

Issue: Group II Written Notice with suspension (failure to report to work without proper notification); Hearing Date: 05/04/06; Decision Issued: 05/10/06; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8319; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8319

Hearing Date: May 4, 2006
Decision Issued: May 10, 2006

APPEARANCES

Grievant
Representative for Grievant
Program Manager
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 report to work as scheduled without proper notice to a supervisor.¹ As part of the

¹ Agency Exhibit 2. Group II Written Notice, issued January 26, 2006.

disciplinary action, grievant was suspended without pay for three 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 an engineering technician³ for 13 years. When this disciplinary action was issued, grievant had one active prior disciplinary action – a Group II Written Notice for misuse of state property.⁴

In 2003, grievant’s supervisor gave grievant a Notice of Improvement Needed/Substandard Performance because grievant failed to give proper notice to his supervisor when requesting leave.⁵

The primary purpose of grievant’s position is to provide daily critical phase inspection of contractor activities in accordance with specifications, standards, and contract provisions. As an inspector, grievant knew that his work schedule was required to match that of contractors. At times, inspectors were required to work at night, on weekends, or more than five days per week. Grievant has willingly worked nights and weekends when required. During the fall of 2005, grievant was assigned to inspect the work of a contractor that was installing highway guardrails. The contractor had fallen behind on the work schedule and the agency notified the contractor in mid-November that it would have to increase its pace of installation. The contractor responded that it would take immediate action to assure that the contract was completed within the allotted time. Among the steps the contractor took was to make Saturdays a regularly scheduled workday.⁶ The senior inspector who normally supervises grievant met with grievant and three other employees on November 30, 2005 and informed them that Saturday work would be added effective the first Sunday in December.⁷ Grievant understood from this meeting that he would be expected to work on Saturdays in December. As it happened, another employee volunteered to work in grievant’s place on the first Saturday in December; on the second Saturday, work was cancelled due to a snow event. However, grievant understood from this meeting that he would be expected to work on Saturdays in December and the new year until the project was completed.

In November, grievant had verbally requested annual leave from Monday, December 19 through Thursday, December 22, 2005. Grievant planned to travel to Georgia to visit his parents during this time. Grievant’s supervisor verbally approved the leave. Grievant put his request in writing and his supervisor signed his approval to the leave on November 29, 2005.⁸ Grievant did not indicate the reason for his leave and did not tell his supervisor what his plans were. Grievant had planned to drive part of the distance to his parent’s home on Saturday, December 17, 2005. He made reservations for a motel in northern Georgia for the evening of December 17, 2005.

² Agency Exhibit 1. Grievance Form A, filed February 8, 2006.

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

⁴ Agency Exhibit 4. Group II Written Notice, issued March 10, 2003.

⁵ Agency Exhibit 4. Notice of Improvement Needed/Substandard Performance, September 3, 2003.

⁶ Agency Exhibit 5. Letter from contractor to agency, November 24, 2005.

⁷ Agency Exhibit 5. Supervisor’s notes, November 30, 2005.

⁸ Agency Exhibit 1. Employee Leave Request form, November 29, 2005.

From December 12, 2005 through January 8, 2006, grievant's regular supervisor (a senior inspector) was on leave. The regular supervisor had told grievant on December 11th that the other senior inspector would be in charge (and thus be the acting supervisor) during the rest of December while he was on leave. The senior inspector normally assigns work for the day, monitors work being performed, and completes required paperwork. On Friday, December 16, 2005, the acting supervisor came to the work site where grievant was monitoring the guardrail installation and reminded grievant that the contractor would be working on the following day – Saturday December 17th.⁹ Grievant told him that he had already paid for a motel in Georgia, had to leave on his vacation not later than noon on Saturday, and would not be coming to work on Saturday. The acting supervisor returned to the office; while doing so, grievant called his regular supervisor to complain about the decision. The regular supervisor told grievant that, if he could not work something out with the acting supervisor, grievant would have to work on Saturday. Grievant said "Alright," and the conversation ended.¹⁰

When the acting supervisor returned to his office, grievant's regular supervisor called and told him to return to the work site and tell grievant that he would have to work on Saturday. The acting supervisor returned to the job site and told grievant that, pursuant to his conversation with the regular supervisor, grievant would have to work on Saturday. When the discussion ended, the acting supervisor knew that grievant was unhappy about the decision but felt that grievant understood that he would have to work the following day.¹¹

The acting supervisor returned to the office. During the rest of the day, grievant did not call either his regular supervisor or the program manager. The program manager was at work on December 16, 2005. Grievant did not work on Saturday, December 17, 2005 nor did he call anyone to report that he would not be working. Because grievant did not work on December 17th, the agency was unable to oversee safety and quality requirements for the guardrails installed by the contractor on that day. Further, grievant failed to notify the agency's Smart Traffic Center that a certain section of guardrail would be under construction on that date.

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

⁹ The acting supervisor avers that he came to the work site because grievant had telephoned him late in the morning of December 16th to advise that the contractor was going to work on Saturday. Grievant maintains that he did not call the acting supervisor and that the acting supervisor showed up at the work site unexpectedly. In view of what subsequently transpired, it is not necessary to determine whether grievant first called the acting supervisor.

