

Issue: Group III Written Notice with suspension/demotion/transfer (threatening and disruptive behavior) and Group II Written Notice (misuse of State property);
Hearing Date: February 22, 2002; Decision Date: February 25, 2002; Agency:
Department of Health; AHO: David J. Latham, Esquire; Case Number: 5380



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5380

Hearing Date: February 22, 2002
Decision Issued: February 25, 2002

PROCEDURAL ISSUE

Grievant filed her grievance on November 30, 2001. She resigned from employment with the agency on December 9, 2001. Because she initiated the grievance prior to resignation, grievant has access to the grievance procedure.¹

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
District Administrator
Legal Assistant Advocate for Agency
Four witnesses for Agency

¹ § 2.3, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

ISSUES

Was the grievant's conduct on and before October 31, 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? Have the agency's policies been misapplied?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on November 26, 2001 because she engaged in threatening and disruptive behavior.² As part of the disciplinary action, grievant was suspended for 30 days, demoted, transferred to another location and given a salary reduction of five percent. Grievant also appealed from a Group II Written Notice issued on November 26, 2001 for misuse of state property.³ She further alleged that the agency misapplied its policies. 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 office services supervisor for 6½ years in a county health office. The office in which grievant worked employs nurses and nurse aides (and a nurse supervisor), environmental health specialists (with an environmental health supervisor), and two office service specialists (supervised by grievant). Each of the three supervisors report to different managers located in the district office.

On October 31, 2001, as was customary each month, personnel in grievant's office gathered for a luncheon to celebrate the birthdays of those born during the month of October. The practice had been not to give gifts during such birthday celebrations. On this occasion, one person had wrapped a pack of matches inside a sheet of yellow legal paper and placed it on the table as a "gag" gift.⁴ When grievant entered the room and noticed the gag gift, she became upset and left. She angrily told two people that she had not received a gift when her birthday was celebrated. Small batches of leftover Halloween candy had been brought to the luncheon and set at each person's place. When grievant returned, a coworker mentioned that the lollypops were very good. Grievant angrily asked why she had not received a lollypop with her candy.

Following this incident, several employees were surprised by the grievant's angry responses to such insignificant occurrences. A conversation

² Exhibit 6. Written Notice, issued on November 26, 2001.

³ Exhibit 9. Written Notice, issued on November 26, 2001.

⁴ The person whose birthday was being celebrated had quit smoking recently. The pack of matches was of inconsequential value and intended to be a gag gift to remind her that she had quit smoking.

ensued in which the employees related to each other past incidents in which grievant had been angry at either employees or customers and had made intemperate remarks involving the use of guns and physical violence. After this discussion, the environmental health supervisor called management to report all of the incidents. The Director suspended grievant and initiated an investigation by interviewing 10 of grievant's coworkers. During the interviews, employees related statements made by the grievant during past occasions when she had become angry. Grievant acknowledged that, when angry, she had often said, "I never forgive and I never forget." Employees also related that she had said, "I don't get mad, I get even."

Five employees heard grievant talk on various occasions about wanting to obtain a firearm and make statements to the effect of, "Do you ever feel like bringing a gun and blowing them all away?" "I wish I had a gun; they would be sorry," or "One of these days, I'd like to just shoot everybody." Whenever grievant made such comments, employees assumed grievant was just frustrated or angry. On one occasion, she threatened to "smack" an employee if he did not comply with her request. No employee believed that grievant would actually follow through on such threats. No employee ever reported such comments to management. Employees attributed other comments to grievant but there is no substantiation that such statements were made.⁵ Employees did not fear any physical harm from grievant but characterized her as "angry," "grumpy" and "frustrated."⁶

During grievant's suspension, management directed that grievant's desk be searched. Among the items found were two color photographic printouts of grievant's vehicle showing damage incurred in a recent automobile accident.⁷ Grievant had taken a state-owned digital camera from the environmental health supervisor's locked office⁸, taken 19 photographs of her vehicle and printed them on the office's color printer. She had retained the diskette of the photographs in her locked desk. In February 2001, grievant's supervisor directed her to prepare and maintain an equipment logbook that would specify storage location and who had access to that equipment.⁹ Grievant never prepared the logbook.

During the recent past, grievant has been stressed due to problems in her personal life such as credit problems, an automobile accident, a husband who has accused her of adultery, and caring for an ill relative. During 2000, her performance as a supervisor had been less than satisfactory resulting in an

⁵ Exhibit 2. Report of Investigation, November 21, 2001.

⁶ Exhibit 2. *Ibid.*

⁷ Exhibit 8. Photocopy of two photographs found in grievant's desk.

⁸ Grievant was the only other person in the office who had a key to the environment health supervisor's office.

⁹ Exhibit 7. E-mail from grievant's supervisor to grievant and five other people located in other counties, February 12, 2001.

adverse annual performance evaluation.¹⁰ Her supervisors had twice counseled her about separating her personal life from work and avoiding negativity in the workplace. During the grievance process, grievant resigned from her employment on December 9, 2001.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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 § 2.2-3000 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 § 2.2-3001.

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.¹¹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹² 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

¹⁰ Exhibit 4. Grievant's Performance Evaluation, November 3, 2000. (Grievant's performance improved during the 2001 performance cycle; she was rated "Contributor" on October 3, 2001).

