

Issue: Group I Written Notice (inappropriate language with a supervisor);
Hearing Date: June 24, 2002; Decision Date: June 25, 2002; Agency:
Community College System; AHO: David J. Latham, Esquire; Case Number:
5453; **Administrative Review: DHRM Ruling requested 07/05/02; DHRM
Ruling Date: 07/15/02; Outcome: No policy violation cited. No basis to
interfere with decision**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5453

Hearing Date:	June 24, 2002
Decision Issued:	June 25, 2002

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 34th day following appointment of the hearing officer.¹

APPEARANCES

Grievant
Attorney for Grievant
Representative for Agency
Attorney Observer for Agency
Five witnesses for Agency

¹ § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Did the grievant's actions on November 30, 2001 warrant 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?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice issued for insulting and disrespectful language to a supervisor.² Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³

The Virginia Community College System (hereinafter referred to as "agency") has employed the grievant as a graphic artist for nine years. She has been a state employee for 24 years.

During the period from approximately late-September to mid-December 2002, grievant's regular supervisor took family leave. The supervisor's superior – the Director of Institutional Advancement – became grievant's acting supervisor during this period of time. The working relationship between grievant and the Director was acceptable during the first several weeks. In early October 2002, a computer virus affected many of the college's personal computers, including grievant's computer. As the problem became worse, grievant offered to perform graphics work on her personal home computer. The Director approved grievant's suggestion and grievant worked at home, responded promptly to phone or e-mail communications and came in to the college when necessary.⁴

By November 2002, the Director had begun receiving complaints from other employees about their difficulties in working with grievant. On November 28, 2002, the Director met with grievant to discuss work issues and to counsel grievant about her performance. The Director told grievant that the quality of her work was good but that she needed to improve her professional interactions and relationships with coworkers. Grievant acknowledged that she had an "attitude" but attributed it to other people taking advantage of her.⁵ She also made statements to the effect that the Director was not being truthful when he denied being aware of the actions of one individual in a group meeting that had occurred approximately 18 months earlier.

² Exhibit 5. Written Notice, issued December 13, 2001.

³ Exhibit 6. Grievance Form A, filed January 10, 2002.

⁴ Exhibit 3. E-mail from Director to grievant, October 20, 2001.

⁵ Exhibit 4. Counseling Memorandum to grievant, November 30, 2001.

The Director documented the November 28, 2002 meeting in writing and met with grievant again on November 30, 2002 to give her a written Counseling Memorandum. The Director gave grievant three specific goals to improve her relationships, her attitude and her performance as a team player. He also advised grievant that she would be scheduled to attend training courses to facilitate improvement in these areas, and would receive an interim job performance evaluation in April 2002. During this meeting, grievant again accused the Director of being untruthful when he said he did not remember an incident that occurred in a group meeting in early 2000. She also told the Director that, "the Maker had nothing to do with your creation – your parents were the only ones that made you." When the Director asked grievant if that statement was intended to be a personal insult, grievant said, "Take it any way you want to."⁶

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.⁷

⁶ Exhibit 5. Memorandum from Director to grievant, December 5, 2001.

⁷ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*.

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.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 are the least severe types of offense.⁹

Jurisdictional Issue

The sole issue that precipitated a hearing in this case was the issuance of a Group I Written Notice on December 13, 2001. Although grievant requested multiple forms of relief (addressed below), her primary concern was obtaining a rescission of the disciplinary action. In addition to addressing the specific event that caused the Written Notice to be issued, the agency attempted to present testimony and evidence regarding grievant's behavior during the grievance resolution process, in the months subsequent to issuance of discipline. The evidence was proffered to document grievant's continuing pattern of offensive and inappropriate behavior. While such evidence has some relevancy, the hearing officer considered that grievant's dismay about being disciplined might have caused some of her subsequent objectionable behavior. Therefore, in the interest of fairness to grievant, the hearing officer ruled inadmissible evidence of post-disciplinary behavior.

If the agency feels that grievant's behavior during the grievance resolution process was inappropriate, it has two possible courses of action. First, the grievance process includes a noncompliance provision.¹⁰ If either party believes the opposing party has violated the procedure, that party may request a ruling from the Director of EDR. Second, if the agency believes that grievant's behavior during the resolution process constitutes an offense under the Standards of Conduct, it may take appropriate corrective or disciplinary action, notwithstanding the fact that the initial disciplinary action is in the adjudication process.

Grievant's behavior

Grievant contends that during the November 28 and 30, 2002 meetings with the Director she said, "I question your credibility when you say you don't remember [what occurred in an early 2000 meeting]." The Director maintains

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

⁹ Exhibit 11. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹⁰ § 6.3 EDR *Grievance Procedure Manual*, effective July 1, 2001.

that grievant questioned his “integrity” and accused him of “lying” about not remembering the incident. It is not surprising that, in an academic setting, semantics would be invoked by one party or the other. However, the fact remains that, regardless of the actual words used, grievant’s meaning was crystal clear. She believed the Director was not truthful, and she told him, in effect, that he was lying or untruthful. Grievant’s accusation, especially when considered in conjunction with her remark about the Director’s creation, can only be understood as intended to insult and disrespect the Director. It is ironic that grievant made such remarks during a counseling session intended to bring to her attention that other employees perceive her behavior as negative and offensive.

