

Issue: Group II Written Notice with 3-day suspension (failure to follow supervisor's instructions and perform assigned work); Hearing Date: May 17, 2002; Decision Date: May 22, 2002; Agency: Department of Social Services; AHO: David J. Latham, Esquire; Case Number: 5420



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5420

Hearing Date: May 17, 2002  
Decision Issued: May 22, 2002

**PROCEDURAL ISSUE**

Subsequent to the issuance of the disciplinary action at issue herein, grievant filed a grievance in February 2002. After failure to resolve the matter at step two of the resolution process, grievant resigned from state service on March 13, 2002. The hearing officer advised grievant during both the pre-hearing conference and the hearing, that a hearing officer cannot reinstate an employee after she has voluntarily tendered her resignation.<sup>1</sup> Grievant averred that she does not want to be reinstated but seeks only to have the disciplinary action removed from her record of employment and to have her lost pay restored.

The Hearing Officer further advised grievant that her request for the cessation of alleged retaliatory actions has been made moot by her resignation. He also advised grievant that a hearing officer has no authority to direct the payment of legal fees.<sup>2</sup>

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<sup>1</sup> § 5.9(b)2, Department of Employment Dispute Resolution *Grievance Procedure Manual*, July 1, 2001.

<sup>2</sup> § 5.9(b)1, *Ibid*.

## APPEARANCES

Grievant  
Representative for Grievant  
Representative for Agency  
One witness for Agency

## ISSUES

Was the grievant's conduct subsequent to November 6, 2001 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? Did the disciplinary action constitute retaliation?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on February 19, 2002 for failure to follow supervisor's instructions, and to perform assigned work.<sup>3</sup> Grievant was also suspended for three workdays as part of the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>4</sup>

The Department of Social Services (hereinafter referred to as "agency") had employed the grievant as an administrative staff assistant for nearly two years.

When grievant was hired, grievant's supervisor advised her that she was being employed pursuant to a special two-year grant from a foundation. Grievant knew that the grant would end, and that her job with the agency would end, on June 30, 2002. The supervisor further advised her that grant programs involve ever-changing priorities and requirements imposed by the grantor organization. The grant provided funds for only two employees – grievant and her direct supervisor who is designated the project manager. The project manager reports to a project director but the director's salary is not funded by the grant. The project manager's responsibilities were generally envisioned as oversight and making necessary contacts with people and organizations outside the agency's office. The project manager has extensive experience in managing this type of grant program. Grievant, as the administrative assistant, was to be responsible

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<sup>3</sup> Exhibit 8. Written Notice, issued February 19, 2002.

<sup>4</sup> Exhibit 9. Grievance Form A.

for handling administrative and clerical support inside the agency office,<sup>5</sup> such as correspondence, filing, making travel and meeting arrangements, budget recordkeeping, and preparation of materials used in meetings. Grievant has never previously worked in a grant-funded program.

From the beginning of her employment, the supervisor gave grievant hands-on training in the specifics of administering the grant program. After a time, it became apparent that grievant's skills and abilities were not quite what the supervisor had hoped for. The supervisor made adjustments by taking on certain tasks herself. It was also necessary to contract with an outside contractor to handle the Access computer program because grievant could not become sufficiently proficient in the program. Nonetheless, grievant was trained on management of the financial system and the database program. In March 2001, grievant told both her supervisor and the project director that she wanted a different job and that she was looking for another position. Grievant was not accustomed to the nature of grant program work and was not comfortable adjusting to the rapid changes in policy and procedure that sometimes occurs in such work.

Until November 2001, grievant's overall performance was considered generally satisfactory.<sup>6</sup> In early November 2001, the supervisor gave grievant a written counseling memorandum directing her to spend less time on personal e-mails and office chitchat.<sup>7</sup> Then, grievant's supervisor became dissatisfied with grievant's performance in planning and conducting a statewide meeting on November 8 & 9, 2001. Although grievant had previously assisted in the planning and conduct of quarterly half-day regional meetings in the agency's offices, she had never planned and conducted a two-day conference at a remote site. The November meeting involved approximately 33 people, many of whom required hotel reservations. The conference occurred at a site that grievant had not previously used. Grievant's supervisor was dissatisfied with grievant's preparation of the meeting notebooks, and her inability to attend to all of her duties such as: being in attendance at the welcome table; monitoring lighting changes during the meeting; adjusting room temperatures during the sessions, assisting participants in finding a place to sit, adjusting to changes in the schedule by changing the timing of snack breaks; monitoring the music level; setting up audio-visual equipment and dealing with hotel check-in problems encountered by one attendee.<sup>8</sup>

In attempting to perform all of the tasks required during the two-day meeting, grievant worked beyond her normal working hours. On November 14, 2001, grievant submitted a leave activity reporting form requesting 11.5 hours of overtime pay. The supervisor initially approved only 7.5 hours of overtime. This resulted in multiple memoranda back and forth between grievant and her

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<sup>5</sup> Exhibit 12. Grievant's Employee Work Profile, effective October 25, 2000.

