

Issue: Group I Written Notice (disruptive behavior), allegation of discrimination, harassment and misapplication of policies; Hearing Date: October 19, 2001; Decision Date: October 22, 2001; Agency: Department of Health; AHO: David J. Latham, Esquire; Case Number: 5311



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5311

Hearing Date: October 19, 2001  
Decision Issued: October 22, 2001

**APPEARANCES**

Grievant  
Attorney for Grievant  
Representative for Agency  
Director  
One witness for Agency

**ISSUES**

Was the grievant's conduct on March 29, 2001 subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Has the grievant been subjected to discrimination, harassment or misapplication of policies?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice issued on April 18, 2001 because she engaged in disruptive behavior. She also alleged that she had been subjected to discrimination, harassment and misapplication of policies by the agency. Following failure to resolve the matter at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Health (hereinafter referred to as agency) has employed grievant as an environmental health specialist senior for ten years, four years at her current location. Grievant received a copy of Memo #55, which details various work rules; rule number 4 states, in pertinent part:

All non-emergency leave must pre-authorized, which means that you are to complete, sign and submit to your supervisor a leave slip (P-8A) as far in advance of the absence as is possible and at least 24 hours prior to the first day of the period of absence. The leave will not be considered authorized until your supervisor signs your leave slips indicating its approval. However, if you feel you must take leave with less than 24 hours notice, call your supervisor and explain the situation and leave may then be taken only with the verbal authorization of your supervisor.<sup>1</sup>

Grievant also received a memorandum regarding leave policy in November 2000. That memorandum repeats the pre-authorization of leave rule outlined in Memo #55. Moreover, it includes an attachment listing the phone numbers and pager numbers of grievant's supervisor and the acting supervisor, as well as the phone number of the facility's health director.<sup>2</sup>

On at least three previous occasions, grievant had been counseled about her failure to obtain pre-authorization and told that permission must be obtained from the supervisor before taking annual leave. During one such discussion, grievant had said words to the effect of, "It's my leave, I'll take it when I want and I don't have to get anyone else's permission."<sup>3</sup> In the event that the supervisor was not available, grievant was instructed to seek such permission from either the director or the acting supervisor designated by the supervisor. Once permission was obtained, the employee is to complete a leave activity reporting form and submit it to the supervisor for signature. In the event of a sudden emergency, employees are allowed to seek permission verbally, by telephone or by e-mail. All other employees had complied with this policy.

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<sup>1</sup> Exhibit 7. Memo #55, *Memorandum for New Staff Members*, Revised November 5, 1999.

<sup>2</sup> Exhibit 7. Memorandum # 2000-4, *Leave Policy*, November 17, 2000.

<sup>3</sup> Grievant denies this statement but the Director's testimony is deemed more credible for reasons explained later in this decision.

On March 23, 2001, grievant's supervisor was out of town. Grievant decided to leave work early to attend to a family matter. She did not seek permission to leave work; instead she filled out a leave activity reporting form and placed it in the supervisor's mailbox. When the supervisor returned to the office and learned about the unauthorized annual leave, he consulted the agency's human resources department in Richmond. Human Resources advised the supervisor to discipline the grievant with a Written Notice. However the supervisor decided not to discipline grievant but only to verbally counsel her. He prepared a memorandum addressing grievant's repeated failure to request annual leave, advising that she would not be paid for the leave time and gave it to grievant on March 29, 2001.

Grievant took the memorandum to her office to read. A few minutes later she returned to the supervisor's office and began yelling at him, accusing him of being prejudiced and harassment. She began yelling, "I hate it here!", and left his office. She returned, threatening to call the police and accused the supervisor of trying to get rid of her. She also yelled such things as, "I don't respect you!", "I'll get you!", and "The next time you come near me, I'm going to call the police!". Finally, she yelled that she was going to file an EEO complaint, walked into her own office and slammed the door. Soon thereafter she returned to the supervisor's office, handed him an unrelated work memorandum and said, "Review this and see if you can find anything else to give me a counseling memo on." Other employees in the office witnessed the grievant's tirade which lasted for several minutes.<sup>4</sup> As a result of this incident, grievant's supervisor issued her a Group I Written Notice on April 18, 2001 for disruptive behavior.