Grievant has accused the Director of assaulting her but has failed to present any testimony or evidence to support this allegation.¹¹ The Director acknowledged that he did point a finger towards grievant on November 30, 2002 but immediately ceased doing so when grievant objected. Grievant erroneously characterizes the Director’s criticism of her interpersonal relationships as an assault.¹²

Grievant expresses consternation that she is unable to identify a specific Standard of Conduct that she violated. The Standards of Conduct found in DHRM Policy No. 1.60 lists only examples of offenses; the list is not all-inclusive. Any offense which, in the judgement of agency heads, undermines the effectiveness of agencies’ activities may be considered unacceptable and treated in a manner consistent with the provisions of Section V.¹³ In this case, the agency has issued a Group I Written Notice – given for the least severe offenses. The agency considered the use of insulting and disrespectful language to a supervisor equivalent in seriousness to such specified Group I offenses as the use of abusive language, or unsatisfactory work performance. It is held that Group I is a reasonable level for the offense that occurred in this case.

The purpose of a counseling session, such as the one that occurred on November 30, 2002, is to provide for an informal discussion between employee and supervisor regarding problems with the employee’s work performance and/or behavior.¹⁴ Most supervisors initiate counseling sessions only after investigating a problem, reflecting on the best way to resolve the problem, and concluding that personal counseling is required. If a supervisor determines that a problem is serious enough to warrant counseling, it behooves the employee to attempt to understand the concerns being communicated. If however, the employee attempts to change the focus of the counseling session to the alleged deficiencies of other employees, or makes comments that insult and offend the

¹¹ Exhibit 5. Memorandum from grievant to Director, December 10, 2001.

¹² Black’s Law Dictionary, Sixth Edition, defines “assault.” “Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault.”

¹³ Exhibit 11. Section V.A, *ibid*.

¹⁴ Exhibit 11. Section II.B.1, *ibid*.

supervisor, the employee is showing disrespect for not only the supervisor but for the counseling process itself. Such behavior is counterproductive and undermines the effectiveness of the counseling session.

Grievant argues that the discipline was attributable to a difference in personalities. There will always be personality differences between coworkers, and between employees and their supervisors. It is rare to find an employment environment in which an employee doesn't dislike at least one coworker. However, working for any organization requires that we get along with, and respect, coworkers – whether we like them or not. This is especially true in employee/supervisor relationships. A very experienced human resource manager once told an employee, “You don't have to like your supervisor, but you do have to respect him.”

Other relief requested by grievant

In addition to requesting a rescission of the Written Notice, grievant requested five other forms of relief. First, she requested that “ongoing harassment” cease. However, grievant presented no testimony or evidence on this issue during the hearing. Therefore, grievant has provided no basis upon which relief can be granted. Moreover, the second-step respondent assured grievant that the agency is committed to providing a non-hostile environment in which to work.

Second, grievant requested that documentation of her behavior be destroyed. Management has the right to retain documentation, notwithstanding grievant's disagreement with portions thereof. Such a decision is an internal management decision made by each agency. Section 2.2-3004.B of the Code of Virginia states, in pertinent part, “Management reserves the exclusive right to manage the affairs and operations of state government.” The second-step response accurately cited the policy regarding the retention of documentation. Grievant has provided no basis to support destruction of memoranda, other than her disagreement with the content of the memoranda. Third, grievant requested that the agency's president place a memorandum in her personnel file rescinding references to her alleged ineffective interactions with coworkers. For the reasons cited above, there is no basis either for such a request or for granting such relief.

Fourth, grievant requested that her performance-planning document be revised to delete a requirement for an April 2002 interim evaluation. This issue has become moot since grievant's supervisor completed the interim review on May 1, 2002. Even if it had not been completed, grievant's request would be denied because, 1) management has the right, under Va. Code § 2.2-3004B, to require interim evaluations and, 2) a hearing officer does not have the authority to grant the relief requested.¹⁵

¹⁵ § 5.9, EDR *Grievance Procedure Manual*, effective July 1, 2001.

Finally grievant requested written assurance that no future retaliatory action would be taken against her. The agency's president has complied with this request in the third-step response to the grievant. However, grievant should not assume that such an assurance precludes future disciplinary action. Where warranted, the agency is obligated to apply the Standards of Conduct to all employees, including grievant. Should grievant commit an offense in the future, appropriate and reasonable administration of disciplinary action would not be deemed retaliation. Moreover, the agency may require grievant to attend training, be given interim evaluations, or take any other action reasonably intended to improve performance or enhance interpersonal working relationships.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on December 13, 2001 is hereby **AFFIRMED**. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party.

The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁶

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.