Issue: Group III Written Notice (acts of physical violence and failure to follow supervisor's instructions); Hearing Date: 10/30/02; Decision Date: 11/04/02; Agency: VDOT; AHO: David J. Latham, Esq.; Case No.: 5557

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

## DECISION OF HEARING OFFICER

In re:

Case No: 5557

Hearing Date: October 30, 2002
Decision Issued: November 4, 2002

## PROCEDURAL ISSUE

The hearing began approximately half an hour after the docketed time because the hearing officer was delayed by multiple traffic collisions blocking the interstate highway between Richmond and the hearing site.

## APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Court reporter for Grievant
Assistant Resident Engineer
Advocate for Agency
Five witnesses for Agency

## ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Has agency management discriminated or retaliated against grievant? Has the agency misapplied policies?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued for an act of physical violence and failing to follow a supervisor's instructions.[1] The agency offered to reduce the discipline to a Group II Written Notice but grievant refused the offer. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Virginia Department of Transportation (hereinafter referred to as "agency") has employed the grievant for 26 years; he is currently a senior technician.

The Commonwealth's policy on workplace violence, which was received by the grievant, prohibits various types of conduct, including behavior that creates a reasonable fear of injury to another person.[3] The agency has promulgated a related policy intended to prevent violence from occurring in the workplace. That policy establishes a standard of zero tolerance for violent and threatening behavior.[4]

At about 8:45 a.m. on May 23, 2002, a senior technician telephoned the assistant resident engineer and asked her to come to the shop. When she arrived, grievant and the senior technician who had placed the telephone call showed her a clipboard on which was a sign out/in log. The only entry on the logsheet indicated that employee H. had signed out that morning at 9:40 a.m. to make a trip to a local retailer.[5] In fact, employee H. had just left the shop at about 8:40 a.m. The engineer said that H. had apparently made a mistake in noting his signout time. One of the two, in effect, challenged her as to what she was going to do about it. The engineer said she would take the clipboard to H's supervisor to make a correction and talk to H.

At this point, the clipboard was being held with one hand by the engineer and with one hand by grievant. With his free hand, grievant unclipped the logsheet from the board, said he was going to make a copy of it and walked away toward the photocopy machine. The engineer was surprised by this and

[1] Exhibit 1. Written Notice, issued June 5, 2002.
[2] Exhibit 1. Grievance Form A, filed June 20, 2002.
[3] Exhibit 6. DHRM Policy 1.80, *Workplace Violence,* effective May 1, 2002.
[4] Exhibit 5. VDOT policy *Preventing Violence in the Workplace*, effective May 1, 2002.
[5] Exhibit 3. The sign out/in log had recently been implemented by facility management to keep better track of employees' whereabouts during trips away from the residency.

did not immediately say anything. When grievant was from 15-20 feet away, she told him to stop. Grievant did not hear her and walked into the room with the copy machine. He returned in a few moments, put the original logsheet back on the clipboard and told the engineer he intended to call central office. The engineer said she was doing to discuss the matter with H's supervisor.

At the time of this incident, another employee was working under a truck in a nearby bay. He was aware of the presence of the two senior technicians and the engineer but was not paying attention to them, did not see the incident, and did not hear what was said. There were no other witnesses in the immediate area. An air compressor was running in the shop at the time. H's supervisor (who also supervises the two senior technicians) was in his office but did not hear the incident.

## 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. The grievant must prove his claims of retaliation, discrimination and misapplication of policy by a preponderance of the evidence.[6]

[6] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

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 Human Resource Management 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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Fighting or other acts of physical violence is a Group III offense; failure to follow a supervisor's instructions is a Group II offense.[7]

The agency's disciplinary action is based solely on the testimony of the assistant resident engineer who alleges that: 1) grievant grabbed the clipboard from her hand (thereby creating a fear of violence), and 2) grievant refused to obey her instruction to stop. The evidence presented during the hearing is insufficient to support this version of the incident for the following reasons. First, both grievant and the second senior technician testified that grievant did not grab the clipboard but merely unclipped the paper from the board. Second, the grievant denied hearing the engineer telling him to stop and the agency has no evidence to disprove this denial. Third, the combined weight of the two senior technicians' sworn testimony outweighs the engineer's assertions. Moreover the technicians testified credibly and generally consistently with each other.

In contrast, the assistant resident engineer's testimony was less than credible for four reasons. First, she testified that grievant was shouting during this incident. However, both senior technicians deny that grievant was shouting; the employee who was working under a nearby truck corroborated their testimony. Second, the assistant resident engineer denied that she has ever shaken her finger at subordinates but four persons, including an agency witness, testified under oath that they have witnessed the engineer shaking her finger at employees on different occasions. Third, she testified that when she told grievant to stop, he turned and said "No." However, upon cross-examination, she substantially modified her statement by saying he may have partially turned, and she did not hear him say anything. Fourth, she repeatedly denied having any knowledge of an incident in which employee H. had made a crude sexual gesture to grievant. However, grievant produced a tape recording of a conversation in which he had clearly described the incident to the assistant resident engineer. For these reasons, the credibility of the assistant resident engineer has been significantly tainted.

[7] Exhibit 10. Section V.B, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Timeliness of disciplinary action

Grievant complains that discipline was not timely issued pursuant to the Standards of Conduct.[8] In this case, the alleged offense occurred on May 23, 2002 and discipline was issued on June 5, 2002. Given that such matters must be investigated, evaluated by supervision and management, and reviewed by human resources, a difference of less than two weeks is not unreasonable. Therefore, the issuance of discipline is held to be sufficiently timely to comply with the mandate of the Standards of Conduct.

Discrimination

Grievant alleged discrimination on the basis of his age. To sustain a claim of age discrimination, grievant must show that: (i) he is a member of a protected age group (over 40 years old); (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's age.[9] Grievant is 56 years old and did receive a disciplinary action. However, he has not presented any evidence to satisfy the remaining two prongs of the test. Therefore, grievant has not borne the burden of proof with regard to his claim of discrimination.

Retaliation

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[10] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant had grieved a 1999 disciplinary action that was later rescinded by a hearing officer. However, grievant has failed to present any evidence of a nexus between that event and the current disciplinary action, which was issued by the assistant resident engineer (who has worked at this residency for only seven months). Grievant alleges a conspiracy between his current supervisor and the assistant resident engineer to discharge him. However, mere allegation is insufficient to substantiate such conjecture. Therefore, grievant has failed to prove that the agency engaged in a retaliatory act.

[8] Section VI.A of Policy 1.60 provides that corrective action should be used as soon as a supervisor becomes aware of unsatisfactory behavior. Section VII.B.1 similarly provides that a Written Notice should be issued as soon as possible after commission of an offense.
[9] Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).
[10] EDR *Grievance Procedure Manual*, p.24

## Conclusion

The agency contends that grievant's past behavior has been disciplined but that he has not changed, and that a Group III Written Notice may be necessary "to get his attention." The agency may or may not be correct in its assessment, but any disciplinary action must be supported by a preponderance of the evidence. Here, the agency has not borne the burden of demonstrating either that grievant was insubordinate or that he engaged in threatening actions.

Notwithstanding the decision below, it is apparent from the evidence presented in this hearing that grievant is less than a model employee. While the agency has not proven its case in this instance, grievant should recognize that his interests might be better served by modifications to his behavior.

## DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice issued to the grievant on June 5, 2002 is hereby RESCINDED.

## 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]

[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

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