

Issue: Group I Written Notice (abuse of State time); Hearing Date: 06/21/07;
Decision Issued: 07/13/07; Agency: VDOT; AHO: Jane E. Schroeder, Esq.; Case
No. 8624; Outcome: Full Relief – Written Notice Rescinded.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of Case Number 8624

Hearing Date: June 21, 2007
Decision Issued: July 13, 2007

PROCEDURAL ISSUE

One telephonic pre-hearing conference was held on June 14, 2007.

APPEARANCES

Grievant

Two Agency Representatives

Witnesses for Agency:

Former Information Technology Manager

Assistant Engineer

Administrative Office Specialist

Assistant Resident Administrator (the Grievant's Supervisor's Supervisor)

ISSUES

Did the grievant work on December 29, 2006?

FINDINGS OF FACT

Grievant was issued a Group I Written Notice for a violation of Code 35: Abuse of State Time, for unauthorized time away from the work place on December 29, 2006. The Agency alleges the Grievant did not work that day. The grievant claims that he was at work that day. The Grievant filed a timely grievance from the Group I Written Notice.¹ Following failure of the parties to resolve the grievance at the third step resolution step, the agency head qualified the grievance for a hearing.²

¹Agency Exhibit 7. Group I Written Notice issued March 13, 2007.

²Hearing Officer Exhibit 3. Grievance Form A filed March 22, 2007.

The Agency has employed the Grievant since 1988. According to his last Employee Work File, he holds the position of Trans Construction Inspector.³ According to the Assistant Resident Administrator (“Administrator” herein) who is the Grievant’s supervisor’s supervisor, the Grievant’s last review in October of 2005 did not note any problems regarding time away from work. The Grievant has no prior disciplinary actions.

The Grievant works as a guard rail inspector in a department at an agency site known as Camp **. In his department, there is a project engineer who is the supervisor, an administrative office specialist (“AOS” herein) and eight inspectors. This department is located on one side of the second floor of a building at Camp **.

The AOS has an enclosed office. From that office, it is not possible who was entering or leaving the inspectors’ offices. As part of her duties, she would prepare a Daily Work Log outlining the project, location, and operation of each of the eight inspectors. This was generally prepared and sent by e-mail to the project engineer and other supervisory personnel before 8:00 a.m. Typically, she would contact with each inspector in person, by phone, by walkie-talkie, or by e-mail, prior to preparing the report.

On December 29, 2006, the AOS prepared the Daily Work Log. She had not communicated with the Grievant that morning. She listed the Grievant as working that day, naming the project number, the location as “Various Guardrails” and the Operation as “Taking pictures, cost estimates.” Her testimony was that she carried that over from the day before, as she sometimes does when she does not talk with the inspector directly. The eight other inspectors and the project engineer were not at work on that day.

The AOS did not see the Grievant all day. At about 9:30 a.m., she got a call from the Administrator who was trying to locate the Grievant. The AOS went down the hall to the office that the Grievant shares with another inspector. The door was locked and no one answered her knock. She reported to the Administrator that she had not heard from the Grievant and he was not in the office at that time. The AOS did not recall calling the Grievant that day, nor did she go back to check his office later in the day to see if he was there. She testified that the Grievant could have gone in and out of his office without her being aware of it.

The Administrator testified that she had been in contact with the Grievant on December 21 regarding the Administrator wanting to accompany the Grievant to a guard rail site. The Grievant could not go on the 21st due to a doctor’s appointment. The Administrator then called the Grievant on the morning of December 29, 2006 to try to set up time that day for the guard rail trip and to give him a camera that his co-worker had requested. When she could not reach him on the walkie talkie, she called his business number, but left no voice mail message.

The Administrator also checked the Global Positioning System (“GPS” herein) used by that agency to find the location of certain employees, but the GPS system did not register any location for the Grievant. [The GPS system is an option that used on the work cell phones at the agency. The former information technology manager testified that map printout of the Grievant’s GPS phone shows a record of activity on December 28, 2006 at 9:42 a.m. and the no more activity until January 5, 2007.⁴ In a March, 19, 2007 Memo sent to employees at the Agency, a

³Agency Exhibit 8. Agency Employee Work Profile, Dated October10, 2006.

