

Issue: Termination resulting from Two Group III Written Notices (willfully damaging state property; failure to follow supervisor's instructions and misuse of state property), Six Group II Written Notices (failure to follow supervisor's instructions and failure to perform assigned work), Three Group I Written Notices (disruptive behavior); Hearing Date: 02/03/03; Decision Date: 02/24/03; Agency: NVCC; AHO: David J. Latham, Esquire; Case No. 5622



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5622

Hearing Date: February 3, 2003  
Decision Issued: February 24, 2003

**PROCEDURAL ISSUES**

The earliest date on which all participants were available for this hearing resulted in the hearing being conducted on the 32<sup>nd</sup> day following appointment.<sup>1</sup>

Grievant requested as part of the relief she seeks, to be transferred to a different department. Hearing officers may provide certain types of relief including reinstatement, rescission of discipline, and payment of back wages and benefits.<sup>2</sup> However, hearing officers do not have authority to transfer an employee.<sup>3</sup> Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in

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<sup>1</sup> § 5.1 Department of Employment Dispute Resolution (EDR) *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.

<sup>2</sup> § 5.9(a) EDR *Grievance Procedure Manual*, *Ibid.*

<sup>3</sup> § 5.9(b)2 *Ibid.*

pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

### APPEARANCES

Grievant  
Assistant for Grievant  
Five witness for Grievant  
Assistant Dean  
Representative for Agency  
11 witnesses for Agency  
Observer for Agency<sup>4</sup>

### ISSUES

Were the grievant's actions subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

### FINDINGS OF FACT

Grievant filed a timely grievance from 11 disciplinary actions including two Group III Written Notices, six Group II Written Notices, and three Group I Written Notices.<sup>5</sup> The grievant was removed from state employment as a result of the disciplinary actions. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>6</sup>

Northern Virginia Community College (Hereinafter referred to as "agency") has employed grievant as an administrative assistant for nearly three years.

Grievant was hired in April 1999. Her performance during the first three months of employment met expectations but by the sixth month her performance was downgraded to Fair but Needs Improvement. At this early point it was noted that she required significant improvement in demonstrating openness in communication and development of congenial interpersonal relationships with coworkers. Grievant's performance in these areas continued to be substandard in subsequent evaluations.

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<sup>4</sup> The observer is a human resource generalist who testified as the eighth witness during the hearing. She was not present in the hearing room prior to her testimony; she became an observer only after she had testified. Grievant agreed to her presence as a witness.

<sup>5</sup> Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 & 13. Written Notices, issued October 2, 2002.

<sup>6</sup> Exhibit 30. Grievance Form A, filed October 27, 2002.

In March 2002, an assistant professor had assigned a clinical education project to grievant. She made clear to grievant that the project was a priority and gave her written instructions to facilitate completion. The project required matching students to clinic assignments, preparing notice letters and mailing them, and was estimated to require no more than one to two hours to complete. When grievant failed to complete the project by the deadline, the professor enlisted the assistance of other faculty members and completed the project. Another faculty member assigned a similar project to grievant in early July specifying that it should be completed by September 1, 2002. Grievant did not finish the project by the deadline, and when she did complete it, there were so many errors that the faculty member had to redo it herself.

By April 2002, the program head in grievant's division advised the dean that grievant had failed to comply with her suggestions for correcting undesired work characteristics and had failed to comply with superiors' instructions to speak with the program head. On May 1, 2002, the assistant dean and dean wrote an Interim Evaluation of grievant and counseled her on several performance areas considered to be substandard including interpersonal relationships, communication with coworkers, failing to meet deadlines, tardiness, and complying with requests for work.<sup>7</sup>

Utilizing the Rules Wizard feature on her computer, grievant placed an automatic delete on her computer in September 2002 for incoming messages from two faculty members. The rule specified that the server should, "Reply using Test and delete [the incoming message]."<sup>8</sup> Therefore, incoming requests from the two faculty members were deleted and grievant did not perform any of the work requested. This was discovered in late September 2002.

On September 11, 2002, an assistant professor asked grievant to locate an available classroom for the following day. Grievant refused to comply with the instruction and told the professor to "fill out a work request." As she said this, grievant turned away and made a dismissive gesture with her hand.