¹¹ § 5.8, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

¹² Now known as the Department of Human Resource Management (DHRM).

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. Group II offenses include acts and behavior that are more severe in nature and include unauthorized use or misuse of state property. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal and include threatening persons associated with any state agency including employees, supervisors, patients and visitors.¹³

Group II – Misuse of State Property

Grievant has acknowledged that she used the digital camera, diskette and color printer for personal use. She alleged that others in the office have used the digital camera for personal reasons, thereby claiming disparate treatment. However she was unable to identify any specific employee or provide any corroboration to support her allegation. She also argues that other employees make personal calls on state telephones, use the photocopier for personal reasons and fax personal items. Nonetheless, grievant acknowledges that her use of the digital camera and color printer constitutes misuse of state property. Grievant's use of this expensive and sophisticated equipment goes beyond what is considered normal and reasonable use of equipment such as a telephone or copier. She also concedes that such misuse constitutes a Group II offense.

Group III – Threatening and Disruptive Behavior

Grievant contends that she did not make the statements about guns that have been attributed to her by several employees. The hearing officer finds that she did make such statements for two reasons. First, even though the evidence from other employees is hearsay, the cumulative weight of that evidence, in conjunction with the sworn testimony of the investigator, is sufficient to overcome grievant's denial. Second, grievant's credibility was tainted by her contention that she had resigned prior employment for personal reasons when, in fact, she was discharged by being told to submit a resignation letter.

The evidence demonstrates that grievant's personal life affected her performance at work. This is reflected in grievant's performance evaluation and in the need to twice counsel her about the necessity to keep personal problems separate from work. It is entirely understandable that marital problems, financial

¹³ Exhibit 11. Standards of Conduct.

difficulties, and other domestic hardships are stressful. However, while all employees are expected to avoid letting personal problems affect their work, it is especially important for a supervisor to set the example for subordinates. The agency has demonstrated, by a preponderance of the evidence, that grievant's frustration and anger manifested itself in the workplace in the form of inappropriate statements. In this case, grievant needed help dealing with her personal problems but because she was not receiving the necessary assistance, her frustration boiled over into making inappropriate remarks in the workplace. However, the remarks had been made over a long period of time, during which not a single employee ever became sufficiently concerned to report them to supervision to management. Moreover, one of grievant's fellow supervisors had heard some of the remarks but did nothing because he did not consider them threatening.

The issue to be resolved herein is whether grievant's intemperate remarks rose to the level of "threatening" statements. There is no testimony or evidence to show that any person ever felt threatened by grievant's statements. The office staff was well aware of grievant's personal problems and attributed her remarks to anger, grumpiness and frustration. Grievant's comments on October 31, 2001 were childish, self-centered manifestations of her personal problems. The remarks on that date were not threatening; at most, they were mildly disruptive.

It was only when interviews revealed a history of making inappropriate remarks about guns over a period of time that anyone became concerned. It must be observed that this incident occurred less than two months after the terrorist attacks against this country. The atmosphere in early November 2001 was one of highly sensitized awareness to the possibility of violence from any quarter. When everyone's nerves were on edge, it is not surprising that management would be hypersensitive to even the most remote possibility of potential violence. The context in which an offense occurs cannot be ignored when determining the appropriate level of discipline.¹⁴

The agency argues that employee violence can occur in the workplace after a series of *increasingly hostile* behaviors from the perpetrator. However, the agency has not demonstrated that grievant's comments had become *increasingly hostile*. In fact, grievant's remarks have continued at the same level for a long period of time. She was reported to have made the "I never forgive or forget" statement on a daily basis.¹⁵ Thus, grievant's remarks were so commonplace that coworkers ignored them, attributing them to her grumpiness.

¹⁴ For example, a recent decision affirmed the discharge of a supervisor who, in October 2001, gave a coworker an anonymous envelope containing a white powdery substance, "as a joke." Had this occurred in August 2001, it is very likely that no discipline would have been issued. But because it occurred during the height of the anthrax scares, it was deemed a far more serious offense and the level of discipline appropriately took into account the context of the times. See Case No. 5346.

¹⁵ Exhibit 2, p.2, para. 3. *Ibid.*

Moreover, several employees stated that they did not want to see the grievant get in trouble over the remarks she had made.

While grievant's remarks regarding guns did not rise to the level of actually threatening anyone, they are clearly unacceptable in the workplace. Accordingly, such remarks are more than simply disruptive – they are serious enough that should grievant repeat them after being disciplined, she should thereafter be discharged from employment. This level of offense is, by definition, a Group II offense. Because grievant has acquired two Group II offenses, and because she was in a supervisory position, her demotion, transfer and salary reduction were appropriate and reasonable.

Grievant alleged misapplication of policies and procedures but failed both to identify such policies and procedures, and to demonstrate the alleged misapplication.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued to the grievant on November 26, 2001 for misuse of state property is AFFIRMED.

The Group III Written Notice issued to grievant on November 26, 2001 for threatening and disruptive behavior is REDUCED to a Group II Written Notice. The demotion, transfer and salary reduction are AFFIRMED.

The disciplinary actions 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 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.
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.

David J. Latham, Esq.
Hearing Officer