

Issue: Group II Written Notice with 5-day Suspension (failure to follow supervisor's instructions); Hearing Date: April 29, 2002; Decision Date: May 1, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5425



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5425

Hearing Date: April 29, 2002
Decision Issued: May 1, 2002

PROCEDURAL ISSUES

Grievant alleged certain deficiencies in connection with the due process meeting conducted by the agency prior to the issuance of discipline and/or during the grievance resolution process. When a due process deficiency occurs before the filing of a grievance, grievant is entitled to file a grievance, as she did in this case. The hearing conducted before this hearing officer ensures that grievant receives a full and fair hearing that protects her due process rights and thereby corrects any previous due process deficiencies.

When a due process deficiency occurs after the filing of a grievance, the Grievance Procedure Manual provides the remedy for party noncompliance. The procedure affords the opposing party an opportunity to correct the noncompliance, and if necessary, the possibility of intervention by the Director of the Department of Employment Dispute Resolution. However, all claims of noncompliance must be raised immediately pursuant to the procedure in the Manual. If a party proceeds with the grievance after becoming aware of a

procedural violation, that party may forfeit the right to challenge the noncompliance at a later time.¹

After acting as the representative for the agency during its presentation of evidence, the representative proffered himself as a witness. In support of his request, he cited § 5.10 of the Grievance Procedure Manual, which states that representatives may “present evidence.” However, the agency’s reliance on this section is misplaced because this provision applies only in the case of employees whose employment has been terminated for one of three specific reasons, and only if the grievant had elected to bypass a grievance hearing by appealing directly to the circuit court.² Here, the grievant’s employment was not terminated; she was only suspended for five workdays. Thus, the statutory exception is not applicable in this case.

Moreover, presentation of evidence generally refers to the proffering of documents during a hearing, not to oral testimony. Attorneys and representatives are customarily limited to examination and cross-examination of witnesses. An exception might be made in an administrative hearing if the attorney or representative was the sole eyewitness of an event. In this case, the agency representative had no first-hand testimony and was able to elicit the information he sought to present by questioning the human resource officer.

APPEARANCES

Grievant
One witness for Grievant
Human Resource Officer
Warden
Three witnesses for Agency

ISSUES

Did the grievant’s actions on February 12, 2002 warrant disciplinary action under the Standards of Conduct?³ If so, what was the appropriate level of disciplinary action for the conduct at issue?

¹ § 6.3, Grievance Procedure Manual, effective July 1, 2001.

² See Code of Virginia § 2.2-3007, Certain employees of the Department of Corrections and Juvenile Justice.

³ NOTE: The Written Notice in this case (Exhibit 6) erroneously cites January 30, 2002 as the Date of Offense. However, the agency clarified during the hearing, and the continuation of the Written Notice corroborates, that the actual Date of Offense was February 12, 2002.

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on February 28, 2002 because she failed to follow a supervisor's instructions on February 12, 2002.⁴ Grievant was also suspended for five workdays as part of the disciplinary action. Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Corrections (hereinafter referred to as agency) has employed the grievant for nearly eight years. The grievant has one other active written notice. A Group II Written Notice was issued on February 28, 2002 for failure to follow a supervisor's instructions on January 30, 2002.⁵

During 2001, grievant had been the source of friction between she and some other employees. This had gotten the attention of the business manager who directed grievant's supervisor to counsel grievant. The business manager was present on two occasions when grievant's supervisor verbally counseled her about improving her interaction with coworkers.

Grievant is a fiscal technician in the business office of a correctional center. During 2001, agency management made a decision, for cost efficiency reasons, to consolidate this business office and the business office of an adjoining correctional center. It was recognized that the consolidation process would not be easy but it was begun in September 2001. One of the initial changes was to move grievant and one coworker to the other business office for crosstraining, while one person was moved from the other office to grievant's facility for the same reason. During the fall of 2001, the consolidation did not go as smoothly as had been hoped and a supervisor had resigned. By January 2002, senior management decided action was necessary to bring the consolidation back on track.

On January 28, 2002, the regional director came to the facilities and conducted a joint meeting with all business office employees (nine from one facility and seven from the other) and the wardens of both correctional centers. The regional director made it abundantly clear that the consolidation process was going to work and that everyone was expected to do his or her part to achieve success. He also introduced an interim business manager from another facility who was designated to spend three days per week at the two facilities until the consolidation was successfully implemented. He also clarified that the employees (such as grievant) who were crosstraining in the adjoining facility were totally under the supervisory and management control of the facility in which they were physically working. Thus, grievant was advised that even though her payroll and certain other paperwork functions were temporarily

⁴ Exhibit 6. Written Notice, issued February 28, 2002.

⁵ Exhibit 5. Written Notice, issued February 28, 2002.

handled by her first facility, she was now subject to the authority of the supervisors and warden of the facility where she is now physically located.