Grievant is the only black employee in her department, which consists of the supervisor, four health specialists and a clerk. Grievant keeps to herself and does not engage in personal conversations or small talk in the office. She prefers to work alone, totally apart from her coworkers and supervisor. In fact, during the hearing, she requested that she be moved somewhere away from her own department.<sup>5</sup> Although there is no assigned parking for employees, grievant had complained to the director that someone was parking where she wanted to park. She believes that her coworkers and management all want to find a way to terminate her employment. On one occasion, she told the director that she is paranoid. She is currently undergoing counseling. Following her annual performance evaluation in the fall of 2000, grievant told her supervisor that she

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<sup>4</sup> See generally: Exhibit 3 (Written Notice), Exhibit 1(Second Resolution Step Response from the Director), Exhibit 4 (Memorandum from coworker to Director, March 29, 2001), and Exhibit 5 (Memorandum from coworker to Supervisor, March 29, 2001). This evidence was unrebutted during the hearing.

<sup>5</sup> Hearing Officers have limited authority regarding the types of relief that can be provided to a grievant. Section 5.9(b) of the Grievance Procedure Manual provides that transfer of an employee is an example of relief that is not available. Moreover, § 2.1-116.06(B) of the Code of Virginia makes clear that the grievance procedure is not a mechanism to shift management and personnel decisions away from management and states "Management reserves the exclusive right to manage the affairs and operations of state government."

no longer wanted to speak with him.<sup>6</sup> Her supervisor has attempted to honor the grievant's request by sending her e-mails or memoranda rather than going to her with questions or directions. The supervisor maintains a normal relationship with the other people he supervises.

The grievant had previously raised her voice at the director on multiple occasions in the past. He had given her a verbal warning on one occasion not to raise her voice at him.

### 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. In grievances that do not involve disciplinary actions and dismissals for unsatisfactory performance, the grievant must present evidence first and must prove her claim by a preponderance of the evidence.<sup>7</sup>

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

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<sup>6</sup> Exhibit 6. Grievant's Performance Evaluation, "Fair but needs Improvement", September 26, 2000.

<sup>7</sup> § 5.8, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

Code of Virginia, the Department of Personnel and Training<sup>8</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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses include acts and behavior of the least severe nature. One example of a Group I offense is disruptive behavior.<sup>9</sup>

The agency has demonstrated, by a preponderance of the evidence, that the grievant's actions on March 29, 2001 constituted disruptive behavior. The grievant failed to rebut almost all details of this incident as presented by the agency. Moreover, grievant acknowledged that her behavior on March 29, 2001 was regrettable and she has apologized for it.<sup>10</sup> Accordingly, the burden of proof now shifts to the grievant to show whether there were any mitigating circumstances, and to prove her allegations of discrimination, harassment, and misapplication of policy.

Grievant testified about incidents that occurred in 1999 and 2000 in an attempt to discredit the supervisor's handling of these incidents and to establish what she contends is a continuing pattern of harassment.<sup>11</sup> She did not file a grievance with regard to these or any other incidents. The grievance procedure provides that grievances "must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute."<sup>12</sup> Although the hearing officer permitted limited testimony regarding these events, little evidentiary weight is given these events because of their remoteness in time and the fact that they were not timely grieved. Moreover, the weight of the testimony indicates that the supervisor acted appropriately in each case and, that there is no evidence of any discrimination, harassment or retaliation in these prior events.

Although the preponderance of evidence in this case demonstrates that the disciplinary action was merited, it is appropriate to comment on the credibility of those who testified. The Hearing Officer finds the testimony of the agency witnesses more credible than that of grievant. The agency witnesses testified consistently, accurately and forthrightly. By contrast, grievant was evasive in

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<sup>8</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>9</sup> Exhibit 2. Standards of Conduct.

<sup>10</sup> Exhibit 3. Memorandum from grievant to supervisor, April 9, 2001.

