

Issues: Group II Written Notice (failure to perform assigned work) and Group III Written Notice with termination (falsification of a state document); Hearing Date: 05/05/06; Decision Issued: 05/08/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8307/8308; Outcome: Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case Nos: 8307 & 8308

Hearing Date:	May 5, 2006
Decision Issued:	May 8, 2006

**PROCEDURAL ISSUE**

Prior to the hearing, grievant did not submit to the hearing officer and the agency advocate either any documents or a witness list. Grievant failed to appear for the hearing, failed to notify either the hearing officer or the agency that he would not be appearing, and failed to submit any testimony or evidence on his own behalf. After waiting 15 minutes past the docketed hearing time, the hearing was conducted taking testimony from the agency witnesses who were present.

**APPEARANCES**

Administrator  
Advocate for Agency  
Two witnesses for Agency

## ISSUE

Did grievant's conduct 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 timely grievances from two disciplinary actions – a Group II Written Notice for failure to perform assigned work,<sup>1</sup> and a Group III Written Notice for falsification of a state document.<sup>2</sup> As part of the disciplinary action, grievant was removed from state employment effective December 19, 2005. The grievances proceeded through the resolution steps; when the parties failed to resolve the grievances at the third step, the agency head qualified the grievances for a hearing.<sup>3</sup>

The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for approximately 16 years. He was a regional ombudsman.<sup>4</sup> Grievant has two prior active disciplinary actions – a Group II Written Notice for failure to perform assigned work and, a Group III Written Notice with five-day suspension for an absence from work of five days without proper authorization or satisfactory reason.<sup>5</sup>

Regional ombudsmen are assigned approximately eight correctional facilities at which they are to monitor, evaluate, and provide research and consultative services for the operation of the inmate grievance process. Grievant's job description requires him to make an in-person monitoring visit to each facility *at least* four times per year.<sup>6</sup> Such visits must be documented in writing. During the first quarter of 2005, grievant visited only one of the eight facilities assigned to him. During the second quarter of 2005, grievant conducted only two visits to facilities. During the third quarter of 2005, grievant failed to conduct any facility visits. Thus, of the 24 visits he was required to make during this nine-month period, grievant failed to make 21 visits. When confronted by his manager about his failure to perform this responsibility, grievant failed to offer any explanation.

---

<sup>1</sup> Agency Exhibit 1. Group II Written Notice, issued December 19, 2005.

<sup>2</sup> Agency Exhibit 2. Group III Written Notice, issued December 19, 2005.

<sup>3</sup> Agency Exhibit 1 & 2. Grievance Forms A, filed January 19, 2006. [NOTE: Grievant filed his grievances more than 30 days after issuance of the disciplinary actions. Therefore, grievant was not in compliance with the 30-day filing requirement of the grievance process (see § 2.2 of the EDR *Grievance Procedure Manual*, effective August 30, 2004). However, the agency accepted the grievances, processed them through the resolution steps and qualified them for hearing. Accordingly, the agency has waived its right to deny these grievances as untimely filed.]

<sup>4</sup> Agency Exhibit 4. Employee Work Profile Work Description, effective November 1, 2004.

<sup>5</sup> Agency Exhibit 5. Group II Written Notice, issued March 8, 2005 and, Group III Written Notice issued February 14, 2005.

<sup>6</sup> Agency Exhibit 4. *Ibid.*

In November 2005, two of the facilities that had been assigned to grievant were reassigned to another ombudsman. Grievant transferred his file for these two facilities to the newly assigned ombudsman. Such files had been kept by grievant in a locked file cabinet inside his locked office. When the newly assigned ombudsman visited these two facilities in November, the facility ombudsman reported that grievant had not visited the facility during 2005. Because grievant's file contained reports indicating he had visited the facilities on April 7, 2005,<sup>7</sup> the matter was reported to the ombudsman manager. The manager contacted the facility to verify that grievant had not conducted any facility visits in 2005. She then confronted grievant who averred that he had written the reports and maintained that they were accurate. The manager reviewed grievant's leave record and found that grievant had been on sick leave on April 7, 2005.<sup>8</sup> When she again confronted grievant, he recanted his earlier statement and asserted that someone else must have prepared the reports.

### 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

---

<sup>7</sup> Agency Exhibit 2. Institutional Visit Reports, April 7, 2005.

<sup>8</sup> Agency Exhibit 2. Leave Activity Reporting Form, signed April 8, 2005.

circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>9</sup>

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 (DHRM) 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 of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.<sup>10</sup> Falsification of state records is a Group III offense. Failure to perform assigned work is a Group II offense.

In this case, the undisputed evidence preponderantly demonstrates that grievant committed the offense of failing to perform his assigned work of visiting correctional facilities on at least a quarterly basis during 2005. This is a Group II offense. The undisputed evidence also establishes that grievant falsified a state document by untruthfully reporting that he had visited two facilities, when, in fact, grievant was not working due to using sick leave. This is a Group III offense which normally results in removal from state employment.

### Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The 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 committed both a Group III offense and a Group II offense. In addition, he has accumulated two other active disciplinary actions which could have resulted in his removal from employment in 2005. Grievant has failed to present any evidence of mitigating circumstances. Other than long service with the agency, the record is devoid of any other mitigating factors. The multiple severe offenses committed by grievant during the past year significantly outweigh the lone mitigating factor. Accordingly, there is no basis to reduce the discipline issued by the agency.

---

<sup>9</sup> § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

<sup>10</sup> Agency Exhibit 6. Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

## DECISION

The decision of the agency is affirmed.

The Group III Written Notice for falsification of state records, the Group II Written Notice for failure to perform assigned work, and grievant's removal from state employment issued on December 19, 2005 are hereby UPHELD.

## 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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]

*S/David J. Latham*

---

David J. Latham, Esq.  
Hearing Officer

---

<sup>11</sup> 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).

<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.