

Issue: Group II Written Notice (failure to report without notice); Hearing Date: 03/21/07; Decision Issued: 03/26/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8536; Outcome: Employee granted partial relief – reduced to Group I; **Administrative Review: EDR Ruling Request received 04/13/07; EDR Ruling #2007-1638 dated 04/20/07; Outcome: Request untimely – HO’s decision affirmed;** **Administrative Review: DHRM Ruling Request received 04/17/07; Outcome: Request untimely – HO’s decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8536

Hearing Date: March 21, 2007
Decision Issued: March 26, 2007

PROCEDURAL ISSUES

Grievant requested as part of his relief that the warden apologize to him. A hearing officer does not have authority to require one employee to apologize to another 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."

The hearing officer advised the parties during the pre-hearing conference that documents were to be submitted so as to arrive in the opposing party's hands and the hearing officer's hands not later than March 14, 2007. The agency timely submitted its documents. Grievant mailed his documents on March 17th and they were received on March 20th in the Hearing Division office – too late to reach the hearing officer who was at another hearing on that date. In any case, most of grievant's documents were duplicative of agency documents; at the hearing, grievant did not proffer any of the non-duplicative documents.

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

APPEARANCES

Grievant
Four witnesses for Grievant
Warden
Three 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 report to work as scheduled.² 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.³ The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 13 years. He is currently a lieutenant. Grievant has one prior active disciplinary action – a Group II Written Notice for conduct unbecoming a corrections supervisor.⁴

The facility's chief of security (major) had notified all supervisors that he would be the only one to approve leave requests from the security staff.⁵ Advance approval must be obtained from the supervisor whenever an employee expects to be absent.⁶ However, when an emergency or other unanticipated absence prevents an employee from coming to work, the employee is required to call the officer in charge or the shift commander not later than two hours prior to the start of the employee's work shift.⁷ The shift commander is supposed to log all such "call-ins" in a log book.⁸ Designated personnel, including lieutenants, must report to work during inclement weather and emergency situations.⁹

² Agency Exhibit 1. Group II Written Notice, September 1, 2006.

³ Agency Exhibit 2. Grievance Form A, filed October 20, 2006.

⁴ Agency Exhibit 6. Group II Written Notice, March 29, 2006.

⁵ Agency Exhibit 3. E-mail from Major to supervisors, July 31, 2006.

⁶ Agency Exhibit 3. Section 5-12-10.C, Procedure 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.

⁷ Agency Exhibit 3. Section 5-12.10.D.2, *Id.*

⁸ Agency Exhibit 9. Logbook pages for period from August 23 to September 6, 2006.

⁹ Agency Exhibit 4. Conditions of Employment. See also Institutional Operating Procedure 202, *Hours of Work and Leaves of Absence*, September 1, 2003.

Grievant works on night shift from 5:45 p.m. to 6:15 a.m. In 2006, grievant was scheduled for rest days on August 29 & 30, and on September 2, 3 & 4; he was scheduled to work on August 31 and September 1. However, grievant had earlier requested, and been approved for, leave time for August 31st.¹⁰ Grievant's wife is in military service and in August 2006, she was transferred to a base in Georgia. Grievant and his wife drove to Georgia in her vehicle on August 29th. Grievant's intention was to return to Virginia by train on August 31st. Grievant knew before going to Georgia that Hurricane Ernesto was approaching the East Coast of the United States because the facility had begun to make preparations for possible severe weather.

On August 31st, grievant went to the Savannah, GA train station to purchase his train ticket. The weather was overcast and dark but Ernesto was not otherwise affecting weather in eastern Georgia because it had been downgraded to a tropical storm and was still in the Atlantic Ocean east of Georgia.¹¹ Because the forecast track of the storm was anticipated to directly affect Amtrak routes from North Carolina through Virginia and other points north, Amtrak had closed its train stations and posted a notice that train service was cancelled until September 2nd.¹² Grievant then went to the Greyhound bus terminal but found that the bus service had also been cancelled until further notice due to the anticipated storm. Grievant called the facility at about 6:30 p.m. and spoke with the lieutenant who was shift commander at that time. He advised the shift commander that public transportation was not available and that he would not be able to make it to work on September 1st. The shift commander failed to record grievant's call in the log book. The shift commander was upset at grievant because he was being moved to a different housing unit and grievant was to become the new shift commander.¹³

In mid-afternoon on September 1st, the assistant warden learned that the shift commander (another lieutenant) would not be at work that evening because he called in sick. The assistant warden asked the shift commander whether grievant would be there to act as shift commander. The shift commander told him that grievant would not be coming to work because he was stuck in Georgia with no transportation to get back to Virginia. Because the shift must have a lieutenant or higher-ranking officer on site, two captains were contacted to cover the shift.

Grievant returned to Virginia by bus on September 3rd. Grievant has always worked as scheduled during other prior hurricanes and natural disasters, and has otherwise had perfect attendance for years. The lieutenant who called

¹⁰ Agency Exhibit 5. Leave Activity Reporting Form, September 12, 2006.

¹¹ Hurricane Ernesto made landfall at the North Carolina-South Carolina border and tracked north northeast through eastern North Carolina and eastern Virginia. Eastern Virginia experienced heavy rain and high winds from the hurricane.

