Issue: Group II Written Notice with lateral transfer to different position (failure to follow supervisor's instructions and leaving work site without permission); Hearing Date: August 6, 2001; Decision Date: August 7, 2001; Agency: J. Sargeant Reynolds Community College; AHO: David J. Latham, Esquire; Case Number: 5255

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of J. Sargeant Reynolds Community College Case Number 5255

Hearing Date: August 6, 2001
Decision Issued: August 7, 2001

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Dean of Finance and Administration
Representative for Agency
Three witnesses for Agency

ISSUES

Was the grievant's conduct on January 17, 2000 such as to 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

The grievant filed a timely appeal from a Group III Written Notice issued on May 17, 2001 because she allegedly consumed alcohol during a work activity and because she abused state time by leaving the employee group during the work activity. As part of the disciplinary action, the grievant was suspended for five workdays and laterally transferred to a different job position. During the second resolution step, the agency reduced the discipline to a Group II Written Notice and rescinded the five-workday suspension. During the third resolution step, the agency upheld the Group II Written Notice but removed the alcohol consumption allegation from the cited offenses. Instead, the agency cited grievant for failure to follow a supervisor's instructions and leaving the work site during work hours without permission. The agency did not obtain a written agreement from the grievant regarding these changes and she requested a grievance hearing. The agency head qualified the grievance for a hearing.

The Virginia Community College System (hereinafter referred to as "agency") has employed the grievant for 20 years. Prior to the disciplinary action, grievant had been a business manager at a satellite campus. She was transferred to the position of accounts receivable supervisor as part of the disciplinary action. Grievant's direct supervisor was the Campus Director. Her annual evaluations for the past several years have rated her performance as exceptional.

On Jan 17, 2000, employees of the college were authorized to participate in a Community Learning/Diversity activity. Grievant and others had participated in this event for at least five previous years. Ten days prior to the event, grievant sent an e-mail to her supervisor and stated, in pertinent part:

> This involves attending a MLK [Martin Luther King] activity in Richmond (at the Ashe Center) and also visiting a local museum, seminar etc in the afternoon. We have the college van for transportation. If this meets with your approval, I will arrange the plans for the day and give you more detail if required.[1]

The Campus Director approved the proposal and did not ask for any further information. A total of seven employees, including grievant, went on this excursion on January 17, 2000. They attended the morning function at the Ashe center and then ate lunch at a diner in Shockoe Bottom. At approximately 1:00 p.m., the group split up. Five employees went in the van to visit various sites in the city. Grievant and one employee went by foot to look at two sites in the Shockoe Bottom and Shockoe Slip area. An arrangement was made that the van would pick up the two walkers at 4:00 p.m. in front of the Tobacco Company restaurant. Grievant and the other employee arrived at the Tobacco Company and went inside where she made a telephone call and ordered a beer. Before she could drink the beer, the van arrived and all seven employees returned to the college campus.

No one complained about or reported the activities of grievant until October 2000. In October, one of the employees who had participated in the excursion on January 17, 2000 reported this matter to his supervisor. That supervisor (who, like grievant, reported to the

[1] Exhibit 3. *E-mail from Campus Director to grievant*, January 7, 2000.

campus director) did not report this matter to the campus director. The matter resurfaced in April 2001, when the same employee complained to the college's president about grievant. The president directed the human resource manager to initiate an investigation. That investigation resulted in a decision to administer the disciplinary action that precipitated the instant grievance. It should be noted that grievant's immediate supervisor did not participate in the investigation, did not prepare the written notice (even though he was directed to sign it) and, argued that such action should not be taken when he learned that the charge of drinking alcoholic beverages could not be substantiated.

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.[2]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training[3] 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 I offenses are the least severe and include abuse of state time. Group II

[2] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2000.
[3] Now known as the Department of Human Resource Management (DHRM).

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. Two examples of a Group II offense are leaving the work site during work hours without permission and, failure to follow a supervisor's instructions.[4]

The agency has twice revised the disciplinary action; it currently cites the two Group II offenses in the preceding sentence. The agency has not borne the burden of proof to demonstrate, by a preponderance of the evidence, either that grievant left the work site without permission, or that she failed to follow instructions. Grievant's supervisor had approved the diversity day activities outlined in her open-ended e-mail request to him. In fact, there is no evidence that grievant's supervisor gave her any specific instructions regarding this activity. Grievant's unrebutted testimony established that, in the past, it had been customary for the group to split up in the afternoon and regroup at the end of the day.[5] The agency has not shown that grievant went to any locations other than those to which she testified.

It appears that grievant's supervisor gave her rather wide latitude when he agreed to her proposal. The hearing officer shares what appears to be the agency's apparent concern that the "diversity day" was subject to abuse. Unfortunately, that was a byproduct of the rather loose parameters under which it has been practiced at the grievant's location. If the agency believes that tighter guidelines are needed for such excursions, it would certainly be appropriate to address that issue in a future memorandum or written policy to all employees. However, the evidence is insufficient to conclude either that the grievant violated the guideline under which she was operating on January 17, 2000 or that she committed any offenses under the Standards of Conduct.

