

Issue: Group II Written Notice with 5-day Suspension (misuse of State property);
Hearing Date: July 11, 2002; Decision Date: July 12, 2002; Agency: Virginia
Department of Transportation; AHO: David J. Latham, Esquire; Case Number:
5472; **Judicial Review: Appealed to the Circuit Court in the City of
Hampton on 08/12/02; Outcome: HO decision affirmed. Not contradictory
to law (Case No. CL02-707) dated 10/02/02**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5472

Hearing Date: July 11, 2002
Decision Issued: July 12, 2002

PROCEDURAL ISSUES

Due to availability of the participants, the hearing could not be docketed until the 30th day following appointment of the hearing officer.¹

Grievant seeks as part of his relief "exemplary damages," which he clarified as being the sum of \$1,000,000.00.² The grievance process authorized by the General Assembly does not include a provision for punitive 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.³

¹ § 5.1, *Grievance Procedure Manual*, effective July 1, 2001, 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 1, Grievance Form A attachments, filed May 10, 2002.

³ § 5.9, *Ibid.*

APPEARANCES

Grievant
Human Resource Analyst
Representative for Agency
Three witnesses for Agency

ISSUES

Did the grievant's actions on April 13, 2002 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 grievance from a Group II Written Notice issued for the misuse of state property on April 13, 2002.⁴ As part of the disciplinary action, grievant was suspended from work without pay for five days.⁵ Following failure to resolve the matter during the grievance process, grievant requested a hearing.

The Virginia Department of Transportation (hereinafter referred to as agency) has employed the grievant as a bridge-tunnel supervisor for 18 years. Grievant currently has one other active disciplinary action – a Group II Written Notice issued for violation of a safety rule.⁶ He filed a grievance that went through the grievance process to a hearing. A Hearing Officer affirmed the disciplinary action and grievant subsequently appealed to Circuit Court where the matter is still pending as of this date.

In 1999, grievant received a Group I Written Notice for using abusive language in an e-mail communication. In that e-mail, grievant had made a threatening comment with reference to his direct supervisor, stating, "...and my advice to him is... He had better be careful."⁷ In 1996 and 1998, he was counseled in writing about inappropriate e-mail communication with a different employee and was warned that failure to improve would result in further corrective action.⁸

⁴ Exhibit 1. Grievance Form A, filed May 10, 2002.

⁵ Exhibit 2. Written Notice, issued April 26, 2002.

⁶ Exhibit 12. Written Notice, issued November 19, 2001.

⁷ Exhibit 4. Written Notice, issued October 14, 1999.

⁸ Exhibit 5. Memorandum from Assistant Superintendent to grievant, March 5, 1998.

In 2000, grievant sent an e-mail message to the assistant superintendent of operations (two supervisory levels above grievant), with copies to the facility manager and four other employees, in which he stated, among other things:

You are a comical fellow... Come to think of it, no You are not comical, you done lose your mind ... As long as [facility manager] has someone like you around to hide behind, racism will continue to run rampant throughout this facility.⁹

As a result of this e-mail, the facility manager gave grievant a written counseling advising him not to use abusive or threatening language in e-mail communications.¹⁰ Grievant subsequently apologized for his offensive language and committed to write future communications in a tempered and professional manner.¹¹

On April 13, 2002, grievant sent an e-mail message on a state computer to another bridge-tunnel supervisor, that person's supervisor, a human resources analyst, the superintendent of operations, the facility manager, and the assistant superintendent of operations. Grievant wanted to express his discomfort at being left alone in the presence of a specific bridge-tunnel patroller.¹² In the message, grievant explains the reason for his discomfort, stating, in pertinent part:

Among other things Mr. _____ is a hard core compulsive liar, and I find it appalling that I am surrounded by these types of individuals at my place of employment.¹³

The grievant made this statement because 1) the employee in question had been counseled in 1999 for making false allegations and misrepresentations¹⁴ and, 2) grievant maintains the employee had lied to him on other occasions.

After reviewing this matter with superiors, the facility manager, and human resources, grievant's supervisor issued a Group II Written Notice for misuse of state property.¹⁵

⁹ Exhibit 3. E-mail from grievant, February 10, 2000.

¹⁰ Exhibit 3. Memorandum from facility manager to grievant, February 24, 2000.

¹¹ Exhibit 3. Memorandum from grievant to facility manager, February 26, 2000.

¹² The patroller works the night shift, which ends at 6:00 a.m. Grievant works the day shift beginning at 6:00 a.m. The patroller does not have personal transportation and frequently waits in the office with grievant for up to two hours until a friend arrives to pick him up.

