Issue: Group II Written Notice with 5-day Suspension (interfering with an investigation and retaliating against employees); Hearing Date: July 8-9, 2002; Decision Date: July 15, 2002; Agency: Virginia Department of Transportation; AHO: David J. Latham, Esquire; Case Number: 5455; **Judicial Review: Appealed to the Circuit Court in the County of Louisa on 08/12/02; Outcome: Court upheld HO's decision; found not contradictory to law [CL4302]; Date of decision: 11/26/02**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

## DECISION OF HEARING OFFICER

In re:

Case No: 5455

Hearing Dates: July 8 & 9, 2002
Decision Issued: July 15, 2002

## PROCEDURAL ISSUES

Due to availability of the participants, the hearing could not be docketed until the 40th day following appointment of the hearing officer.[1]

Grievant seeks as part of his relief "monetary damages including payment of grievant's attorney's fees and costs."[2] The grievance process authorized by the General Assembly does not include a provision for monetary damages. Hearing Officers have the authority to award back pay if a suspension is removed, but they do not have authority to award monetary damages or attorney fees.[3]

[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.

[2] Exhibit 15, Grievance Form A attachments, filed March 14, 2002.

[3] § 5.9, Department of Employment Dispute Resolution *Grievance Procedure Manual,* effective July 1, 2001.

## APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
District Administrator – Day 1
District Construction Engineer - Day 2
Attorney for Agency
Legal Assistant Advocate for Agency
12 witnesses for Agency

## ISSUES

Did the grievant's conduct warrant disciplinary action under the 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 II Written Notice issued for interfering with an investigation and retaliating against employees on February 5, 2002.[4] As part of the disciplinary action, the grievant was suspended for five workdays from February 11 through 15, 2002.[5] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Transportation (VDOT) (hereinafter referred to as "agency") has employed grievant as resident engineer for 34 years.

In January 2002, an employee whose employment had been terminated filed a complaint with the agency's central office. Central office notified grievant on January 29, 2002 that investigators would be arriving at his residency on February 4, 2002 to conduct interviews with employees.[6] A human relations consultant and an equal employment opportunity investigator came to the residency and conducted interviews with nine employees on February 4, 2002. Interviewees expressed multiple concerns that went well beyond the initial complaint of religious discrimination that had been lodged by the discharged employee. The investigators concluded that there was significant stress and

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[4] Exhibit 15. *Grievance Form A*, filed March 14, 2002.
[5] Exhibit 6. Written Notice, issued February 13, 2002.
[6] Exhibit 1. Email from central office to grievant, January 29, 2002.

tension in the office and that the grievant had interfered with the investigation and retaliated against employees who participated in the interviews.[7]

As interviews were conducted during the day, grievant met some employees as they entered the conference room where interviews were being conducted. Some employees felt intimidated by comments he made to them while others were upset that he was "hovering" in the area. Between some interviews, grievant entered the conference room and made comments to the investigators about some of those being interviewed. One female employee cried during her interview, one male was trembling, and two others were visibly nervous. Two female employees brought documents to show the interviewers but kept them concealed on their person until they were inside the conference room. Several employees either whispered or talked in very low voices because they were apprehensive that someone might be listening outside the conference room. Most indicated that they feared some form of retaliation as a result of speaking with the investigators.

At 9:00 a.m. on the morning after the interviews, grievant sent an e-mail message to only the nine employees who had been interviewed the preceding day that stated, in its entirety:

> Very seldom does an employee have a chance to show their loyalty and support or lack of!!! It is obvious what choice you have made.[8]

The nine employees were, "intimidated," "scared," and "hurt," and feared that grievant intended to retaliate against them. Some recalled that grievant had been observed in the past to say, "I never forgive." During that morning, grievant drafted and printed out a proposed reorganization of the residency.[9] The reorganization significantly reduced the responsibilities of the assistant resident engineer (who was one of those interviewed). It also elevated significantly the responsibilities of the transportation operations manager (who was not interviewed). In addition a memorandum attached to the reorganization chart stated that the assistant resident engineer (ARE) would be moved to a smaller and significantly less desirable office,[10] while the program specialist who serves as the resident engineer's secretary would be moved into the ARE's office. The memorandum specifically mandated that office furniture would not be moved. Grievant distributed the reorganization chart and memorandum during the early afternoon. Most recipients perceived this as part of the retaliation they had feared and some promptly faxed or e-mailed copies to the investigators in central

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[7] Exhibit 2. Memorandum from investigators, February 6, 2002.
[8] Exhibit 3. E-mail message from grievant to nine employees, February 5, 2002.
[9] Exhibit 4. Reorganization chart and attachment.
[10] The office into which grievant planned to move the ARE was occupied by an office service specialist (OSS). It has entranceways without doors on two sides and is used as a "pass-through" to access other offices behind it. The office is substantially smaller than the ARE's office and has modular furniture designed for clerical employees. The ARE's office has executive-type furniture appropriate for her position.

office. Almost all concluded that the reorganization was a "done deal," and put no stock in grievant's solicitation of feedback about the proposal.

