

Issue: Group II Written Notice (failure to follow instructions and/or policy); Hearing Date: 09/10/07; Decision Issued: 09/11/07; Agency: VDOT; AHO: Frank G. Aschmann; Case No. 8651; Outcome: No Relief, Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 8651

Hearing Date: September 10, 2007
Decision Issued: September 11, 2007

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Agency Presenter
Agency Representative
Two Agency Witnesses

ISSUES

Did the Grievant fail to follow a supervisor's instructions, perform work, or otherwise comply with established written policy on January 31, 2007 such as to warrant disciplinary action under the Standards of Conduct?

FINDINGS OF FACT

The Grievant was on duty working for the Agency on January 31, 2007. Grievant received a call to supply change to toll booth operators. Grievant and a co-worker took bundles of change to sell to the toll booth operators. The Grievant did not sign for the change he took. Grievant had been instructed, by a supervisor, on a prior occasion that he was to sign for change when it was taken to sell to toll booth operators.

The Grievant and a co-worker went to several toll booth operators and sold change. The cash received for the change was co-mingled during the process. Upon return to the coin counting trailer the funds were counted and found to be \$230.00 short.

A search of the vehicle used was made with no additional funds found. An additional search of the route taken and area was made with no funds recovered.

The Grievant and co-worker each contributed \$115.00 of personal funds to make up the shortage. The Grievant did not fill out a shortage report form.

The Agency has a written policy titled, "Security Procedures For Field Personnel Transporting Vaults And Selling Coin". Number 19 of this policy provides, " Any overage or shortage that develops in the process of transacting with others shall be recorded on the form provided. All overages shall be deposited in the Fiscal Drop Box. All shortages shall be declared".

The co-worker reported the incident the next day. A supervisor conducted an

investigation of the matter. The funds were never recovered. After review of the investigation and consideration of mitigating factors, the supervisor issued the Grievant a Group II Written Notice. The Group II Written Notice is the subject of this hearing.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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. The Agency uses these policies for its Standards of Conduct.

The Agency presented evidence that the Grievant failed to follow the instructions of a supervisor and perform assigned work when he did not sign for the change he took to sell to toll booth operators. This was the standard operating procedure and a logical method of maintaining accountability for state funds. The Grievant was aware of the procedure having been given instructions previously by a supervisor to sign for change whenever it was taken to be sold. Signing was a job duty of the Grievant on January 31, 2007 which he failed to perform.

Additionally, the Agency maintains a written policy in regard to reporting shortages. The Grievant failed to follow this established written policy and perform assigned work when he did not submit the appropriate form after a shortage occurred while making transactions with other employees. The Grievant was aware of this policy having signed an acknowledgment copy on September 15, 2005. Filling out the form was a job duty of the Grievant on January 31, 2007 when a shortage occurred which he failed to perform.

Policy Number 1.60 of the Standards of Conduct provides for a Group II Written Notice for failure to follow a supervisor's instructions and written policies or failure to perform assigned work. Grievant's actions are within the parameters of this policy. A Group II Written Notice is found to be appropriate and warranted.

DECISION

The disciplinary action of the Agency is affirmed.

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 officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 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 Street, 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 contrary 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.

Frank G. Aschmann
Hearing Officer