However, it must be observed that the hearing officer found grievant a less than totally credible witness. Her responses to questions posed by the agency, the hearing officer and even grievant's own attorney, were almost always evasive or argumentative. Grievant denied drinking alcoholic beverages but admitted to purchasing a beer and then not drinking it because there was insufficient time. Obviously, she would not have purchased beer unless she had intended to consume it – a clear violation of the Commonwealth's policy on Alcohol and Drugs, which prohibits the use of alcohol in the workplace.[6] For these reasons, the hearing officer endorses the agency's recommendation that grievant be counseled about improvement of supervisory skills, state and agency policies regarding alcohol, and appropriate workplace behavior.[7]

Grievant alleged retaliation by the agency and by her coworkers. However, other than allegation, the grievant presented no substantive evidence to support this allegation. She also complained that agency management had overruled the recommendation of her immediate supervisor. A prior ruling by the Director of the Department of Employment Dispute Resolution (EDR) has established that upper management has the discretion to review the immediate supervisor's decision and to make a determination to award the requested relief or uphold the disciplinary action.[8]

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[4] Exhibit 4. *Standards of Conduct.*
[5] The agency's own witnesses corroborated the grievant's position on this issue.
[6] DHRM Policy No. 1.05, *Alcohol and Other Drugs*, September 16, 1993.
[7] Exhibit 2. Attachment to *Written Notice* issued to grievant on May 17, 2001.
[8] Compliance Ruling of Director, *In re: DMHMRSAS*, March 23, 2001.

Relief

Grievant requested an upgrade in her position and a letter of apology from the college. The grievance procedure sets forth the authority of a hearing officer.[9] That procedure also sets forth examples of relief that may be available, as well as the types of relief that are not available. For example, a hearing officer may reinstate an employee to her former position or, if occupied, to an objectively similar position.[10] However, a hearing officer may not provide any relief that is inconsistent with the grievance statute or procedure.[11] In a situation where the hearing officer appropriately concludes that disciplinary action is totally unjustified, he may rescind the disciplinary action, reinstate the grievant and award back pay, benefits and all seniority rights. In other words, the hearing officer may do no more than restore the grievant to the status quo immediately preceding issuance of the disciplinary action. The two forms of relief requested by grievant are not within a hearing officer's authority.

The agency argued that grievant's transfer was attributable to an internal reorganization, not to the disciplinary action. However, the Written Notice unambiguously states on its face that transfer to the accounting supervisor position was "Disciplinary action taken in addition to issuing Written Notice."[12] Moreover, grievant's supervisor corroborated this during his testimony at the hearing.

The agency reduced the discipline from a Group III to a Group II Written Notice. The maximum discipline available in connection with the issuance of a Group II Written Notice is up to ten days of suspension without pay.[13] A disciplinary transfer is available only in the application of mitigation in connection with a Group III Written Notice or when an employee has committed two Group II offenses.[14] Therefore, when the agency unilaterally reduced the discipline to a Group II Written Notice, the disciplinary transfer was automatically voided.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. 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.[15] Management should issue a written notice as soon as possible after an employee's commission of an offense.[16] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

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[9] § 5.7 *Grievance Procedure Manual, Ibid*.
[10] § 5.9(a) *Ibid*
[11] § 5.9(b) *Ibid.*
[12] Exhibit 2. *Written Notice* issued to grievant on May 17, 2001.
[13] Exhibit 4, Section VII.D.2.a. *Ibid*.
[14] Exhibit 4, Sections VII.D.2 & VII.D.3. *Ibid.*
[15] Exhibit 4. Section VI.A. *Ibid.*
[16] Exhibit 4. Section VII.B.1. *Ibid.*

In this case, the disciplinary action occurred 16 months following commission of the alleged offense. It is recognized that an agency can not act until it becomes aware of the offense. Thus, the promptness standard can be applied only from the time of notice to the agency. Here, the agency was notified of the alleged offense in October 2000 but failed to act until May 2001 – a delay of seven months. Such a lengthy delay is not in compliance with the spirit and intent of the Standards of Conduct. The agency might argue that it should not be held accountable for the failure of the supervisor who knew of the offense in October but failed to take appropriate action. This defense fails because, the agency must be held accountable for the acts and omissions of its management and supervisory personnel. Thus, the agency had knowledge of the offense in October 2000 but failed to issue prompt disciplinary action.

Conclusion

Because the agency has not borne the burden of proof with regard to the cited offenses, the disciplinary action must be reversed. Moreover, even if one could interpret the evidence such as to find an offense, the disciplinary action must be reversed because it was not promptly issued. As explained above, the agency automatically invalidated the transfer when it reduced the discipline to a Group II Written Notice.

In this particular case, restoration of grievant to her prior position is complicated by the fact that the agency has been involved in a structural reorganization. However, when an agency transfers an individual as part of a disciplinary action, the agency must anticipate that such action might be grieved and possibly reversed. Therefore, the agency's reorganization may not be used to bar restoration of an employee to the prior position. In this case, grievant had performed her previous job for several years, earning an "exceptional" performance evaluation since at least 1991. Therefore, it is apparent that grievant is well qualified to perform her previous job and, but for this disciplinary action, there was no rational basis to transfer her to another position.

Nevertheless, it is recognized that it may not be practical to restore grievant to precisely the same position previously held. Grievant's primary job function at the time she was transferred was the supervision of safety and security operations. This function remains extant; therefore, the grievant should be transferred to whatever position currently incorporates this function. As long as that objective is achieved, agency management retains the right to retain or change other parameters deemed necessary to implement its reorganizational plan. Such parameters might include, but not be limited to: determination of grievant's direct reporting supervisor, location of grievant's office, and the assignment of additional responsibilities.

DECISION

The disciplinary action of the agency is reversed.

The Written Notice issued to the grievant on May 17, 2001 is REVERSED. The agency shall restore to the grievant all pay and benefits withheld during her suspension from work.

The agency shall reinstate grievant to her prior position or, the current functionally equivalent position that incorporates supervision of safety and security operations.

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.

Implementation of the Decision

See §7.3(c) of the Grievance Procedure Manual.

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