

Issue: Group I Written Notice (failure to diligently pursue permission to bid two dormitory projects); Hearing Date: August 15, 2002; Decision Date: August 19, 2002; Agency: College of William and Mary; AHO: David J. Latham, Esq.; Case No.: 5494



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5494

Hearing Date:	August 15, 2002
Decision Issued:	August 19, 2002

**APPEARANCES**

Grievant  
Five witnesses for Grievant  
Human Resource Manager  
Two witnesses for Agency

**ISSUES**

Did the grievant's actions 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 I Written Notice issued for failure to diligently pursue permission to bid two dormitory projects between January 16 and February 14, 2002.<sup>1</sup> Following failure to resolve the matter during the grievance process, grievant requested a hearing.<sup>2</sup>

The College of William and Mary (hereinafter referred to as agency) has employed the grievant for four years.<sup>3</sup> He has no other disciplinary actions. Grievant's performance evaluations rated him as exceeding expectations in 1999 and 2000; for the most recent performance cycle of 2001, he was rated a "Contributor."<sup>4</sup>

Grievant had been the Associate Director for Capital Outlay in the Facilities Management Department. Among grievant's responsibilities was seeking approval from the Bureau of Capital Outlay Management (BCOM) whenever a construction project was about to be put out for bids. In grievant's four years with the agency, the Director of BCOM would approve a project for bids only if funding had been committed for the project. Typically, this meant that the General Assembly had passed an appropriations bill that identified the project as being approved for funding. Grievant chairs a 12-member Residence Halls Construction and Planning Committee.<sup>5</sup> One of the functions of this committee is to meet regularly regarding the periodic renovation of older dormitories and the building of new residence halls.

During the last half of 2001, the discovery of asbestos in a building required the use of funds initially earmarked for projects scheduled to begin during the summer of 2002. By January 2002, the insufficient funds problem had not yet been resolved. The Project Manager for one of the summer 2002 renovation projects advised the committee that the project would have to be advertised for bids on February 1, 2002 in order to meet scheduling deadlines.

The Planning Committee met on January 16, 2002 to discuss strategies for bidding and awarding the summer 2002 projects. A meeting agenda was printed and distributed, however, no formal meeting minutes were taken. Some

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<sup>1</sup> Exhibit 1. Written Notice, issued February 19, 2002.

<sup>2</sup> Exhibit 1. Grievance Form A, filed March 15, 2002.

<sup>3</sup> Grievant left the College on July 7, 2002 to accept new employment with the Bureau of Capital Outlay Management (BCOM).

<sup>4</sup> Exhibit 4. Grievant's evaluations for the three most recent performance cycles. NOTE: The Commonwealth completely revised the performance evaluation scheme in 2001, replacing the previous five ratings with three new ratings – Extraordinary Contributor, Contributor, and Below Contributor.

<sup>5</sup> The committee is comprised of grievant, the Director of Facilities Management (grievant's immediate supervisor), Vice President of Administration (grievant's second-level supervisor), Vice President of Student Affairs, two Project Managers (grievant's subordinates), Financial Manager, Director of Residence Life, and four others.

participants made handwritten notes on their copies of the agenda.<sup>6</sup> The discussion about resolving the problem was roundtable and apparently freewheeling but eventually a two-pronged strategy emerged. On one hand, it was concluded that advertising for the projects would have to state that awarding of bids was conditional upon funding. It was agreed that the advertising would include the language, “subject to the availability of funds.” The other prong required switching the projects from the General Assembly’s regular appropriation bill (which would not be effective until July 1, 2002) to a “caboose bill.”<sup>7</sup> A caboose bill becomes effective immediately when the governor signs it. Since the caboose bill was expected to be signed in March or April, funding would become assured at that time. Grievant volunteered to contact BCOM. Grievant knew that the advertising would have to be placed not later than noon on January 30, 2002.

The handwritten notes taken by both the Vice President of Administration and her Assistant indicate that Capital Outlay (grievant) was to first talk with BCOM regarding the process to bid the project without funds. Then the Vice President of Student Affairs would talk to the necessary people to move the funds from the 2002-04 appropriations bill to the 2000-02 caboose bill. Grievant’s handwritten notes reflect that he was to, “Touch base with Richmond. Call [BCOM Director] on our method of approach.” His notes do not clearly address whether he was to contact BCOM first, or whether the caboose bill possibility was to be explored first. Grievant’s administrative assistant also took handwritten notes that state, in part:

M. can get DPB (Department of Planning & Budget) to approve but must be moved into Caboose Bill – too late? No one knows. A. says talk with M.F. Find out from F. and S.J. if can move to caboose bill first – M. and A. will follow up with F.<sup>8</sup>

On January 29, 2002, grievant called the BCOM Director to seek approval to advertise the projects for bids. He explained that the advertising would include the “subject to availability of funds language.” Grievant did not advise the BCOM Director that the College was taking steps to have the project transferred to the Caboose Bill. Based on the information grievant had given him, the BCOM Director explained that he could not grant approval to advertise the project in February 2002 because (i) the 2002-04 Appropriations Act might not be passed and approved until mid-May 2002, (ii) even then funds would not be allotted until the effective date of the legislation, July 1, 2002, and (iii) passage of the Appropriations Bill was not yet assured given the events of the 2001 General

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<sup>6</sup> Exhibits 6, Handwritten notes of the Vice President of Administration and her administrative assistant. Exhibit 7, Grievant’s handwritten notes.

<sup>7</sup> A caboose bill is a budget bill that amends the biennium that is coming to a close. The governor’s proposed amendments to the 2000-2002 biennium were submitted in a caboose bill (House Bill 29 and Senate Bill 29).