⁴Agency Exhibit 1: Maps and Written Log: Page 13

manager explains that the GPS system usage is being significantly scaled back because, among other things, “The tracking system does not work reliably and there is too much dead space.”⁵

The Administrator testified that she sent the Grievant an e-mail at 8:59 a.m. on December 29 asking him to call her with an explanation of where he was that day.⁶ She heard nothing from the Grievant that day, which was her last day at work before she went on a three week vacation out of the country.

The Grievant testified that his usual work hours are from 7:00 a.m. until 3:00 or 3:30 p.m.⁷

Since early December, 2006, the grievant has been assigned to assist one of the inspectors who was inspecting guard rails. On December 29, 2006, he arrived at Camp ** at or before 7:00 a.m. Before getting out of his own car, he called J.B., another agency employee, and left a voice mail message asking the address of a certain guard rail hit. Since he was having trouble with his work cell phone maintaining a charge, he had called J.B. on his personal cell phone. The Grievant then went to his agency truck and put diesel in the truck. J.B. called him back around 7:30 a.m. and told him the guard rail location he was asking about.

The Grievant went to that location in the agency truck to inspect the guard rail. He took pictures, but he had been having trouble with this camera and the pictures did not turn out. He took notes to report to his co-inspector about the site. Around 8:00 a.m., he went to another guard rail site where he took notes, but did not try to take pictures. Around 11:00 a.m., he went back to Camp ** and went into his office, entering the building via the back stairs. He saw no one. He stayed in his office until around 2:00 p.m., studying for one of two exams he was slated to take: one on guard rails and one on nuclear safety. When he left the office at 2:00 p.m., no one was there. He went to a third guard rail site, where he took notes. The notes on all three sites were part of a report that he turned in to the inspector he was assisting when that inspector returned from vacation in January. After inspecting this third site, he returned the truck to Camp ** around 3:00 p.m. and went home.

The following week, the AOS and the Grievant had a conversation about December 29. The AOS told the Grievant that the Administrator had been looking for him and that the AOS did not see him all day. The AOS testified that the Grievant then asked her to say that she had seen him at work that day. The Grievant testified that he had not asked her to say she saw him, but had insisted that he was at work that day.

The Administrator returned from her vacation on January 17, 2007. She testified that the issue of the Grievant being at work on December 29, 2006 was her number one priority to resolve. When asked what she did to resolve this number one priority, she said that the first thing she did was she responded to an e-mail from the Grievant that was sent at 1:18 p.m. that day.⁸ Later she testified that she may have spoken to the Grievant’s supervisor before receiving the e-

⁵Agency Exhibit 3: Attachments 1-5: Attachment 2

⁶Agency Exhibit 5: E-mails December 29, 2006-January 17, 2007

⁷The confusion regarding the ending time is the hearing officer’s. The actual ending time is irrelevant to these proceedings.

⁸Agency Exhibit 7: Written Notice and attachments

mail in the afternoon. When questioned about why she did so little to resolve the issue for this number one priority, she responded that she had many number one priorities that day.

She did not speak to the Grievant regarding whether he was at work on December 29th. His e-mail to her on January 17 indicated that he thought they had discussed this issue. She send a responding e-mail saying that it was a separate issue, that she wanted to know his whereabouts on Dec. 29.⁹

On January 24, 2007, the Administrator sent a memorandum to the Grievant to inform him of her intent to issue a Group I Written Notice for not being at work on December 29, 2006. On January 29, the Grievant responded with a memorandum stating that he was at work that day, stating that he had spoken with JB about a guard rail hit; that the battery on his phone was not holding a charge; and that he was out in the field checking for guard rail hits. On January 31, the Administrator sent the Grievant an e-mail asking where he was when he called JB. On February 2, the Grievant responded that he called from the parking lot at Camp ** using his personal cell phone because his work cell phone was having problems. On March 13, 2007, the Administrator filed the Group I Written Notice to the Grievant for “Unauthorized time away from work”.¹⁰