Initially, various faculty members had verbally given grievant various work requests. At some point, grievant began requesting faculty to put their requests in writing on a Faculty Work Request Form. On September 16, 2002, the Dean directed grievant not to ask faculty to use this form.<sup>9</sup> Subsequently, she placed on her computer system a blocking mechanism that deleted the incoming message and automatically responded to emails with the following message, "Mail Return: Please fill out a request form and put in [grievant's] in-box." When grievant's supervisor (the dean) learned about this, he instructed her early in the morning of September 18, 2002 to immediately remove the automatic response

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<sup>7</sup> Exhibit 3. Interim Evaluation for grievant, May 1, 2002.

<sup>8</sup> Exhibit 8. Printout of rule found on grievant's Microsoft Outlook file.

<sup>9</sup> Exhibit 4. Memorandum of Record to grievant from dean, September 19, 2002.

message.<sup>10</sup> When grievant had not complied with this instruction by September 20, 2002, the Dean requested the Information Technology Department to remove the automatic delete from grievant's computer.

Also on September 18, 2002, the Dean counseled grievant in writing about changing established work practices without permission, failure to work as a team member, and failure to communicate with faculty. He advised her that her behavior was unacceptable, required immediate correction and that failure to do so would result in disciplinary action.<sup>11</sup>

On September 24, 2002, a faculty member requested in writing that grievant copy, collate, and staple 33 copies of some documents and finish the task not later than noon on September 27, 2002. Grievant failed to do the task and told the faculty member during the afternoon of September 27<sup>th</sup> that she would not complete it.<sup>12</sup>

Grievant's workstation included a file cabinet containing program files that other employees needed to access from time to time. The cabinet has a door that swings upward to gain access to the files. An inoperative printer had been stored on top of the file cabinet. On some occasions, coworkers would move the printer from the top of the file in order to access files. Sometimes they would leave the printer on grievant's desk and fail to replace it on the cabinet when finished. When grievant returned to her workstation, she would become annoyed because others failed to replace the printer and grievant would have to move it back to the file cabinet. On October 2, 2002, grievant again found the printer on her desk. She went to the nearby office of an assistant professor and a laboratory instructor and asked if they had moved the printer. The assistant professor said she had moved it one time. Grievant left the office and the assistant professor closed the door. Grievant carried the printer over to the closed door of the assistant professor and slammed the printer into the door, gashing the wood door in the process. She then put the printer on the floor directly in front of the closed door.

The assistant professor and laboratory instructor heard the collision with the door and opened it to investigate. When they saw the printer lying on the floor they called campus police because they believed that grievant had thrown the printer into the door and that she might become more violent. A police officer responded and investigated the incident by interviewing those present in the area. He charged grievant with intentionally damaging state property under Va. Code § 18.2-138.<sup>13</sup> Grievant subsequently retained an attorney who negotiated

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<sup>10</sup> Exhibit 4. E-mail to grievant from dean, September 18, 2002.

<sup>11</sup> Exhibit 3. Memorandum of Record to grievant from dean, September 18, 2002.

<sup>12</sup> Exhibit 3. Email from faculty member to dean and assistant dean, September 27, 2002.

<sup>13</sup> Exhibit 1. Report of investigating police officer.

a settlement with the Commonwealth's Attorney whereby grievant paid restitution of \$50 for damage to the door without admitting guilt.<sup>14</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 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>15</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 Human Resource Management (DHRM) 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. Group I offenses are the least severe. Examples of Group I offenses include inadequate or unsatisfactory work

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<sup>14</sup> Exhibit 2. Letter from grievant's attorney to investigating police officer, November 13, 2002.

<sup>15</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

performance, and disruptive behavior. 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 should warrant removal from employment. Examples of Group II offenses include failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy. Group III offenses include acts and behavior of such a serious nature that a first offense normally should warrant removal from employment; one example is willful destruction of state property.

### Destruction of State Property

The agency has not proven that grievant threw a printer against the professor's door, because there were no eyewitnesses to the event. However, the agency has demonstrated that grievant did willfully destroy state property. Although grievant initially denied in writing that she had caused any damage to the door<sup>16</sup>, she recanted during the hearing by acknowledging that she hit the door with the printer but claimed it was not intentional. The testimony of the witnesses who were in the office established that the slamming of the printer into the door was very loud and caused the door to shudder. The police officer observed a fresh gouge in the door, which others testified had not been there previously. Moreover, the incident was sufficiently loud to frighten two faculty members into immediately calling campus police. Accordingly, the totality of the evidence is sufficient to conclude that, more likely than not, grievant was so irate about the printer that she forcibly slammed the printer into the door to express her anger to the two faculty members. Her actions caused damage to the door and constituted a Group III offense; the Group III Written Notice (Exhibit 1) must therefore be affirmed.