On February 4, 2002, grievant's supervisor reported to the interim business manager that grievant had been continuing to causing disruption by interfering in other employees' work. On February 5, 2002, the interim business manager conducted verbal counseling with grievant regarding: 1) her negative tone and attitude in dealing with people and, 2) the need to discuss any concerns she may have with her supervisor – not with other employees.⁶ She was encouraged to demonstrate more teamwork and cooperation.

On February 12, 2002, the supervisor directed a temporary employee to pull inmate cards. After the employee began the task, grievant told the temporary employee that she wouldn't do that job and that the employee shouldn't do it either. Grievant further said that she intended to report the supervisor because it was wrong for the temporary employee to be doing this task. The employee reported this incident to the supervisor and said that grievant had been interfering with her work in a similar fashion on several previous occasions. The supervisor spoke with another employee in the area who had overheard part of the conversation. That employee verified that grievant told the temporary employee that the supervisor shouldn't have assigned that task.

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

⁶ Exhibit 7. Written documentation of verbal counseling session, February 6, 2002.

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.⁷

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 Training⁸ 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 defines Group II offenses to include acts and behavior more severe in nature are such that an additional Group II offense should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. The DOC Standards includes as an example of a Group II offense failure to follow a supervisor's instructions.⁹

The agency has demonstrated, by a preponderance of the evidence, that grievant has a history of getting under people's skin through her negative comments and uncooperative attitude. Further, the agency has shown that grievant has been verbally counseled about these issues on multiple occasions. After the regional director's meeting on January 28, 2002 and verbal counseling on February 5, 2002, grievant knew, or reasonably should have known, that she should not make negative comments to, or interfere in the work of, her coworkers. Nevertheless, her behavior on February 12, 2002 reflects that counseling had not been effective and that the agency had no option but to escalate to a disciplinary action.

Grievant objects to the fact that the agency's decision to discipline was based, in part, on hearsay evidence.¹⁰ In any administrative proceeding, hearsay evidence is always admissible providing it is otherwise reliable. "The only limit to the admissibility of hearsay evidence is that it bears satisfactory indicia of reliability. We have stated the test of admissibility as requiring that the hearsay

⁷ § 5.8 Grievance Procedure Manual, Department of Employment Dispute Resolution.

⁸ Now known as the Department of Human Resource Management (DHRM).

⁹ Exhibit 1. Department of Corrections Policy Number 5-10.16.B.1, *Standards of Conduct*, June 1, 1999.

¹⁰ Exhibit 2. Grievance Form A, filed February 28, 2002.

be probative and its use fundamentally fair.”¹¹ The hearing officer must assign an appropriate level of evidentiary weight to hearsay evidence in arriving at a decision in the case.

Grievant is also under the mistaken impression that verbal conversations should not be given consideration unless they have been documented in writing. It is true that contemporaneous written documentation of a conversation is generally accorded more evidentiary weight than a later recollection of the event. Nonetheless, verbal testimony is admissible evidence and will be accorded the appropriate evidentiary weight in arriving at a decision. In this case, the sworn, credible testimony of the interim business manager regarding the counseling that occurred in 2001 is admissible and relevant. It is indirectly corroborated by his February 6, 2002 memorandum, which refers to the turmoil grievant caused during 2001. Accordingly, it is concluded that his testimony should be afforded more weight than grievant’s self-serving denial.

Grievant alleges that this disciplinary action was retaliatory because grievant had filed another grievance on February 13, 2002 charging her supervisor with discrimination and retaliation. However, grievant presented no witnesses, evidence or testimony to support her allegation. There is more to proving retaliation than merely making an allegation. Viewing the evidence in the light most favorable to grievant, she did engage in a protected activity (filing a grievance). However, she has not established the required nexus between that activity and management’s action.

Moreover, the agency has rebutted grievant’s allegation of retaliation by establishing that it had a nonretaliatory business reason for this discipline. The preponderance of evidence in this case establishes that grievant had a history of creating turmoil among her coworkers. Less than one week after the regional director had laid down the law regarding the need for a successful consolidation and a real team effort by all employees, it was necessary to counsel grievant about her negative attitude. One week later, grievant again fomented a problem by interfering in a coworker’s work. Finally, the grievant has presented no evidence that the discipline was pretextual.

Grievant maintains that the interim business manager and the temporary employee both lied where their testimony differed from grievant’s testimony. However, grievant has offered no credible motivation for either of these witnesses to falsify their testimony. Both witnesses testified forthrightly; their demeanor was straightforward and lacking any indicia of deception. Moreover, their oral testimony was consistent with their prior written statements. For these reasons, it is concluded that their testimony was more credible than grievant’s testimony.

¹¹ Calhoun v. Bailar, 626 F.2d 145, 148 (9th Cir. 1980). *Cert. denied* 452 U.S. 906 (1981).

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on February 28, 2002 and the five-workday suspension are hereby AFFIRMED. The Written Notice shall be retained in the grievant's personnel file for the period specified in Section 5-10.19.A 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