<sup>11</sup> For more detail on prior incidents, review Exhibit 1, memorandum from Director to grievant, August 6, 2001. This detailed, 20-page memorandum gives considerable insight into the lack of foundation for grievant's allegations.

<sup>12</sup> § 2.2, *Grievance Procedure Manual*, effective July 1, 2000.

some responses, avoided eye contact at times, exaggerated some descriptions, and testified inconsistently with respect to some events.<sup>13</sup>

The picture of grievant's situation that emerges from this hearing is filled with contradictions. By her own preference, grievant admits that she keeps apart from coworkers in the office and would, in fact, like to be totally separated from them. Yet, she feels that she is treated differently by coworkers. She is apparently unable to recognize that being treated differently is an automatic consequence of her self-imposed isolation. Grievant has acknowledged feelings of paranoia, yet she apparently doesn't recognize that being "scared" of losing her job is a common manifestation of paranoia. Grievant expressed objection to her supervisor sending her memoranda rather than talking with her. Yet, it was she who told her supervisor that she didn't want to talk with him one-on-one. Again, grievant apparently fails to recognize the cause-and-effect relationship between her statement to the supervisor and his subsequent attempt to honor her request.

Grievant alleged misapplication of personnel policies, rules and regulations. However, she was unable to cite what specific policies, rules or regulations were being misapplied. Other than general allegations of harassment and discrimination, grievant did not present any documentary evidence, witnesses or credible testimony to support her charges. In order to establish discrimination, one must prove 1) unwelcome conduct, 2) based on race, 3) severe enough to create an abusive work environment and, 4) some basis for imposing liability on the employer.<sup>14</sup> Grievant has not met this test.

Grievant feels that she is being harassed and that agency management is attempting to fire her. However, an objective review of the evidence presented in this case fails to support that allegation. Rather, it appears that management has gone to unusual lengths to appease the grievant. At her request, a significant amount of money was expended to provide private cubicles in what had been an open, communal work area. Grievant's supervisor has acceded to her request to avoid verbal communication by sending her written memoranda. Even though Human Resources felt that grievant should be disciplined for repeatedly failing to request pre-authorization for leave,<sup>15</sup> her supervisor opted to give her only counseling. The Director has devoted far more time listening to grievant's

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<sup>13</sup> For example, grievant initially testified under direct examination that in February 1999, when a coworker startled her, that grievant stepped back away from the coworker. Later, on recross-examination, grievant contended that the coworker had shoved her. In reporting this matter to the director, grievant did not mention being shoved until March 2001. In a second example, she first stated that the entire office had witnessed this incident but, on cross-examination, admitted that, "maybe one person saw it."

<sup>14</sup> See generally: Hutchinson v INOVA Health System, Inc. 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998) (citing Harris v. Forklift Sys, Inc. 510 U.S. 17 (1993)).

<sup>15</sup> The grievant had been repeatedly warned to obtain pre-authorization for leave. Her failure to do so was insubordinate, a clear failure to follow a supervisor's instructions, and a failure to comply with established written policy. Such an offense merits a Group II Written Notice; a second such offense normally warrants removal from employment.

concerns than any other employee. He has also spent considerable time investigating and responding to grievant's concerns (see footnote 11 on preceding page).

It was revealed during this hearing that grievant and her supervisor had previously utilized a certified mediator in an attempt to resolve grievant's concerns.<sup>16</sup> These mediations clearly were not completely successful. From the examples cited in the preceding paragraph, one must conclude that the agency has gone more than halfway in attempting to work with grievant. However, it takes two parties to make any working relationship succeed. At this point, it appears that grievant should reassess her isolationist position and give serious consideration to establishing a more harmonious working situation with her coworkers.

### DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on April 18, 2001 is **AFFIRMED**. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

The grievant has failed to demonstrate that this disciplinary action, or any other agency actions, constituted discrimination, harassment or misapplication of policies, rules or regulations.

### 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 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.

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<sup>16</sup> Grievant had requested that her coworkers participate in these mediation sessions but the coworkers saw no need to do so and elected not to participate. Mediation between parties only occurs when both parties are willing to participate.



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.

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.

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.

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David J. Latham, Esq.  
Hearing Officer