It is widely recognized that grievant and his secretary are very close. Most perceive that the secretary receives special treatment (works overtime when others are not permitted to do so), that she is nosy, that she manipulates the grievant and that she regularly reports on others to the grievant. The reorganization moved grievant's secretary to an office further from his own, rather than closer.[11]

On February 5 & 6, 2002, grievant sent several e-mail messages to the ARE. One directed her to investigate why one of the interviewees had made negative statements about the grievant's secretary.[12] Another stated, "Effective immediately any proposed purchase for the residency office personnel must be approved by me! ! !"[13] A third message expressed grievant's opinion that one of the interviewees had an "unjustified negative attitude toward this residency" and directed the ARE to counsel the employee that such would not be tolerated or "serious disciplinary action will be the consequence."[14] Grievant also sent an e-mail message to a transportation operations manager regarding one of his employees whom grievant believed was taking too much leave on Fridays.[15] Both the manager and the employee were among those interviewed.

On February 6, 2002, the investigators concluded in their report that grievant had retaliated against those who participated in interviews, interfered with the investigation and threatened interviewed employees. They recommended grievant's removal from his position pending completion of their investigation.

In residencies where there is only one assistant resident engineer, VDOT practice is to have that person manage both construction and maintenance (the two major functions performed by residencies). Grievant's reorganization would have completed removed the maintenance function from the ARE's responsibility thereby denying her valuable experience she would need to be considered for promotion. According to the district administrator, grievant's ARE was being groomed for possible future consideration as a resident engineer. The district administrator would have overruled grievant's reorganization had he known about it beforehand.

## APPLICABLE LAW AND OPINION

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[11] Exhibit 23. Floor plan of office space.
[12] Exhibit 6. Email from grievant to ARE, 1:23 p.m., February 5, 2002.
[13] Exhibit 6. E-mail from grievant to ARE, 8:50 a.m., February 6, 2002.
[14] Exhibit 6. E-mail from grievant to ARE, 10:24 a.m., February 6, 2002.
[15] Exhibit 10. E-mail from grievant to TOM, 11:04 a.m., February 6, 2002.

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.[16]

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[17] 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 include acts and behavior which are more severe in nature and are such that an accumulation of two Group II notices normally should warrant removal from employment.[18]

In order to state a prima facie case of retaliation, one must demonstrate that: (i) the employee engaged in a protected activity; (ii) adverse action was

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[16] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[17] Now known as the Department of Human Resource Management (DHRM).
[18] Section V.B.2, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

taken against the employee; and (iii) a causal connection exists between the protected activity and the adverse action.[19] Grievant argues that this test is inapplicable because this case does not involve a Title VII action. While it is agreed that this is not a Title VII case, the test nevertheless provides a useful framework to analyze the facts. In the instant case, nine employees engaged in the protected activity of participating in an investigation conducted by the agency. Further, adverse action in the form of retaliatory e-mail messages and office reorganization was taken against several of the employees.

The agency has demonstrated, by a preponderance of the evidence, that grievant took actions that were retaliatory and interfered with an investigation. It is concluded that a causal connection exists between participation in the interviews and the retaliatory actions for the following five reasons. First, grievant attempted to influence the investigators by making unsolicited comments between interviews. Further, rather than maintain neutrality by remaining in his office, grievant made it a point to be in the hallway as interviewees arrived, greeting them in manner designed to make them aware that he knew they were being interviewed. This was clearly a subtle but unmistakable attempt to intimidate employees, and some employees testified that they were, in fact, intimidated. The fact that he was the resident engineer is not justification for interfering with the investigation in this manner. Had any other employee taken these actions, a manager would certainly be justified in disciplining them.

Second, grievant very pointedly sent his e-mail of February 5, 2002 only to the nine people who spoke with the investigators. His short, exclamatory message told the nine employees that he considered them disloyal. The tone of the message made it apparent that grievant was highly displeased. It only added to the existing fear that retaliation was forthcoming. Grievant maintains that his e-mail was only, "A reaction, not a retaliation."[20] While it may have been a reaction, it was intimidating and therefore constituted interference with an on-going investigation as well as retaliation for participation in the investigation.

