

Issue: Group II Written Notice, reduced to Group I Written Notice during the resolution steps (failure to follow supervisor's instructions); Hearing Date: July 31, 2001; Decision Date: August 1, 2001; Agency: Northern Virginia Community College; AHO: David J. Latham, Esquire: Case Number: 5246

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of Department of Northern Virginia Community College Case No. 5246

Hearing Date:            July 31, 2001  
Decision Issued:        August 1, 2001

PROCEDURAL ISSUE

Grievant requested two forms of relief. First, he asked that the disciplinary action be expunged and, second, that his supervisor be disciplined and reassigned to another location. The Hearing Officer advised grievant during the hearing that his second request is outside the scope of a grievance hearing. The purpose of this hearing is solely to address whether grievant's discipline was warranted. Agency management has the sole authority to determine whether to initiate a disciplinary action; a hearing officer's authority is limited to reviewing that action and determining whether such discipline was appropriate.<sup>1</sup>

APPEARANCES

Grievant  
Attorney for Grievant  
One witness for Grievant  
Grievant's Supervisor  
Attorney for Agency  
Two witnesses for Agency

ISSUES

Do the grievant's actions on December 12, 2001 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

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<sup>1</sup> § 5.9(b)(5), *Grievance Procedure Manual*, effective July 1, 2000.

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on January 25, 2001 for failing to follow his supervisor's instructions. During the second-step resolution level of the grievance process, the agency reduced the discipline to a Group I Written Notice; however, the agency failed to obtain a written settlement agreement. The grievant nevertheless requested that his grievance be advanced to the third step of the resolution process. The agency head directed that the discipline be reduced to a Group I Written Notice. Again, the agency failed to obtain a written settlement agreement and the grievant requested a hearing; the agency head qualified the grievance for a hearing.

The Virginia Community College System (hereinafter referred to as "agency") has employed the grievant as a police officer for almost seven years. He was first hired in 1993, left for outside employment for two years in 1994-95 and returned to the employer in 1996.

One of the agency's security staff is a female who has what she characterizes as "bad feet." She has fibromyalgia and rheumatoid arthritis, and takes medication for pain relief. She has disabled parking license plates for her primary vehicle and a disabled parking placard to hang from the interior rear-view mirror of her secondary vehicle. When she is not experiencing pain in her feet, she parks in regular parking places at the college campus. However, when she does experience pain, she parks in a handicapped parking space to lessen the distance she has to walk to the building. The female security officer's responsibilities include patrolling the building by foot and patrolling the parking lots on foot to issue parking tickets. Because her job involves a significant amount of walking, others find it inconsistent that she has obtained disabled parking license plates and parks in handicapped parking spaces. A police sergeant had advised the female that it "looks bad" for her to park in the handicapped space, especially when her job involved significant walking. She had agreed not to park in handicapped spaces unless she was experiencing substantial pain.

In April 2000, grievant had issued a parking ticket to the female officer because her vehicle was in a handicapped space and the disabled parking placard was not on her rear-view mirror. The female officer had left the placard on her dashboard but the portion containing the expiration date was obscured by part of the windshield. The grievant did not know at the time that he issued the ticket that the vehicle belonged to the female security officer. The female officer ignored the ticket because it did not include the vehicle identification number (VIN) of her car and she knew the ticket could not be traced to her. Grievant subsequently learned to whom the vehicle belonged when he observed the female officer driving the car. He then sent an e-mail to his supervisor requesting the ticket be voided.

At about 3:30 p.m. on December 12, 2000,<sup>2</sup> grievant's supervisor (a sergeant) left the building to go home. As he started through the parking lot, grievant approached his supervisor and pointed out that a vehicle parked in a handicapped parking space belonged to the female security officer. Grievant asked his supervisor whether he should issue a parking ticket for the

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<sup>2</sup> Grievant contends the date of the incident was December 10, 2000. However, neither the grievant nor the agency proffered any documentary evidence to resolve this issue. In any case, the precise date is moot because both parties agree that the incident that precipitated the discipline occurred either on December 10 or December 12, 2000.

vehicle; the supervisor responded with words to the effect of, “No, she shouldn’t be parked there; I’ll talk with her about it.” Grievant repeated his question and the supervisor responded similarly. Again, the grievant pursued the matter and again, the supervisor repeated the same answer. At this point, the supervisor was suspicious about why grievant kept repeating the same question despite the supervisor’s unambiguous answer that grievant should not issue a parking ticket. He asked grievant whether this was a trick. Grievant said, “I just want a yes or no answer as to whether I should issue a ticket.” The supervisor repeated, for the fourth time, “No, do not issue a ticket; I’ll speak to her about it.”

At this point, the supervisor walked back toward the building and grievant resumed his patrol of the campus. The supervisor located the officer whose vehicle was in the handicapped parking space and told her she was putting him in a difficult position (by parking in the handicapped space). Subsequently, the female officer moved her vehicle from the space in which she had been parked to another handicapped parking space located further away from the building. Grievant observed the female officer’s vehicle in that parking space later that evening and issued a parking ticket for the vehicle. At the time grievant issued the parking ticket, he did not know whether the sergeant had spoken with the female officer. He also did not know why the female had moved her vehicle from one handicapped space to another.

#### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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 § 2.1-116.05(A) 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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>3</sup>

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<sup>3</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2000.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to §§ 2.1-114.5 and 53.1-10 of the Code of Virginia, the Department of Personnel and Training<sup>4</sup> promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal [from employment].<sup>5</sup> One example of a Group II offense is failure to follow a supervisor's instructions.

Grievant resented the fact that the female officer was parking in handicapped parking spaces. This is most apparent from an e-mail sent by grievant to his supervisor in which he states:

[Name of female] is either:

1. handicapped and not capable of performing her job [or]
2. misusing a handicapped permit/tag.<sup>6</sup>

It is clear from the above that grievant had concluded that the female officer was abusing the disabled parking privilege and he was determined to do something about it. There is a provision in the law that addresses the fraudulent obtaining of a disabled parking license plate.<sup>7</sup> However, this provision does not authorize a police officer to issue a parking citation because merely because he believes the plate was fraudulently obtained.

On December 12, 2000, grievant persistently attempted to get his supervisor to agree that a ticket should be issued to the female. It was clear from his response that the supervisor was displeased that the female was parking in the handicapped space. However, the supervisor recognized that the female had a valid handicapped license plate issued by the Department of Motor Vehicles and was therefore legally entitled to park in a handicapped space. The supervisor further recognized that it would be improper to ticket a vehicle with a valid disabled parking plate. He therefore resolved to speak with the female officer and "encourage" her not to park in a handicapped space. He told the grievant four times not to issue the ticket. Later that evening, grievant nonetheless issued the ticket. Grievant assumed that the sergeant had spoken to the female and that he now had a basis to issue the ticket.

In fact, the sergeant had spoken to the female. She agreed to move her vehicle from a nearby handicapped space to one further away from the building but maintained that she had a

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<sup>4</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>5</sup> Exhibit 2. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>6</sup> Exhibit 1, page 9, electronic mail message to supervisor from grievant, December 12, 2000.

<sup>7</sup> Code of Virginia § 46.2-1251. Fraudulently obtaining a disabled license plate or placard; penalty.

right to use the handicapped space. The sergeant agreed and simply encouraged her to avoid using the space unless absolutely necessary. Grievant, however, was unaware of this discussion (or even whether it had taken place) and made an assumption that the female was flaunting what grievant presumed was an instruction from the sergeant. Thus, grievant deliberately took matters into his own hands, notwithstanding the direct instruction from his supervisor not to issue a ticket.

Grievant's actions were insubordinate because he failed to follow the reasonable instruction of a supervisor.<sup>8</sup> Grievant could have taken alternative actions that would not have been insubordinate. He could have contacted his supervisor prior to issuing the ticket to ascertain whether the sergeant had spoken to the female, and what the outcome of the conversation was. He could also have waited until the following day to discuss this with the sergeant. Grievant contends that the female had been parking in handicapped spaces since April 2000. However, grievant had not issued any tickets to her for seven months. He has offered no reason why the issuance of a ticket became such a pressing matter on December 12, 2000 that could not wait until he was able to confirm that the sergeant had actually spoken with the female.

Grievant alleged that he was being retaliated against because he had turned in another police officer for stealing money from parking meters. However, no evidence was presented to support this assertion. In any case, the underlying facts of this case are relatively undisputed. This decision is based solely on what actually occurred with regard to the specified offense. If the findings of fact fail to support the offense, retaliation would be relevant. However, if this incident, standing alone, constitutes an offense under the Standards of Conduct, disciplinary action is warranted solely on the offense's own merits.

Grievant contends that the six-week delay between the offense (December 10) and the issuance of the written notice (January 25) is not in compliance with the Standards of Conduct requirement for prompt issuance of disciplinary action.

Section VI.A of Standards of Conduct policy 1.60 states:

As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.

Section VII.B.1 of the Policy states:

Management should issue a Written Notice as soon as possible after an employee's commission of an offense.<sup>9</sup>

Thus, the Standards of Conduct require that discipline be issued "as soon as possible." However, the Standards do not provide either any specific number of days or any guidance as to

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<sup>8</sup> Generally, an intentional refusal to follow rules or instructions is just cause for discharge providing the rule or instruction is reasonable, legal and does not place an employee in physical jeopardy. See *generally Stokes v. Enmark Collaborative, Inc.*, 634 S.W. 2d 571 (Mo. Ct. App. 1982).

<sup>9</sup> Exhibit 2. *Ibid.*

what constitutes “as soon as possible.” Because the circumstances precipitating disciplinary action can vary widely, agencies have some discretion in deciding when to issue the disciplinary action. In adjudicating such matters, a hearing officer must look to what is reasonable based upon the facts of the individual case. In the instant case, there are three extenuating circumstances that account for a significant portion of the delay. First, the offense occurred just prior to the Christmas-New Year’s holidays and the school was closed for 11 days. Second, during the fall, the grievant’s supervisor had been criticized by subordinates for acting too quickly without giving matters appropriate time for consideration. The sergeant was sensitive to this and had resolved not to rush this disciplinary action. Finally, college management reviewed this matter before grievant was allowed to issue the written notice. Given these factors, the hearing officer concludes that the delay in issuing the disciplinary action, while borderline, was not excessive.

Although this case is decided based on the evidence, the Hearing Officer notes that the testimony of the grievant was less credible than that of the agency’s witnesses. Grievant testified at the hearing that he never saw the female security officer parking in handicapped parking places from April to December. However, in his December 12, 2000 e-mail to the sergeant, he stated, “She has continued to park in the handicapped spaces since I wrote her a prior parking citation earlier this year for the same violation.”<sup>10</sup> In his verbal testimony, grievant first stated that the sergeant had only told him not to write the ticket once, after the third time he asked the question. However, later on redirect, grievant said that the sergeant had also told him not to write the ticket when he first asked the question.

Here, the agency has demonstrated, by a preponderance of the evidence, that grievant was insubordinate. As the agency head correctly noted, grievant did not follow orders.<sup>11</sup> Thus, grievant’s offense was his failure to follow the reasonable instruction of his supervisor, i.e., not to ticket the female officer’s vehicle. Under the Standards of Conduct, this is a Group II offense. However, for its own reasons, the agency elected to reduce the discipline to a Group I Written Notice. A Hearing Officer has no authority to increase the level of discipline.<sup>12</sup> Therefore, the Group I Written Notice is affirmed.

The Hearing Officer empathizes with the grievant’s viewpoint regarding the apparent abuse of the disabled parking privilege by the female security officer. Testimony at the hearing demonstrates that agency management personnel (grievant’s supervisor, the business manager and others) also have serious concerns about this issue. The agency’s approach with this female officer compared with the prior police officer appears to constitute disparate treatment.<sup>13</sup> However, the Hearing Officer has no authority to address that matter because it is outside the purview of this grievance hearing. Similarly, grievant’s dissatisfaction must be addressed through his chain of command, not through the issuance of a parking ticket. Grievant should take this matter up his chain of command; if he does not obtain satisfactory resolution from his supervisor, he should go to the next level of management until the matter is resolved.

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<sup>10</sup> Exhibit 1, page 9. *Ibid.*

<sup>11</sup> Exhibit 1, page 3. Agency head’s third-step response, item number 3, May 14, 2001.

<sup>12</sup> Section VI.B. *Rules for Conducting Grievance Hearings*, effective July 1, 2001.

<sup>13</sup> See Exhibit 1, Grievant’s initial response to Written Notice, February 1, 2001, in which he alleges that another police officer under similar circumstances was told that, if was able to perform his duties, he could not park in the handicapped parking spaces

## DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on January 25, 2001 for failing to follow the instructions of a supervisor is **AFFIRMED**. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

## APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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 four 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.
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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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 **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-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 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, 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.

David J. Latham, Esq., Hearing Officer