

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 11/12/02; Decision Date: 11/14/02; Agency: Dept. for the Blind & Vision Impaired; AHO: David J. Latham, Esq.; Case No.: 5554; **Administrative Review: EDR Ruling Request received 11/26/02; EDR Ruling Issued 03/18/03 [Ruling #2002-229]; Outcome: HO did not abuse discretion by refusing to allow certain witnesses to testify**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5554

Hearing Date: November 12, 2002
Decision Issued: November 14, 2002

PROCEDURAL ISSUE

Grievant proposed to call ten customers by telephone to testify that they had been satisfied with the services grievant provided to them. The agency stipulated that the ten customers would probably testify favorably and therefore the witnesses were not called.

APPEARANCES

Grievant
Three witnesses for Grievant
Regional Manager
Deputy Director of Agency
One witness 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 appeal from a Group I Written Notice issued for unsatisfactory job performance between March 15, 2001 and May 22, 2002.¹ Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.²

The Virginia Department for the Blind and Vision Impaired (Hereinafter referred to as agency) has employed the grievant for 19 years. She is currently a rehabilitation teacher.

The grievant instructs customers in adaptive skills and techniques for gaining or maintaining their maximum level of independence through individualized living plans, counseling and the use of community resources, and in the use of specialized equipment.³ Although assigned to a regional office, grievant primarily provides services in a five-county area, the center of which is located about 50 miles from the regional office. A new regional manager was assigned to the office in June 2000. After assessing personnel matters, the new manager came to recognize that grievant had had a strained relationship with the prior regional manager and with other employees in the office.

The new regional manager sought to promote teamwork among all employees. He also sought to assure that employees adhered to agency policies. When he recognized that an employee was not following policy, he made sure that the employee understood his expectation that policy should be followed. The new manager's initial impression was that grievant was cooperative with some of his requests for change. His first performance evaluation of grievant in November 2000 was based only on his initial favorable impressions and he therefore rated her overall performance as exceeding expectations.

However, by the first part of 2001, the regional manager noted that grievant had not complied with certain of his requests for change. He advised grievant of the need for changes during his first quarter interim evaluation. During the spring and summer of 2001, grievant had difficulty with paperwork, meeting deadlines, and less-than-thorough initial customer plans and

¹ Exhibit 7. Written Notice, issued June 26, 2002.

² Exhibit 1. Grievance Form A, filed July 23, 2002.

³ Exhibit 2. Grievant's Employee Work Profile, November 14, 2001.

assessments. The manager advised grievant of these concerns during interim evaluations in July and September 2001 but was unable to detect any change in grievant's performance. Accordingly, the manager's November 2001 evaluation of grievant rated her a "Contributor" overall but rated her "Below Contributor" on her primary core responsibility and on one other evaluation factor. Of particular concern was that 29 percent of her cases were not in compliance with RT Program guidelines. Also of concern was the fact that none of grievant's customers gave positive feedback about her services while four customers expressed dissatisfaction with grievant's failure to complete plans of instruction.⁴ The two other rehabilitation teachers in the region received commendations from some of their customers; no complaints were received about either teacher.

Among other deficiencies observed by the manager, grievant failed to complete six-month narrative reports on customers, sometimes entered incorrect vendors or codes on reports, and did not always follow proper referral procedures. The manager had specifically requested that grievant add more training components to service plans but grievant failed to follow her supervisor's instructions because, "It's too much trouble." The manager had accompanied grievant when she interviewed customers and afterwards instructed her to change her interview technique with regard to open-ended questions. Grievant refused to comply with this instruction because, "I have a different philosophy from the manager." On at least one occasion, grievant took her dog with her while conducting official state business at a customer's residence. On multiple occasions, the regional manager has instructed grievant to contact him personally when she is unsure about correct procedures. Grievant failed to contact the manager and continued to submit incorrect documentation. Grievant refused to follow a reasonable instruction to sign her Employee Work Profile in December 2001.

The manager gave grievant a detailed quarterly evaluation and a Notice of Improvement Needed/Substandard Performance on February 6, 2002.⁵ The Notice was sufficiently detailed and unambiguous in meaning that grievant could have no illusions about the need to make immediate change. Furthermore, the Notice specifically advised grievant that the consequence for failure to correct deficiencies would be disciplinary action.

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

⁴ Exhibit 3. Grievant's performance evaluation, October 23, 2001.

⁵ Exhibit 5.

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.⁶

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 Training⁷ 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 to include behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force. One example of a Group I offense is inadequate or unsatisfactory job performance.

Normally, the best judge of an employee's performance is the employer. In this case, agency management is held accountable for fulfilling the mission of the agency. To accomplish that mission, the agency establishes policies designed to assure that goals are achieved, objectives are met and regulations are adhered to. The supervisor or manager is charged with the responsibility to assure that employees accomplish the goals and objectives of the employer. When a manager observes that an employee is not following the written policies or practices of the agency, he is obligated to educate employees and take whatever action is necessary to assure compliance. In this case, the regional

⁶ § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

⁷ Now known as the Department of Human Resource Management (DHRM).

manager observed problems with grievant's performance and informed her of the changes necessary to achieve acceptable performance.

Grievant, by her own admission, has her own philosophy about the best way to perform her job. When her ideas conflict with those of agency management, she chooses to follow her own drummer. For example, when told to utilize a newer form, grievant decided to continue using the old form because of her personal preference. When directed to use correct codes, grievant used only an abbreviated list of the most frequently used codes, thereby incorrectly coding some of her data. Grievant had easy access to the complete list of codes either in manuals in the office, or on the office computer Intranet.⁸

It is apparent from grievant's testimony and evidence that she disagreed with many of the regional manager's directions. Viewing this evidence in the light most favorable to grievant, it might be concluded that the regional manager is a tough taskmaster. However, grievant has not shown that any of the manager's instructions were illegal, immoral or contrary to agency policy. To the contrary, it appears that the manager was focused on assuring that employees followed agency policy to the letter. Because grievant had been allowed over the years to work independently, she viewed the new emphasis on following the rules as something to be resisted rather than adapted to. Unfortunately, grievant failed to recognize that resistance to legitimate authority carries with it a price – in this case, disciplinary action.

Grievant has demonstrated her insubordinate attitude by refusing to follow the regional manager's instructions because, "It was too much trouble," or because she does not agree with his philosophy. She further states that, "I do not wish to work with management to address the issues involved."⁹ It appears that grievant takes a perverse pleasure in resisting authority, even to the extent of chiding the agency's Commissioner because of his use of the term client in referring to customers.¹⁰ At the very least, grievant's deliberate refusal to follow her supervisor's instructions in this case constitutes a Group II offense. However, grievant's supervisor elected to focus on the concomitant deficiencies in grievant's job performance and discipline her only for the Group I offense of unsatisfactory job performance. The agency has proven this offense by a preponderance of the evidence.

⁸ Exhibit 9, page 6.

⁹ Exhibit 1. Grievant's response to agency Commissioner, undated.

¹⁰ Exhibit 1. *Ibid.*

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on June 26, 2002 is hereby UPHELD. The Written Notice shall be retained in the grievant's personnel file for the period specified 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.¹¹

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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