The Grievant then filed a Grievance, which went through the three resolution steps before being qualified for hearing.¹¹

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

⁹Agency Exhibit 5: E-mails December 29, 2006-January 17, 2007

¹⁰Agency Exhibit 7: Written Notice and attachments

¹¹H.O. Exhibit 3: Grievance Form A

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60: Standards of Conduct provides a set of rules governing the professional 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.1.b. provides that Group I offenses include “abuse of state time, including, for example unauthorized time away from the work area, use of state time for personal business, and abuse of sick leave.”¹²

In this case, the Agency presented evidence to show that the Grievant was not at work on December 29, 2006. This evidence included showing that the Administrator was unable to contact or confirm the whereabouts of the Grievant that day, that the Grievant was not accessible by his work cell phone, that the Grievant’s work cell phone’s GPS system showed no activity on that day, and that the Grievant did not respond to an e-mail sent that day until January 17, 2007. Further, the AOS did not see him at work and did not talk to him as she usually did before preparing the daily work log. She also testified that the Grievant wanted her to say she saw him at work that day.

The Administrator was unable to contact the Grievant that day. However, her only attempts were prior to 9 a.m. Her phone calls and e-mails to the Grievant and her phone call to the AOS were made early morning. When she called the work office number for the grievant, she did not leave a voice mail. She did not call back later in the day.

The Grievant’s work cell phone had been having battery problems for some time. The Grievant testified that he had given the AOS his personal cell phone number to call in case she had trouble reaching him on his work cell phone. The AOS did not call him on his personal cell phone on that day. She testified that she did not call him at all that day. While the Assistant Engineer testified that he had given the Grievant a new battery in November, 2006, the Grievant testified that he had problems with the battery holding a charge, and on the 29th, he did not have the car battery charger with him, because it was with another employee who was not there.

The evidence regarding the GPS system not tracking the Grievant on the 29th is of little value. The GPS had only tracked him the day before until 9:42 a.m. It did not track him again until January 5, 2007. The Agency did not claim he wasn’t at work after 9:42 a.m. on December 28 or that he wasn’t at work again until January 5, 2007. Picking that one day and saying the GPS showed he did not work that day is not credible. Additionally, the Agency subsequently put out a memo stating that the tracking system was unreliable.

The only way the Grievant could know that the Administrator was trying to reach him was for him to check his e-mail. The Grievant did not check his e-mail that day. All of his fellow inspectors, his supervisor, and the contractors that may ordinarily contact him were not at work that day. It is reasonable that the Grievant could have been at work and not checked his e-mail that day. No policy was cited that required an employee to check e-mail daily. The Grievant replied to the Administrator’s e-mail the day The Administrator returned to work three

¹²DHRM Polices and Procedures Manual, Standards of Conduct V.B1.b.

weeks after December 29. The Administrator testified that she believes the Grievant should have replied while she was gone, even though the Grievant knew she was not at work.

The Grievant could have been at work even if the AOS did not see him. The layout of the offices allows for him to come and go without seeing her. There were other days when she would not see him or talk to him, but she usually did see him. Whether he did ask her to say she saw him that day is unclear. The Grievant speaks with a strong accent. She may have misunderstood whether he was telling her he was there or whether he was telling her to say he was there. I find that my decision does not rest on what was said in that conversation in January, 2007.

The Agency has no policy that an employee must follow to show that the employee is at work. The Agency is holding the Grievant responsible for proving he was at work on December 29, 2006. The Grievant testified as to what he did at work that day. The burden is on the agency to prove that he was not there. The evidence presented was too weak to prove to this hearing officer that the Grievant did not work that day. The Administrator who filed the Written Notice testified that it is possible the Grievant could have been at work that day.

Therefore, given all the evidence presented at the hearing and the applicable law, the hearing officer finds that the Agency has not proven by a preponderance of the evidence that the Grievant was not at work on December 29, 2006.

DECISION

The Group I Written Notice issued on March 13, 2007 to the Grievant is hereby RESCINDED.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing office to revise the decision to conform it to written policy. Requests should be made to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in

compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided, and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Jane E. Schroeder, Esq.
Hearing Officer