

Issue: Group II Written Notice (failure to follow supervisory instructions, perform assigned work, or comply with applicable written policy); Hearing Date: 09/28/06; Decision Issued: 10/02/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8431; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8431

Hearing Date: September 28, 2006
Decision Issued: October 2, 2006

PROCEDURAL ISSUES

Grievant requested as part of his relief that he be laterally transferred into a different position. A hearing officer does not have authority to transfer employees.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 also requested that the administration conduct themselves professionally. A hearing officer does not have authority to determine whether administrators are behaving professionally or to direct the methods by which work activities are carried out.² However, agencies must conduct business in accordance with all applicable laws, policies, and procedures.

APPEARANCES

Grievant

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

² § 5.9(b)7. *Id.*

Two witnesses for Grievant
Assistant Warden
Advocate for Agency
Two witnesses for Agency

ISSUES

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 a timely grievance from a Group II Written Notice for failure to follow supervisory instructions, perform assigned work or otherwise comply with applicable established written policy.³ The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.⁴ The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 11 years. He is a counselor.

As a condition of employment, grievant agreed in writing that he would familiarize himself with all departmental, division, and institutional policies and procedures.⁵ One such procedure requires that employees must provide verification of illness in each instance that the employee is absent from work on sick leave for more than two (2) consecutive days.⁶ A departmental policy requires an employee who is absent due to temporary medical disability to submit documentation from his medical care provider indicating the extent of the disability and the anticipated length of time before the employee will be fully able to resume his job.⁷ *The policy also states that the physician's certificate must describe the disability, state that the employee is unable by reason of the disability to be on duty during the entire period, and the probable length of the disability.* The same policy provides that advance approval shall be obtained from the supervisor when an employee expects to be absent.⁸

On April 6, 2006, grievant told human resources that his doctor had told him to take medical leave from work for 125 days. Grievant did not provide any documentation from a medical care provider to support this statement. Although human resources did not mention bringing in medical documentation, grievant's

³ Agency Exhibit 1. Group II Written Notice, issued July 11, 2006.

⁴ Agency Exhibit 1. Grievance Form A, filed July 17, 2006.

⁵ Agency Exhibit 8. *Conditions of Employment for Non-Security Staff*, signed December 26, 2001.

⁶ Agency Exhibit 7. Section IV.G, Institutional Operating Procedure 208, *Employee Work Schedules*, November 10, 2004.

⁷ Agency Exhibit 6. Section 5-12.13.A, Departmental Operating Procedure 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.

⁸ Section 5-12.10.C, *Id.*

supervisor had advised his employees in the past to submit documentation to human resources if they were going to be absent for more than two days. Grievant called his supervisor from home on the same day and assured him that he had spoken with human resources and that everything was taken care of. Grievant had not obtained advance approval from his supervisor for the absence.

Grievant was absent from April 7 through July 14, 2006. During that time he did not provide any medical documentation indicating the extent of disability or the length of time he would be absent. The only note grievant submitted was not from a physician but rather from a social worker who stated that grievant could return to work on a full time basis beginning on July 5, 2006.⁹

When grievant began his period of absence in April, he filed a claim with the state's third party administrator (TPA) of the disability program.¹⁰ He gave the TPA his correct mailing address. However, the human resource officer subsequently gave the TPA an incorrect address for grievant which resulted in some of the TPA mail to grievant being returned and delayed in final delivery.¹¹ For the first several weeks, the TPA declined to pay benefits because grievant did not submit sufficient medical documentation to the TPA.¹² On April 24, 2006, the human resource officer notified grievant that he was considered absent without authorization and was therefore placed on leave without pay status.¹³ Later, the TPA did obtain the information needed and approved benefits from April 14 through July 4, 2006.¹⁴

On May 1, 2006, grievant contacted the Human Resources Manager in Central Office. The HR manager authorized grievant's human resource office to pay grievant whatever leave balances he had available pending approval from the TPA. Up to the time of this hearing, some leave time had been paid to grievant but other leave time is still in dispute.

In mid-May, grievant telephoned his supervisor regarding a salary question.¹⁵ When the supervisor asked grievant why he had not yet submitted medical documentation, grievant did not want to discuss the matter. To date, grievant has still not provided proper medical documentation to human resources.