<sup>8</sup> Exhibit 8. Notes of grievant’s administrative assistant.

Assembly session when no appropriation act passed. Grievant then sent an e-mail message to the Vice President of Administration advising that BCOM would not allow advertising the projects for bid at this time. The following morning, January 30, 2002, the Planning Committee met and grievant advised them of BCOM's denial of advertising approval.

Grievant did not contact the Vice President of Administration or anyone else between January 16 and 29, 2002 to ascertain whether there had been any success on switching the projects to the Caboose Bill.

During the past two years, grievant's supervisor had talked with him about the necessity to improve communication by promptly informing others by e-mail or voice mail about changes, delays, or any other significant project information.<sup>9</sup> During 2001, the housekeeping manager experienced repeated situations where grievant failed to communicate important information to her until the very last minute.<sup>10</sup> Some of the supervisor's concerns were reflected in grievant's most recent performance evaluation in which he was rated "Below Contributor" on one of his core responsibilities.<sup>11</sup>

#### 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

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<sup>9</sup> Exhibit 3. Memoranda from supervisor to grievant, April 21, 2000, and November 28, 2001.

<sup>10</sup> Exhibit 3. Memorandum from housekeeping manager to grievant's supervisor, October 23, 2001.

<sup>11</sup> Exhibit 4. *Ibid.*

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 Training<sup>12</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 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. One example of a Group I offense is unsatisfactory job performance.<sup>13</sup>

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>14</sup>

The offense with which grievant has been cited is "failure to diligently pursue permission to bid two dormitory projects." This type of offense is simply a variant of unsatisfactory job performance and is, therefore, appropriately categorized as a Group I offense.

The facts establish that grievant and the Planning Committee were well aware of the January 30, 2002 advertising deadline when the Committee met on January 16, 2002. Grievant also understood that a consensus strategy was developed during the meeting and that it had two prongs. Grievant further knew that he was responsible to take action on one of those two prongs by contacting the Director of BCOM to obtain permission to advertise the project for bids. Grievant admits that he waited until the evening before the deadline to contact the BCOM Director. The evidence also establishes that grievant failed to tell the BCOM Director about the second prong of the agency's strategy, i.e., he did not tell him that the agency was attempting to switch the project from the 2002-04 appropriations bill to the current biennium's caboose bill. The issue to be resolved herein is whether grievant's 11<sup>th</sup>-hour call, and his failure to fully inform the BCOM Director constitute "failure to diligently pursue." It is concluded that the agency has demonstrated, by a preponderance of the evidence, that grievant did fail to diligently pursue for the following reasons.

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<sup>12</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>13</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>14</sup> § 5.8, Department of Employment Dispute Resolution Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

First, un rebutted documentation and testimony establish that grievant had a history of waiting until the last minute to address urgent issues. Grievant had been given written counseling regarding his failures to keep others informed, or informing them of problems shortly before action was required. This latter problem upset others, and required them to scramble in order to address situations that they had not had time to prepare for. Grievant's failure to contact the BCOM Director until the last minute is consistent with his past behavior, and more importantly, it once again gave others little or no time to react. Had grievant called the BCOM Director within a few days after the January 16<sup>th</sup> meeting and relayed the Director's denial to others, they would have had more time to deal with the situation. Grievant knew that a deadline was approaching and that advertising would have to be placed by noon on January 30, 2002. His failure to call the BCOM Director sooner demonstrates a lack of diligence in pursuing this matter.

Second, it is also un rebutted that grievant failed to fully inform the BCOM Director about the college's attempt to move the renovation projects into the current biennium caboose bill. The BCOM Director testified that, had he known this, he would have given serious thought either to approving the request or to contacting the VP of Administration for reassurance. Grievant's failure to mention this key element of the strategy to the BCOM Director is certainly a less than diligent effort to pursue approval.

Grievant contends that he delayed calling the BCOM Director for two reasons. First, he maintains that he was busy with other priority projects. While this may have been true, grievant has failed to demonstrate that he was so consumed in work that he could not have afforded a few minutes for a telephone call. He knew that this project could be jeopardized for two years if the advertising was not submitted by January 30, 2002. Thus, this telephone call was at least as much of a priority as, if not more than, other tasks he was working on.

Second, grievant avers that he believed he was not to make his call until after the VP of Administration had arranged to switch the project to the caboose bill. This argument is less than persuasive. Even if grievant believed this, he never contacted the VP of Administration between January 16 and 29 to ascertain whether the switch had been arranged. Had he diligently pursued this matter, he should have asked about the caboose bill well before January 29<sup>th</sup>. Moreover, grievant never did inquire about the funding issue before he called the BCOM Director. Accordingly, it is concluded that grievant's failure to call until the last minute was attributable more to his established pattern of procrastination than to a misunderstanding about the sequence of tasks.

Grievant has not provided an explanation for his failure to tell the BCOM Director about the caboose bill strategy. Given the January 16, 2002 meeting, in which this strategy was discussed, grievant was well aware that this was a key

component in securing approval to advertise. His failure to explain this to the BCOM Director can only be explained as a lack of diligence. During the telephone conversation after the Director denied approval, it would have been logical and natural for grievant to explain that the caboose bill strategy was being pursued and then repeat his request for approval. It is reasonable to expect that someone at grievant's level of management would recognize the necessity to use all the available information he had in order to "sell" the BCOM Director on the importance of granting approval.

Because grievant had previously received written counseling for similarly unsatisfactory job performance, it was reasonable for the agency to decide that this incident required an escalation of corrective action. Therefore, based on careful evaluation of the evidence, it is concluded that a Group I Written Notice was both warranted and appropriate for the offense.

### DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on February 19, 2002 is 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>15</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

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<sup>15</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.