¹⁰ Grievant Exhibit 12. E-mail from regular supervisor to program manager, January 1, 2006.

¹¹ Grievant Exhibit 8. Statement of acting supervisor, undated.

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 from employment.¹³ Failure to report to work as scheduled without proper notice to a supervisor is an example of a Group II offense.

The agency has shown, by a preponderance of evidence, that grievant failed to perform assigned work when he failed to report for work as scheduled on Saturday, December 17, 2005. The undisputed evidence establishes that grievant was told on November 30, 2005 that he would have to work all Saturdays in December. Grievant was told again on December 16th, by both his regular supervisor and by the acting supervisor, that he would have to work the following day. Grievant failed to report for work on Saturday. This insubordinate act is a failure to follow supervisory instructions – a Group II offense.

¹² § 5.8, Department of Employment Dispute Resolution (EDR), *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.

Grievant argues that he did not think his supervisor expected him to work on Saturday, December 17th because the supervisor knew he was planning to be on leave beginning the following Monday. Most employees have a set work schedule - typically Monday through Friday. If grievant had such a normal work schedule his argument would be more persuasive. However, grievant knew when hired, and for the 13 years of his employment, that he does not have a set work schedule. Grievant acknowledged that he is sometimes required to work at night, on weekends, on holidays, and up to six days per week. His work schedule is determined by the agency based on contractor schedules and other agency work requirements. It was not unusual for grievant to have to work Saturdays, and he has done that on many occasions both before and since December 17, 2005. In this case, it is undisputed, and grievant admits, that he knew he was required to work Saturdays in December. Therefore, grievant knew that he would have to work on December 17th. Once grievant was told on November 30th about the Saturday work requirement, it was incumbent on him to tell his supervisor that he wanted to be off that day in order to accommodate his travel plans for his vacation the following week.

Grievant suggests that it has not been standard practice to request time off for the Saturday prior to the week in which an employee plans to take annual leave. While it may not have been standard practice, this was not a standard situation. The supervisor was not aware of grievant's travel plans or even that grievant planned to be out of state. Grievant could have noted in the comments section of the leave request form that he also wanted to be off on Saturday to accommodate his travel but did not do so.¹⁴ Therefore, it was reasonable for supervision to assume that grievant would work on December 17th as scheduled more than two weeks earlier. Grievant was the only person with knowledge of his travel plans. Therefore, it was incumbent upon grievant to notify supervision that he planned to drive out of state on Saturday so that arrangements could be made to find a replacement (as had been done on the first Saturday in December).

Grievant argues that he was unaware that the acting supervisor was in charge on December 16th. This argument is not persuasive for four reasons. First, grievant knew that his regular supervisor had been on leave since December 12th. Second, grievant also knew that his position is subordinate to that of a senior inspector. Third, grievant's regular supervisor told him that the acting supervisor would be in charge; the acting supervisor corroborated this testimony. Both senior inspectors testified credibly about this point and therefore, their testimony outweighs grievant's denial of that knowledge. Fourth, if grievant truly doubted the authority of the acting supervisor on December 16th, grievant could have called either his regular supervisor (whom he had called earlier that morning), or he could have called the program manager who was at work that day. Grievant's failure to pursue this with either person suggests that supervisory authority became an issue for grievant only after he was given notice that he might be disciplined.

¹⁴ See Grievant Exhibit 2, E-mail from supervisor to grievant, February 28, 2006, in which the supervisor explains to grievant the proper use of the comments section to identify when an employee wants to be off on weekends or holidays.

Grievant contended that he was not certified to inspect guard rails. However, grievant had been inspecting guard rails for some time and never raised this as an issue prior to receiving notice that he might be disciplined. In any case, the program manager offered un rebutted testimony that while formal certification is preferred, it is not required that grievant be certified providing the senior inspector is certified. In this instance, the senior inspector is certified for guardrail inspection.

Grievant averred that he had prepaid for a motel in Georgia for the evening of December 17, 2005. However, the bill submitted by grievant reflects that the room was not prepaid but was actually paid by credit card on the morning of December 18, 2005 when grievant checked out.¹⁵ Grievant's wife acknowledged in her written statement that the motel was only reserved, not prepaid.¹⁶

Mitigation

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. In this case, grievant has long state service and a generally satisfactory work performance record. The agency considered these mitigating circumstances and opted not to remove grievant from employment. In lieu of removal, grievant was suspended for three days.¹⁷ After carefully reviewing the circumstances of this case, it is concluded that the agency appropriately applied the mitigation provision.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and three-day suspension 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.

¹⁵ Agency Exhibit 1. Motel bill for night of December 17-18, 2005.

¹⁶ Grievant Exhibit 6. Statement prepared by grievant's wife, undated.

¹⁷ For a second active Group II Written Notice, the agency could have suspended grievant for up to 30 days, demoted him, or transferred him.

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.¹⁸ 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.¹⁹ 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

¹⁸ 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).

¹⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer