

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 07/29/02; Decision Date: 07/30/02; Agency: Department of Motor Vehicles; AHO: David J. Latham, Esq.; Case No.: 5488



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5488

Hearing Date: July 29, 2002  
Decision Issued: July 30, 2002

**PROCEDURAL ISSUE**

In her request for relief, grievant requested that district policy regarding management coverage of branch offices be clarified. Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law or policy. Specifically, hearing officers may not establish or revise policies, procedures, rules or regulations.<sup>1</sup>

**APPEARANCES**

Grievant  
Personnel Manager  
Two witnesses for Agency

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<sup>1</sup> § 5.9(b)4, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

## ISSUES

Did the grievant's actions warrant disciplinary action under the agency's 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 unsatisfactory job performance on February 21, 2002.<sup>2</sup> Following failure to resolve the grievance, the agency head qualified the grievance for a hearing.<sup>3</sup> The Department of Motor Vehicles (DMV) (hereinafter referred to as agency) has employed the grievant as a customer service center manager for 17 years.

The agency's policy requires that branch managers submit to the district manager on a weekly basis an itinerary that lists the work schedule for each member of the management team in the branch office. The district manager does not review the schedule unless she has a need to contact management in that office. The schedule lists work hours for each day and reasons for absences. Grievant has routinely submitted such a schedule to her branch manager each week. Grievant has two assistant managers in her branch location.<sup>4</sup>

On January 30, 2002, grievant's office had no management coverage from 7:00 p.m. until 8:00 p.m. When confronted about this incident by the district manager, grievant acknowledged that she had planned poorly and assured the district manager that it would not happen again. On February 2, 2002, grievant's office was again open without management coverage until 1:30 p.m. The branch manager documented these two incidents in a written memorandum of counseling emphasizing the need to assure that at least one manager is in the office whenever the office is open to the public.<sup>5</sup> The memorandum states, in pertinent part:

In addition to your coor (sic) responsibilities that were reviewed in your EWP [Employee Work Profile], please be aware of the following: There **will** be management coverage at the mall CSC's (sic) at all times. If there is an emergency situation where a senior needs to be left in charge, I **must** be notified immediately. Itineraries **must** reflect the actual hours being worked by management. (Emphasis added)

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<sup>2</sup> Exhibit 8. Written Notice, issued February 27, 2002.

<sup>3</sup> Exhibit 9. Grievance Form A, filed March 27, 2002.

<sup>4</sup> At the time of the offense, assistant managers were known as coordinators.

<sup>5</sup> Exhibit 4. Written Counseling memorandum, February 5, 2002.

Grievant and the district manager both signed this document. The following day, grievant wrote to the district manager assuring that changes had been made in the management schedule to assure coverage during operational hours.<sup>6</sup> Grievant spoke with her two assistant managers regarding the district manager's memorandum.

On February 10, 2002, grievant called the district manager to request annual leave from February 14 through February 21, 2002, which the district manager granted. On February 13, 2002, one of grievant's assistant managers submitted to the branch manager the weekly itinerary for the upcoming week of February 18, 2002.<sup>7</sup> The schedule was inaccurate in four significant respects. First, it showed that the grievant would be working on February 20 & 21, 2002 when, in fact, she was scheduled to be on annual leave. Second, it showed that the male assistant manager would be working from 8:30 a.m. to 5:30 p.m. on February 20, 2002 when, in fact, he was out of the office participating in a grievance hearing on that date. Third, the male assistant manager had been prescheduled to attend a training class at the district office for the entire day on February 21, 2002.<sup>8</sup> Fourth, the hours on the itinerary for the female assistant manager did not accurately reflect the *actual* hours she was working. Both grievant and the district manager were aware of the scheduled date for the assistant manager's grievance hearing, and in fact, participated in the hearing. Both were also aware of the scheduled training class.

At about noon on February 21, 2002, the district manager and her immediate superior – the director of customer service – from the central office were en route to a branch office when they received a telephone call from central office. The employees in grievant's branch office had encountered difficulty with an automated teller machine and, because there were no management members in the office, had called central office for help. On this date, grievant was on leave and the male assistant manager was in a training class at the district office for the entire day. The other assistant manager had worked 12.5 hours on February 20, 2002. She told a senior employee (not management staff) that she would come to work at 1:30 p.m. on February 21, 2002, and that the senior employee would be in charge until then. As a result of this incident, the district manager issued a Group I Written Notice for unsatisfactory job performance to grievant.

When grievant learned about what had occurred on February 21, 2002, she did not take any corrective or disciplinary action with regard to her two assistant managers.

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<sup>6</sup> Exhibit 5. Memorandum from grievant to district manager, February 6, 2002.

<sup>7</sup> Exhibit 1. Manager/Coordinator Itinerary, week of February 18, 2002.