<sup>6</sup> Exhibit 11. Grievant's Performance Evaluation, performance cycle ending October 30, 2001.

<sup>7</sup> Exhibit 7. E-mail from supervisor to grievant, November 7, 2001.

<sup>8</sup> Exhibit 3. Attachment # 4 to Written Notice, issued February 19, 2002.

supervisor. Eventually, 11.5 hours of overtime was approved and grievant was paid for this time.<sup>9</sup> The program was not over budget in November 2001.

After grievant submitted her request, the relationship between grievant and her supervisor cooled distinctly. Conversation between the two was minimal and much of their communication was by memorandum, e-mail or voice-mail messages. On November 15, 2001, the supervisor decided to send to grievant, usually via e-mail, a "daily project list." Grievant was expected to complete the tasks on the list, add any additional tasks completed, sign the list and return it to her supervisor. The supervisor was dissatisfied with grievant's failure to comply with the first project list because she mailed five notebooks out before obtaining the supervisor's approval; the supervisor gave grievant a written counseling memorandum.<sup>10</sup>

Between November 2001 and mid-February 2002, the supervisor amassed documentation and statistics to support her dissatisfaction with grievant's performance. In general, the supervisor concluded that the amount of work completed by grievant was inadequate, the quality of work was below expectation and grievant's attitude was unsatisfactory.<sup>11</sup> As an example of the latter problem, grievant was asked to compile five notebooks on November 15, 2001 and hold them for the supervisor's review on November 16<sup>th</sup> before mailing them. Grievant mailed the notebooks on November 15<sup>th</sup> before the supervisor had an opportunity to review them. When the supervisor asked her about this on November 16<sup>th</sup>, grievant said, "Then write me up."<sup>12</sup> On other occasions, grievant called her supervisor a "robot" and "rude."

The supervisor described grievant's response to the daily project lists as "resistant." Grievant told her supervisor that she did not like using the list and did not believe it to be necessary. One example of this behavior is noted on the February 6, 2002 daily project list wherein grievant requests that completion of a leave activity reporting form be added to the task list.<sup>13</sup> She attached to the task list a half-page e-mail explaining why she wanted this task added to the list.<sup>14</sup> Typing the memorandum required substantially more time than simply completing the leave activity form. Similarly, on the same date, grievant requested that providing her car's license plate number by e-mail to Human Resources (for the employee parking garage) be separately listed on the daily project list. Grievant's e-mail response to Human Resources was a routine clerical task requiring a few seconds and is not a "project."

Grievant's supervisor concluded that grievant had difficulty understanding her role as administrative assistant. Grievant herself affirmed this during the

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<sup>9</sup> Exhibit 10. Memorandum from supervisor to grievant, December 13, 2001.

<sup>10</sup> Exhibit 5. Counseling memorandum from supervisor to grievant, November 27, 2001.

<sup>11</sup> Exhibit 8. Summary of Group II offense.

<sup>12</sup> Exhibit 4. Follow-up notes on supervisor's memorandum, November 15, 2001.

<sup>13</sup> Completion of Leave Activity Reporting Forms is required of all classified employees who utilize leave time. In most cases, the routine completion of this form requires less than one minute.

<sup>14</sup> Exhibit 7. Memorandum from grievant to supervisor, February 6, 2002.

hearing when she stated that she felt left out of the “project side” of the program and was expected to perform just the “administrative side.”

### 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.<sup>15</sup>

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 Training<sup>16</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 includes acts and behavior which are more

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<sup>15</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

<sup>16</sup> Now known as the Department of Human Resource Management (DHRM).

severe in nature than Group I and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example of a Group II offense is failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.<sup>17</sup>

Grievant contends that the supervisor's attitude toward her changed significantly after she requested overtime compensation in November 2001. It is difficult to imagine that such a relatively small amount of compensation could have resulted in such a change in the relationship between grievant and her supervisor. However, the evidence is clear that the supervisor began to impose a daily project list on grievant the day after grievant submitted her overtime request. In contrast, grievant's performance evaluation completed in the fall of 2001 rates her a contributor in every core responsibility and there are no negative comments on results achieved during the one-year performance cycle. Therefore, the problems appear to have begun in earnest during early to mid-November 2001.

