

Issue: Misapplication of Policy – Notice of Improvement Needed and Docking of Pay; Hearing Date: 04/16/07; Decision Issued: 04/17/07; Agency: DCE; AHO: David J. Latham, Esq.; Case No. 8568; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:
Case No: 8568

Hearing Date: April 16, 2007
Decision Issued: April 17, 2007

APPEARANCES

Grievant
Two witnesses for Grievant
Employee Benefits Manager
Attorney for Agency
One witness for Agency

ISSUES

Did the agency misapply policy either by issuing a Notice of Improvement Needed/Substandard Performance to grievant or by charging him one day of leave without pay?

FINDINGS OF FACT

Grievant filed a grievance following issuance of a Notice of Improvement Needed/Substandard Performance and loss of one day's pay.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency

¹ Agency Exhibit 6. Notice of Improvement Needed/Substandard Performance, January 16, 2007.

head qualified the grievance for a hearing.² The Department of Correctional Education (Hereinafter referred to as “agency”) has employed grievant as an instructional assistant for 12 years.

All forms of leave are granted at the discretion of the agency. Before taking a leave of absence from work, an employee should request and receive his agency’s approval.³ State policy provides that if an agency does not approve an employee’s request for leave, but the employee still takes the time off from work, the agency may designate the absence as unauthorized, deny pay for missed time, and/or take disciplinary action.⁴

The agency has in the past experienced difficulty in assuring sufficient staffing during the December holiday season. In order to avoid problems during the 2006 holiday season, the assistant principal at grievant’s facility advised all employees in November of the policy for holiday leave.⁵ The memorandum advised employees that that each person was expected to work on the days before and after Christmas unless leave approval had been granted in advance. It further stated that, “Any staff that experiences an emergency during this time must provide medical/official documentation of your absence or lateness. **Failure to provide this documentation will result in those hours being charged to ‘leave without pay.’**” In late November, the assistant principal advised employees of certain days in December (including December 27th) for which no additional employees would be granted leave, i.e., days for which any further request for leave was closed (referred to in the memorandum as “Closed Days”).⁶ The above-quoted admonition was repeated in this second memorandum. Grievant received and signed for receipt of both of the above-discussed instructions.

Grievant is covered under the Virginia Sickness and Disability policy, which provides that an employee who uses sick leave must comply with management’s request for verification of the appropriateness of sick leave. An employee’s use of sick leave may be denied if the employee fails to comply with a reasonable management request for verification of the need for sick leave.⁷

Grievant was not granted advance approval for leave on December 27th. At about 7:00 a.m. on December 27th, grievant called and advised a secretary that his back was hurting and that he would be about two hours late in reporting to work. After making the call, grievant took two Aleve tablets and fell back asleep. At some point during the day, grievant called again and said he would

² Agency Exhibit 10. Grievance Form A, filed January 16, 2007.

³ Agency Exhibit 8. Section III.A, Department of Human Resource Management (DHRM) Policy 4.30, *Leave Policies – General Provisions*, revised April 2004.

⁴ Agency Exhibit 8. Section III.E, *Id.*

⁵ Agency Exhibit 1. Memorandum from assistant principal to all employees, November 16, 2006.

⁶ Agency Exhibit 2. Memorandum from assistant principal to all employees, November 28, 2006.

⁷ Agency Exhibit 9. p. 11, DHRM Policy 4.57, *Virginia Sickness and Disability Program*, November 25, 2005.

not be coming to work at all that day.⁸ Grievant did not go to a physician on that day or at any point thereafter to obtain medical documentation. When grievant came to work on December 28th, the assistant principal gave grievant a written reminder to obtain medical documentation.⁹ The following week, grievant was given another written reminder.¹⁰ When grievant failed to provide medical documentation within a reasonable time, the principal gave grievant a Notice of Improvement Needed/Substandard Performance (NIN/SP)¹¹ and charged him with one day of leave without pay.

About 12 years ago, grievant sustained a compensable back injury at work when a ward attacked him. Since that time, grievant has regular, recurring back pain which is manageable most but not all of the time with over-the-counter pain relievers. Once a year in July, grievant's physician administers a three-dose course of Cortisone to help control his back pain. Grievant acknowledged that he could have called his physician and obtained an excuse to cover the December 27th absence. Grievant did not call or visit his physician because he does not agree with the agency's policy and because he did not want to incur a charge for a doctor's visit.

One of grievant's witnesses testified that he has obtained physician's excuses when he was absent on a closed-leave day but that management has not always asked him to submit the excuse. A second witness for grievant stated that he had been absent on occasion on a closed-leave day and did not turn in an excuse but was not penalized in any way. The principal was not aware that these two employees had not turned in required medical documentation on those occasions.