<sup>8</sup> Exhibit 2. Various e-mail messages, January 22, 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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>9</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>10</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.1 defines Group I offenses as being the least severe and includes inadequate or unsatisfactory work performance.

It is undisputed that grievant received verbal counseling on February 5, 2002 regarding the importance of providing an accurate itinerary to the district manager. She also signed written counseling documentation directing that (i) itineraries *must* reflect the actual hours being worked, (ii) there *will* be

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<sup>9</sup> § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

<sup>10</sup> Now known as the Department of Human Resource Management (DHRM).

management coverage at all times and, (iii) the district manager *must* be notified immediately if a senior had to left in charge in emergency situations. On February 21, 2002, the itinerary was grossly inaccurate, there was no management coverage in the office, there was no emergency situation, and the district manager was not notified that a senior was being left in charge. As the branch manager, grievant is ultimately responsible for what occurs in her office. The agency has demonstrated, by a preponderance of the evidence, that grievant's work performance was inadequate or unsatisfactory. The burden of demonstrating mitigating circumstances, if any, now shifts to the grievant.

The district manager documented a verbal counseling of grievant on February 20, 2002 regarding the importance of providing management coverage in the branch office at all times.<sup>11</sup> Grievant denies that such a conversation occurred. There was no witness to the discussion, and both grievant and the district manager testified credibly. Therefore, there is insufficient evidence to resolve whether such a discussion occurred. However, even if such a discussion did not occur, the written counseling memorandum signed by grievant on February 5, 2002 constitutes more than ample notice of what the district manager expected with regard to providing management coverage in branch offices.

Grievant attempts to shift responsibility to the district manager, contending that the district manager might have recognized the potential problem if she had reviewed the itinerary when it was submitted. However, the district manager utilizes itineraries primarily to ascertain which manager is on duty when she has a need to contact a branch office. Accordingly, there may be weeks where she has no occasion to refer to the itineraries of every branch office. In any case, even if the district manager had discovered the problem in advance, the fact remains that the itinerary was submitted with four significant errors.

Grievant contends that the job description of senior employees indicates that they may be placed in charge of an office as part of their training for future advancement. While grievant did not proffer such a job description, the agency did not rebut this testimony. Moreover, the district manager implicitly acknowledged this by writing in the counseling memorandum that seniors may be left in charge in emergency situations. However, the district manager had given grievant unambiguous written instructions that she must be notified immediately if a senior had to be left in charge during an emergency situation. Therefore, the fact that a senior may be placed in charge in an emergency does not alter the instruction that immediate notification must be given to the district manager.

Grievant points out that the female assistant manager had worked over 12 hours on February 20<sup>th</sup> and that if she worked another 12 hours on February 21<sup>st</sup>, it would have necessitated her taking a day off. Management personnel are exempt from overtime requirements and it is expected that, from time-to-time, they will have to work more than 40-hour weeks. Accordingly, the fact that the

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<sup>11</sup> Exhibit 3. Documentation of verbal counseling, February 20, 2002.

assistant manager would have had to work a longer day does not justify the failure either to be present or to notify the district manager about the situation.

Grievant argues that she was on leave and should therefore not be held accountable. Those who accept the benefits of being in charge must also accept the responsibilities that go with the privileges. One such responsibility is being held accountable for those situations that occur in one's absence that could have been prevented. Here, grievant had received very clear, detailed, written instructions from her superior just two weeks earlier. Grievant is responsible to assure that those instructions are followed during her absence. Although grievant testified that she spoke to her assistant managers about the instructions, three facts strongly suggest either that she did not speak to them, or that she did not do so in an effective manner. First, grievant did not counsel or discipline either assistant manager following this incident. If, as grievant argues, the assistant managers were at fault for submitting an inaccurate itinerary, failing to provide management coverage, and failing to notify the district manager, part of grievant's responsibility is to take appropriate corrective action.

Second, if grievant had effectively conveyed the district manager's instructions to her assistant managers, it is highly unlikely that the assistant manager would have submitted an itinerary that contained four significant errors. It is also likely that the assistant managers would have assured that one of them was in the office at all times - if grievant had communicated this requirement to them. Further, even if there had been an emergency situation requiring that a senior be left in charge, the assistant managers would have notified the district manager immediately - if grievant had emphasized the importance of doing so. The fact that both assistant managers did not comply with the district manager's directive strongly suggests that grievant did not show them the directive or emphasize its importance.

Finally, grievant did not offer the testimony of either assistant manager during the hearing. If she had given them clear instructions, grievant should have had them so testify in order to exonerate herself. The fact that grievant did not request their testimony further suggests that grievant believes they are not culpable. Therefore, it must be concluded that grievant's job performance, with respect to this management directive, was unsatisfactory.

### DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for unsatisfactory work performance issued to grievant on February 27, 2002 is hereby UPHELD. 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.<sup>12</sup>

[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]

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David J. Latham, Esq.  
Hearing Officer

<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.