Grievant notes that last-minute unexpected changes accounted for some of the problems encountered during the November 8<sup>th</sup> & 9<sup>th</sup> meeting. For example, the caterer had set out water pitchers and plastic cups on the meeting room tables for participants. Upon arriving at the site, grievant's supervisor told grievant to obtain glasses to replace the plastic cups. While grievant was attending to this task, she could not be at the reception table. She was also called away from the reception table to attend to lighting and temperature concerns in the room as well as the hotel billing problem encountered by one of the participants. She also offered un rebutted testimony that none of the meeting participants made any complaints about any aspect of the two-day meeting to her or to her supervisor.

Grievant points out that she did not request overtime pay but instead would have preferred to utilize compensatory time off from work. However, Human Resources advised her that agency policy required payment of money for overtime worked.

The agency has demonstrated, by a preponderance of the evidence, that grievant failed to perform assigned work satisfactorily and that her resistance to the daily project list constituted a failure to follow instructions. The unsatisfactory work is reflected in the extensive documentation attached to the Written Notice and corroborated by the supervisor's testimony during the hearing. Grievant's resistance to the daily project list was described by the supervisor and is reflected in the documentary evidence as described in the Findings of Fact above.

It is also apparent that there were multiple dynamics at work in this case. First, grievant's supervisor is an experienced, professional, grant program manager who has high expectations and aspirations for the program she

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<sup>17</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

manages. Over time, she became increasingly concerned and frustrated with grievant's inability to accomplish the tasks assigned to her in a timely manner. Her frustration partially manifested itself in reduced verbal communication with the grievant, and the imposition of a daily project list to hold the grievant more accountable.

Second, grievant became disenchanted with her position during 2000. In March 2001, she openly advised her supervisor and the project director that she wanted to work elsewhere and that she was actively looking for other employment. Knowing that her job was scheduled to end in June 2002, it became increasingly difficult for grievant to maintain the high level of motivation required in this position. At the same time, grievant was also well aware of the supervisor's growing dissatisfaction with her performance. Grievant chafed at the daily requirement of a project list and resented the supervisor's reduced verbal communication with her.

All of these factors contributed to a situation that was unpleasant for both supervisor and grievant. Regrettably, grievant's work product suffered as a result. Grievant contends that her supervisor just wanted to have her fired but this is not a credible argument. The supervisor knew that the project will end in June 2002 and it is highly unlikely that she would prefer training a brand-new employee to having grievant work another four months. However, the supervisor felt that disciplinary action was the most appropriate method to get grievant's attention and correct the perceived deficiencies in her performance.

### Retaliation

Grievant alleges that the counseling she received in November and the Written Notice she received in February represented retaliation by the supervisor because grievant had requested compensatory time off for the overtime she had worked. However, grievant presented no testimony or evidence to support her allegation. First, grievant has presented no evidence that she wronged her supervisor so as to engender a retaliatory response. "Retaliate" means, "to repay (as an injury) in kind; to get revenge."<sup>18</sup> In order for the supervisor to retaliate, there must have been a wrong committed by grievant against the supervisor. There is no evidence that grievant committed any such wrong, ergo, there is nothing against which the supervisor could have retaliated. Viewed in a broader sense, the Grievance Procedure Manual defines retaliation as, "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g., whistleblowing)."<sup>19</sup>

Grievant has not established a claim of retaliation because she was not engaged in a protected activity as defined in case law. However, assuming for the sake of argument that making a request for overtime compensation

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<sup>18</sup> Webster's Ninth New Collegiate Dictionary.

<sup>19</sup> Definitions, *Grievance Procedure Manual*, effective July 1, 2001.



constitutes a protected activity, grievant has not established a nexus between her filing of the overtime request and the disciplinary action. Even if grievant could establish that she engaged in a protected activity, and even if she could establish the required nexus between that activity and the disciplinary action, the agency has rebutted grievant's allegation of retaliation by establishing that it had a nonretaliatory business reason for the discipline. The agency has shown by a preponderance of the evidence that grievant was not satisfactorily performing assigned work, and that her resistance to compliance with the daily project lists constituted failure to follow her supervisor's instructions. Finally, the grievant has presented no evidence that the agency's goal in disciplining her was pretextual.

It is just not credible that a supervisor would take the time required to document this case over an issue as small as approximately \$200 in overtime pay. The impact of such a small expense on a budget exceeding \$350,000 per year is insignificant. Moreover, the budget was not overspent in November 2001; therefore this expenditure did not cause a budget problem. It is apparent that both the supervisor and the project director were displeased with the fact that grievant had not asked in advance to work overtime. However, the supervisor addressed that issue by directing grievant in writing not to work any further overtime without obtaining prior written approval.<sup>20</sup>

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued to the grievant on February 19, 2002 and the three-day suspension are 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 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,

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<sup>20</sup> Exhibit 10. Memorandum from supervisor to grievant, November 19, 2001.

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.

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David J. Latham, Esq.  
Hearing Officer