¹³ Exhibit 2. E-mail message from grievant, April 13, 2002.

¹⁴ Exhibit 11. Counseling memorandum, September 27, 1999.

¹⁵ Exhibit 2. Written Notice, issued April 26, 2002.

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.

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 Training¹⁶ 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 offenses normally warrant removal from employment.¹⁷ Examples of Group II offenses include failure to follow a supervisor's instructions, and misuse of state property.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁸

¹⁶ Now known as the Department of Human Resource Management (DHRM).

¹⁷ Exhibit 6. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁸ § 5.8, *Grievance Procedure Manual, Rules for the Hearing*, Effective July 1, 2001.

The agency has demonstrated, by a preponderance of the evidence, that grievant wrote and distributed to six people a communication that may be potentially libelous because it harms the reputation of an employee. Two of those who received the message were supervisors of the subject employee and could have given him a copy of the e-mail. In addition, others in the agency who monitor e-mail communications have access to this message, thus expanding the number of people who could possibly send or give a copy to the subject employee. Thus, grievant has created a situation that could possibly result in the filing of a lawsuit against the agency.

Grievant argues that simply expressing his opinion in an e-mail message is not “misuse of state property” (i.e., his computer). However, writing and publishing a potentially libelous statement on a state-owned computer does constitute misuse of the computer. Moreover, grievant committed another Group II offense by failing to follow a supervisor’s instructions. Grievant had previously been counseled by his supervisors not to write abusive e-mail messages. In any case, this is clearly a serious offense – serious enough that a second such offense would warrant termination of grievant’s employment. It thus fits the general definition of a Group II offense. The offenses listed in the Standards of Conduct are only examples of unacceptable behavior. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agency activities may be considered unacceptable and treated in a manner consistent with the provisions of the policy.¹⁹

Grievant contends that issuance of the disciplinary action is harassment and discrimination. In support of his argument, grievant cites the Commonwealth’s policy prohibiting employment discrimination.²⁰ The policy specifically prohibits employment discrimination in the application of corrective actions, including disciplinary actions. Grievant is a member of a protected class because of his race. However, grievant has not provided any evidence to prove that the agency has imposed harsher discipline against him than against other employees who have committed this same offense.²¹

Grievant maintains that he had a right to express his opinion in the email pursuant to the First Amendment.²² Grievant also cited an encyclopedia reference on freedom of speech, which explains that the right may be expressed in electronic documents on computer networks. However, the article also notes, in pertinent part:

¹⁹ Exhibit 6. Section V.A. *Ibid.*

²⁰ Exhibit 7. DHRM Policy 2.05, *Equal Employment Opportunity*, effective September 25, 2000.

²¹ See generally Cabral v. Medical College of Virginia Hospital, 1998 U.S. App. LEXIS 6610 (4th Cir. 1998).

²² Exhibit 8. Amendment 1, *Constitution of the United States*.

Most democratic nations have four major **restrictions** on free expression. (1) Laws covering *libel* and *slander* prohibit speech or publication that harms a person's reputation...²³ (Emphasis added)

Grievant is correct in asserting that the agency is restricting his freedom of speech. However, the agency is restricting his right only because the laws covering libel and slander restrict the agency's rights; as a supervisor, grievant represents the agency. Accordingly, grievant must restrict his freedom of expression just as the agency, and every other citizen, must limit what they say so as not to violate the laws that prohibit libel and slander. When grievant publishes an e-mail message to several people, he does so as a supervisor and thereby speaks on behalf of the agency. In this case, grievant published a statement that could potentially be libelous because it defames the character of a person.

Grievant admitted during the hearing that his e-mail message on April 13, 2002 was not proper. He also acknowledged that he learned much during the hearing about why his message was improper. Nonetheless, the fact remains that the e-mail did constitute a serious offense. Given the additional fact that grievant had previously been counseled or disciplined on at least four occasions in 1996, 1998 and 2000, it is apparent that grievant has not fully understood the seriousness of his actions.

Grievant contends the level of discipline is too harsh for his offense. However, grievant is reminded that the agency considered terminating his employment, demoting him, and giving him a longer suspension, all of which would have been more severe discipline than he received. The agency ultimately decided to give him one more chance by issuing a Group II Written Notice and a shorter suspension. After careful evaluation of the evidence, the level of discipline imposed in this case is held to be commensurate with the offense.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued to the grievant on April 26, 2002 and the five-day suspension are **AFFIRMED**. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

²³ Exhibit 9. World Encyclopedia, p. 506

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.²⁴

[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

²⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.