¹² Agency Exhibit 2. Letter from Amtrak to grievant, October 12, 2006.

¹³ Agency Exhibit 2. Memorandum from assistant warden to supervisors, August 28, 2006.

in sick on August 31st, and who failed to record grievant's call-in, was given a disciplinary hearing with the warden and then resigned from employment.

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 employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁴

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

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

normally should warrant removal from employment.¹⁵ 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*.¹⁶ Failure to report to work as scheduled without proper notice to supervision is an example of a Group II offense.

Although grievant's call-in was not recorded in the logbook, the preponderance of evidence establishes that grievant did call the shift commander on August 31, 2006. In addition to grievant's testimony on this point, the assistant warden testified that the shift commander told him on September 1st that grievant was stuck in Georgia with no available public transportation. The shift commander would not have known this unless he had received grievant's call-in on August 31st. Based on this undisputed testimony, it must be concluded that the shift commander was at fault for not logging grievant's call-in in the logbook.

The agency asserts that grievant should have called the Major to request leave for September 1st. The agency's contention is that, because grievant called in more than two hours prior to his shift, he should have requested leave pursuant to the Major's e-mail directive of July 31, 2006. Grievant argues that he was calling in pursuant to Procedure 5-12 because his absence was unanticipated. It is undisputed that grievant's absence was unanticipated. He had made plans to return to Virginia on August 31st and return to work on September 1st. He did not know that both Amtrak and Greyhound were going to cancel their interstate service for two or more days. The call-in policy states that employees must notify the officer in charge *at least* two hours before the beginning of their shift. Grievant notified the officer in charge approximately 23 hours prior to his shift, thereby complying with the call-in requirement.

Given the fact that grievant had a full day to notify the agency, the agency counters that grievant should have called the Major to request an additional leave day. Grievant maintains that he complied with the call-in policy because he called in *at least* two hours prior to the start of his shift, thereby giving the agency almost 24 hours to find a replacement to cover his position on the shift. Both agency and grievant have some merit in their arguments. While grievant failed to report to work as scheduled, he did give proper notice to the shift commander. If the shift commander had fulfilled his responsibility, he would have promptly notified the appropriate person that both he *and* grievant were going to be absent so that coverage could have been arranged.

On the other hand, grievant could have called the Major to advise him of the situation and request a day of leave to cover his absence. In addition, there

¹⁵ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁶ Agency Exhibit 3. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

is a question as to whether grievant did all that he could have done to arrange transportation back to Virginia. After learning that transportation by bus and train was not available, grievant did not check airlines because he assumed that the airports in Virginia would not be taking flights. Although grievant could have called airlines to determine whether this was true, his assumption was probably not unreasonable under the circumstances. However, grievant did not consider renting a car because he thought the highways might be either closed or dangerous to drive on. Given the fact that Ernesto had been down graded to only a tropical storm well before making landfall in North Carolina, grievant's decision not to rent a car and drive home was questionable. Thus, it appears that grievant did not make every reasonable effort to report to work as scheduled.

Viewing the evidence objectively, grievant did not understand the policy as the agency has interpreted it in this case. The agency's position is that if the unanticipated emergency occurs close to or at two hours before the beginning of the shift, the call-in policy rules apply. However, if the unanticipated emergency occurs significantly earlier than two hours before start of shift, the employee must call the Major to request leave time. While this interpretation may be reasonable, neither the Major's e-mail nor the call-in policy specifically states this. Grievant did not understand this to be the policy. When policies are reduced to writing, any ambiguity in the document must be construed against the author (in this case, the agency). Grievant's interpretation was that he called in at least two hours before shift start, and in fact, he called in well ahead of that deadline so as to give the agency even more time to find coverage. Grievant's interpretation is not unreasonable given the ambiguity in the policies. If grievant had failed to call at all, that would have constituted the Group II offense cited by the agency since it would have been a willful and deliberate offense. But, since grievant called the shift commander, he did not fail to report *without proper notice*. He made an effort to comply with policies as he understood them by giving more than adequate notice that he was stranded out of state.

On the other hand, grievant's failure to report was due, in part at least, to his failure to exhaust all reasonable possibilities to return to Virginia. As noted above, grievant could have rented a car and attempted to drive back to Virginia. Had he encountered blocked roads, he would have been able to show that he had exhausted all reasonable possibilities. Under these circumstances, grievant's offense is more appropriately characterized as equivalent to unsatisfactory or inadequate job performance – a Group I offense.

The agency inferred that grievant and the shift commander had made some kind of deal regarding grievant's absence. However, there is more to proving a "deal" than merely making an allegation. The agency did not offer the shift commander or any other witness who had knowledge of any alleged deal. Moreover, grievant's testimony, which was not rebutted, indicates that the shift commander was angry at grievant, and therefore would have been very unlikely to have made any type of "deal."

Mitigation

The normal disciplinary action for a Group I offense is a written notice. 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 does have long service. His job performance has generally been satisfactory; however, he does have another active disciplinary action, which constitutes an aggravating circumstance. Based on the totality of the evidence, a Group I Written Notice is within the tolerable limits of reasonableness.¹⁷

DECISION

The decision of the agency is modified.

The Group II Written Notice is hereby REDUCED to a Group I Written Notice.

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

¹⁷ Cf. Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

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

David J. Latham, Esq.
Hearing Officer

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.