in rural areas as long as they are more than 50 yards from businesses and homes. However, parking next to an elementary school full of young children is clearly a much more serious violation, especially when considered in conjunction with the other offenses cited above.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from 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 and an otherwise good work record; the agency considered these factors to be mitigating when it decided to issue only one disciplinary action instead of separate written notices for each offense. However, the agency also considered as aggravating circumstances the fact that this incident had carried with it a significant potential for danger to schoolchildren, the adverse publicity it could have generated for both VDOT and DOC, and the fact that grievant could have requested leave to attend the function. Given the totality of the evidence, it is concluded that the agency's discipline was measured and appropriate considering all of the circumstances of this case.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and ten-day suspension for leaving the work site without permission, misuse of state equipment, failure to comply with a supervisor's instructions, failure to comply with established written policy, unsatisfactory performance, and abuse of state time are 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 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.