### Failure to Follow Supervisor's Instructions; Unauthorized Use of State Property

Grievant's failure to complete a project assigned to her on September 11, 2002 is a failure to follow supervisory instructions. Her installation of an automatic delete rule on her computer resulted in the deletion of valid requests and memorandums prepared by faculty. Even after being specifically directed by the dean to remove the delete rule, grievant failed to do so. Accordingly, these actions constitute a Group III offense; the Group III Written Notice (Exhibit 3) is affirmed. The behavior documented by multiple faculty witnesses was corroborated by grievant's coworker who testified that grievant was hostile, not a team player, antagonistic towards others, and would refuse to perform assigned work. An assistant dean testified that grievant misconstrued the assistant dean's words, was defiant, hostile, unpredictable, and unable to accept constructive feedback. On one occasion, the dean counseled grievant that she would have to perform the work assigned to her in order to avoid an adverse performance evaluation; grievant contends that this counseling was a "threat." Similarly, the examples of failures to follow supervisory instructions found in Exhibits 4, 6, 8 &

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<sup>16</sup> Exhibit 27. Grievant's written response to charges.

11 constitute offenses for which the disciplinary actions imposed must be affirmed.

### Prompt Issuance of Disciplinary Actions

One of the Group II Written Notices (Exhibit 5) issued on October 2, 2002 was for failure to perform assigned work because on May 3, 2002, grievant had requested a week's notice to make 30 copies of an examination. Grievant's request for a week's delay for such a minor task (no more than five minutes) was not a failure to perform assigned work because the agency did not prove that she did not ultimately make the copies. Rather, her request constituted, at most, unsatisfactory work performance – a Group I offense. However, aside from the miscategorization of the offense, a more serious concern is the agency's tardy issuance of discipline.

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.<sup>17</sup> Management should issue a written notice as soon as possible after an employee's commission of an offense.<sup>18</sup> One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense. In this case, the disciplinary action occurred five months following commission of the alleged offense. Such a lengthy delay is not in compliance with the spirit and intent of the Standards of Conduct. Therefore, the Group II Written Notice in Exhibit 5 must be rescinded.

Another Group II Written Notice (Exhibit 7) issued on October 2, 2002 was for failure to perform assigned work because she made multiple errors when she updated syllabi during the summer. Grievant did perform the assigned work but she did not perform it satisfactorily because she made multiple errors. Therefore, the appropriate offense in this case would be a Group I for unsatisfactory job performance. However, these errors were discovered in late August 2002. This was a straightforward offense requiring no investigation and could have been disciplined promptly upon discovery. The agency's failure to discipline promptly requires that this disciplinary action also be rescinded.

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<sup>17</sup> Section VI.A, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

<sup>18</sup> Section VII.B.1. *Ibid.*



A Group I Written Notice (Exhibit 10) was issued on October 2, 2002 because grievant raised her voice to the assistant dean in January 2002, and because she failed to report to her workstation on one day in April 2002. If the agency concluded that these actions constituted offenses sufficient to discipline grievant, the discipline should have been issued reasonably proximate to the offenses. Moreover, the record reflects that the agency counseled grievant verbally and, in writing, in February 2002.<sup>19</sup> Since the agency took corrective action by counseling grievant, and did not advise her that disciplinary action might be issued at a later time, it may not now issue discipline on a retroactive basis for the same incident.<sup>20</sup> Therefore, the failure to issue discipline until many months after the fact requires that the disciplinary action be rescinded.

#### Miscategorization of Offense

One of the Group II Written Notices (Exhibit 9) was issued for completing a project incorrectly. The grievant's offense was performing the work in an unsatisfactory manner – not failing to perform the work. Therefore, this offense must be reduced to a Group I offense – unsatisfactory job performance.

#### Duplication of Written Notices

The offenses cited in the Group I Written Notice for disruptive behavior (Exhibit 12) are largely duplicative of offenses cited in three other Written Notices (Exhibits 3, 4 & 8). Therefore, the Written Notice (Exhibit 12) must be rescinded.

#### Mitigation

In mitigation, grievant offered the testimony of a psychologist whom she began seeing in July 2002. Grievant had gone to the psychologist on five occasions between July and October 2002 for counseling on how to find a solution to her workplace conflicts. In addition to these conflicts, grievant has been under stress from a marital breakup, health problems, and trying to attend school while working fulltime. It is commendable that grievant was sufficiently introspective to recognize that counseling might be beneficial. Regrettably, however, the five sessions grievant had with the psychologist were insufficient for the psychologist to fully address all of grievant's problems in the in-depth manner necessary to reverse her behavior patterns in such a short time.