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

⁹ Agency Exhibit 5. Note from social worker, July 5, 2006.

¹⁰ Grievant Exhibit 1. UNUM Income Protection Claim, April 14, 2006.

¹¹ Grievant Exhibit 3. Envelope from TPA to grievant, June 12, 2006.

¹² Agency Exhibit 4. Letter from TPA to grievant, April 27, 2006.

¹³ Agency Exhibit 4. Letter from human resource officer to grievant, April 24, 2006.

¹⁴ Agency Exhibit 4. Letters from TPA to grievant, May 11, May 26, and June 23, 2006.

¹⁵ Agency Exhibit 2. E-mail from supervisor to human resource officer, July 6, 2006.

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 employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁶

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 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.¹⁷ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XI of the DOC *Standards of Conduct* addresses Group II offenses, which are defined identically to the DHRM *Standards of Conduct*.¹⁸ Failure to follow supervisory instructions, perform assigned work or otherwise comply with established written policy is a Group II offense.

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

¹⁷ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁸ Agency Exhibit 9. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

The evidence is undisputed that grievant did not seek advance approval from his supervisor before telling him that he was taking 125 days of leave. It is also undisputed that grievant did not provide either to his supervisor or to human resources any medical documentation to support the leave. In fact, to this date, grievant has still not given the agency documentation from a physician that explains his disability, the reason that the disability requires leave from work, and the probable length of the leave. Grievant knew, or should have known (because he had agreed to familiarize himself with agency policy) that he was required to provide this information either to his supervisor or to human resources. Accordingly, grievant failed to comply with applicable established written policy.

Grievant suggests that because the TPA eventually approved him for disability payments, he is not obligated to provide the agency with the above information. One of the purposes of employing a TPA to make disability decisions is to assure that agency supervisors and managers do not receive confidential medical diagnoses of employees. The TPA does not provide to the agency medical documentation it obtains from physicians. For this reason, the agency requires employees to have their physician provide limited documentation which does not include a diagnosis. This requirement is explained in an agency memorandum from the Human Resource Director.¹⁹ The agency seeks this information from the treating physician because, 1) it needs sufficient information to have a basis to approve leave, and 2) it needs to have some reasonable idea of the length of disability in order to plan replacement staffing during the period of absence. The only way for the agency to get this information is to require that the employee obtain a statement from his treating physician.

Grievant's argument that his supervisor and human resources did not specifically ask him to bring a physician's note is without merit. Grievant knew, or should have known, that agency policy requires medical documentation to support any absence in excess of two days. Moreover, grievant was advised by letter from the human resource officer on April 24th that his employment could be terminated if he did not provide the proper documentation. Not only did grievant not timely respond to this letter, but he has still not provided the requested documentation to this date.

Grievant also notes that the human resource officer gave the TPA an old, incorrect address for grievant even though grievant had initially supplied the TPA with his correct, current address. However, this error by the human resource officer has no bearing on grievant's failure to obtain proper medical documentation for his absence. The error resulted in one temporarily delayed letter from the TPA but did not change the fact the grievant did not submit a physician's note to the human resource office.

¹⁹ Agency Exhibit 6. Memorandum from human resource director to unit heads, September 29, 2000.

Grievant appears to be under the mistaken impression that the TPA is part of the agency. In fact, the TPA is a private sector company which works for the state under a contractual agreement. There is no exchange of medical information between the TPA and the agency. Therefore, it is necessary for grievant to have his physician provide: 1) proper medical documentation as requested by the agency (DOC), and separately, 2) medical information that the TPA requests.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice or a Written Notice and up to 10 days suspension. The policy provides for 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. The agency considered these factors when it mitigated the discipline from a Group III with termination (for incurring an absence in excess of three days without proper authorization) to a Group II with no suspension. Therefore, it is concluded that the agency's decision was within the limits of reasonableness.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice issued on July 11, 2006 is hereby AFFIRMED.

The agency is directed to promptly resolve the remaining leave time issue. It appears that central office is already reviewing the records to assure that grievant's leave time is properly credited and paid.

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 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.²⁰ 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.²¹ 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

²⁰ 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).

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.