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).

⁸ Grievant avers that he slept until about 4:00 p.m. and did not call back that day; the principal testified that grievant did call again later during the day to say he was not coming in that day.

⁹ Agency Exhibit 4. Note from assistant principal to grievant, December 28, 2006.

¹⁰ Agency Exhibit 5. Note from assistant principal to grievant, January 3, 2007.

¹¹ Agency Exhibit 6. Notice of Improvement Needed/Substandard Performance, January 16, 2007.

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, such as a claim of misapplication of policy, grievant must present his evidence first and must prove his claim by a preponderance of the evidence.¹²

The agency asserted that a Notice of Improvement Needed/Substandard Performance is not grievable. That assertion is incorrect. Assuming an employee has access to the grievance procedure, *any* employment-related issue may be grieved as long as six rules enumerated in the Grievance Procedure Manual are followed.¹³ While any issue may be grieved, only grievances challenging certain actions qualify for a hearing. In this case, grievant's claim and facts, taken as a whole, raised a sufficient question as to whether the action constituted an adverse employment action so as to qualify for hearing.

However, having heard all of the testimony and reviewed the evidence, it is clear that the Notice of Improvement Needed/Substandard Performance (NIN/SP) did not constitute an adverse employment action. The evidence supports a finding that grievant knowingly and deliberately failed to comply with supervisory instructions – a Group II disciplinary offense. The agency elected not to discipline grievant but only to advise him through the NIN/SP that he needed to improve his performance in following supervisory instructions. The NIN/SP is not disciplinary in nature and essentially constitutes a written reminder to comply with instructions in the future. Accordingly, it is concluded that the issuance of a NIN/SP in this case was a reasonable part of the performance evaluation process. Grievant expressed concern that the NIN/SP was in his personnel file. However, policy provides that a NIN/SP is maintained only in the *supervisor's file* (not the official personnel file) until completion of the annual evaluation.¹⁴ Therefore, the NIN/SP is not in grievant's official personnel file.

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

¹³ § 2.4, *Id.*

¹⁴ DHRM Policy 1.40, Performance Planning and Evaluation, revised August 1, 2001, provides that a NIN/SP would become part of an employee's official personnel file only if it was used to support an overall rating Below Contributor on the annual performance evaluation.

The essential facts in this case are undisputed. Grievant took a day of leave without advance approval. When he did so, grievant knew that he had not been approved for leave and he knew that he was required to provide medical documentation for his unauthorized absence even though he had a condition that he felt prevented him from attending work that day. Grievant also knew that his day of unauthorized leave would be charged to "leave without pay" if he did not provide the required documentation. Grievant received these instructions in two separate memoranda dated November 16 and 28, 2006. In addition, the assistant principal twice advised grievant in writing after December 27th that he must provide medical documentation but grievant failed to comply with this supervisory instruction.

Grievant elicited testimony from two employees who averred that they had not always been asked to submit medical documentation when they were ill on closed leave days, but did not suffer any adverse consequences. He contends that this amounts to disparate treatment. However, the principal was unaware of any such occurrences. If agency management was not aware of such infractions when they occurred, it could not have taken any action at that time. Moreover, without more information about those cases, it is impossible to determine whether there may have been extenuating circumstances that resulted in obviating the need for documentation.

Grievant also contends that the agency should be lenient in his case because the back problem that caused him to be absent on December 27th stems from a compensable injury he sustained at work about 12 years ago. In view of the fact that the agency could have issued disciplinary action in this case, it appears that the agency was lenient in treating this as a performance issue by issuing a NIN/SP.

Grievant acknowledged that he understood the supervisory instructions and could have relatively easily obtained medical documentation to cover his absence. He had ample time (two and one half weeks) prior to issuance of the Notice of Improvement Needed/Substandard Performance in which to obtain medical documentation. The sole reason grievant failed to follow his supervisor's instructions is because he disagreed with the agency's policy. If every employee who disagreed with an agency directive was free to ignore the directive without consequences, chaos would rule and agencies would be unable to function effectively. One of the conditions of any employment relationship is that employees must comply with the employer's reasonable directives, assuming they are not illegal or immoral. Failure to comply with reasonable instructions can result in consequences that the employee may not like. In this case, the consequences were loss of one day's pay and a written reminder (NIN/SP) to comply with the instruction in the future.

DECISION

Grievant has not shown, by a preponderance of evidence, that the agency misapplied policy when it issued a Notice of Improvement Needed/Substandard Performance and charged him one day's leave without pay.

Grievant's requests for relief are hereby DENIED.

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 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.¹⁵ 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.¹⁶ 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

¹⁵ 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).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.