Third, on the heels of this implicitly threatening message, grievant quickly drafted and distributed a proposed reorganization chart. Grievant contends that the residency reorganization was only a proposal and was therefore subject to change following input from employees. Grievant's contention is facile and self-serving. No one gave feedback to the grievant because they all believed the reorganization would take place as drafted by grievant and that feedback would be pointless. Grievant also maintains that reorganization had been previously discussed with the staff. In fact, however, the only issue previously discussed with anyone involved the hiring of two office service specialists and under whose direction they would work. Prior to February 5, 2002, grievant never discussed reorganizing major responsibilities or physical office assignments with his district administrator, his ARE, his secretary or anyone else.

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[19] See Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).
[20] Exhibit 13. Memorandum to district administrator from grievant, February 7, 2002.

Grievant maintains that the impending employment of two office service specialists prompted him to reorganize at the time he did. In fact, the evidence revealed that the hiring of two OSSs had been planned since at least as early as December 2001. Grievant suggests that the timing was attributable to hiring approval having been granted on February 1, 2002. While that may have forced the decision as to where on the organization chart these two clerical workers would be placed, it fails to explain the major reorganization of other responsibilities and the office shuffling that constituted the disruptive changes in grievant's reorganization plan. Given the clearly adverse effect on some of those who spoke to the interviewers, and the beneficial effects on some employees grievant considered loyal, it was inevitable that this major reorganization would be perceived as retaliatory.

With 34 years of management experience, grievant knew, or reasonably should have known, that this hastily drafted reorganization would be seen as retaliatory. Nonetheless, without prior discussion with his own superior, or with his second-in-command, grievant gave his reorganization chart to the nine interviewees just hours after angrily sending them a message that they were disloyal. Is it reasonable or realistic to expect subordinates whose loyalty you have just questioned to disagree with your proposal to reorganize the office? Under these circumstances, a reasonable person would conclude that the reorganization was intended to be punitive and retaliatory, and that feedback would be pointless.

Fourth, the flurry of other e-mail messages grievant sent to the ARE on February 5 & 6, 2002 is further evidence that grievant was looking for ways to crack down on the activities on some of his "disloyal" employees. The problems discussed in these messages had existed for some time. The grievant's decision to suddenly address these problems in the two days following interviews is another attempt to intimidate and retaliate. An analysis of the e-mails reveals that they directly targeted or adversely impacted at least five of the nine people interviewed. Moreover, the evidence in this case reveals that grievant had previously addressed these same issues in e-mail messages issued on January 25, 2002.[21] The tone of those messages was direct and to the point but not punitive in tone. In contrast, the messages of February 5 & 6 convey a much more strident, threatening tone.

Fifth, grievant's decision to move his secretary to the office occupied by the ARE can only be viewed as punitive and retaliatory. Part of his rationale was to provide her with an office that had more privacy. If that were so, grievant could have moved her to the office directly across from his own, and installed doors to give her the desired privacy. There was also an office available on the second floor that would have afforded even more privacy. In summary, it is concluded that grievant's reasons for his actions are pretextual.

[21] Exhibit 20. E-mail messages from grievant to ARE, January 25, 2002.

Grievant argues that his discipline was disparate and unwarranted because the ARE was not disciplined for her issuance of an e-mail message which indicated that grievant's five-day absence from work during the suspension was due to discipline issued to him. Without adjudicating the ARE's alleged offense, it may well have been inappropriate to send such a message to employees. However, grievant's offense is far different from that allegedly committed by the ARE. Grievant has not shown that his discipline was different from any other management person who interfered with an investigation and retaliated against employees who participated in an investigation.

Finally, grievant seeks to absolve himself of guilt by arguing that: 1) the e-mail was only a knee-jerk reaction, 2) he did not connect the timing of his e-mail and the reorganization chart, and 3) it was his prerogative as resident engineer to reorganize the office. Even if the thought expressed in his e-mail was only a reaction, the grievant should have known better than to put it in writing, and certainly should have known better than to transmit it anyone – let alone send it to subordinates. The e-mail and reorganization chart were issued less than five hours apart; it is simply not credible that grievant did not connect the timing. While grievant undeniably has the prerogative to reorganize his office, he also has the overriding responsibility as a manager to do so in a manner that does not intimidate or retaliate.

The agency noted that it could have imposed more severe discipline in this case but that in view of grievant's long service and past good performance record, it issued only a Group II Written Notice and a five-day suspension.[22] The evidence in this case supports this level of discipline.

## DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for interference with an investigation and retaliation and the five-day suspension issued to grievant on February 13, 2002 are 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:

[22] The Standards of Conduct provide for a suspension of up to 10 days for the first Group II Written Notice.

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.[23]

[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

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