Grievant had complained to the dean that her job was too much for one person. The dean requested human resources to conduct an audit of her job to determine whether the job was classified in the correct pay band, and whether

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<sup>19</sup> Exhibit 10. Memorandum of Record to grievant from dean, February 1, 2002.

<sup>20</sup> NOTE: There are situations where verbal counseling occurs immediately following an offense but the situation is sufficiently complex that a detailed investigation by trained investigators is required. In such cases, if the investigation reveals that the offense warrants disciplinary action, the agency may then issue disciplinary action providing issuance occurs reasonably promptly after completion of the investigation.

one person could reasonably perform the duties and responsibilities assigned to grievant. In June 2002 a human resources analyst conducted a standard desk audit to assess grievant's position. During a one-week period grievant was asked to maintain a log of all of her work. The generalist then sat with grievant in her workstation to observe her performance for about 2-3 hours. The audit concluded that grievant's position was correctly classified and that the duties assigned to grievant did not require more than one person. Moreover, in the hearing, grievant acknowledged that she had sometimes worked on personal coursework for the classes she was attending during working hours. Grievant also acknowledged that the dean had frequently allowed her to take time off from work to attend to various personal needs, that she was given various equipment and a two-line telephone that she requested, that she was allowed to take a computer skills course, and that she was allowed to work a special compressed work schedule to accommodate the personal college classes she attended.

Grievant contends that the dean would not listen to her. However, the dean's administrative assistant was present during every meeting between grievant and the dean. On average, grievant met weekly with the dean. The administrative assistant presented very credible testimony that, during most meetings, grievant was angry and yelled at the dean. At times, she was openly insubordinate to the dean by shouting at him in front of other employees. The dean always listened to grievant, gave her ample opportunity to express her concerns, and provided counseling and explanations to grievant. The administrative assistant observed that grievant was not a team player and that she would make excuses for her refusal to participate in various projects.

Grievant contends that all of her coworkers did not like her and wanted to have her discharged. Grievant argues that over time, "Everyone else's attitude changed," as an explanation of why she had problems in the workplace. If true, it appears from the totality of the evidence presented in this case that the attitudes of others changed in response to grievant's behavior. Witness after witness described her behavior as hostile, defiant or unpredictable. It is therefore unsurprising that coworkers who were initially cooperative and friendly became less so over time. Grievant was counseled on several occasions but she perceived these sessions as threats.

### Summary

Although this decision reduces the level of one disciplinary action, and rescinds four other disciplinary actions, it affirms six disciplinary actions including two Group III Written Notices, three Group II Written Notices, and one Group I Written Notice. The Standards of Conduct provides that an employee may be removed from employment for only one Group III offense. Therefore, the accumulation of disciplinary actions affirmed by this decision is more than sufficient to affirm the termination of grievant's employment.

## Relief

Grievant requested as part of her relief that books and class notes be returned to her. While it is not relief that a hearing officer is authorized to provide, it is recommended that the agency make a good faith effort to return to grievant any personal belongings that may still remain in its possession.

## DECISION

The decision of the agency is hereby modified.

The Group III Written Notice issued on October 2, 2002 for willfully damaging state property (Exhibit 1) is UPHeld.

The Group III Written Notice issued on October 2, 2002 for failure to follow a supervisor's instructions and misuse of state property (Exhibit 3) is UPHeld.

The Group II Written Notice issued on October 2, 2002 for failure to follow a supervisor's instructions (Exhibit 4) is UPHeld.

The Group II Written Notice issued on October 2, 2002 for failure to perform assigned work (Exhibit 5) is RESCINDED.

The Group II Written Notice issued on October 2, 2002 for failure to follow a supervisor's instructions (Exhibit 6) is UPHeld.

The Group II Written Notice issued on October 2, 2002 for failure to perform assigned work (Exhibit 7) is RESCINDED.

The Group II Written Notice issued on October 2, 2002 for failure to perform assigned work (Exhibit 8) is UPHeld.

The Group II Written Notice issued on October 2, 2002 for failure to perform assigned work (Exhibit 9) is REDUCED to a Group I Written Notice for unsatisfactory job performance.

The Group I Written Notice issued on October 2, 2002 for disruptive behavior (Exhibit 10) is RESCINDED.

The Group I Written Notice issued on October 2, 2002 for disruptive behavior (Exhibit 11) is UPHeld.

The Group I Written Notice issued on October 2, 2002 for disruptive behavior (Exhibit 12) is RESCINDED.

Grievant's removal from employment effective October 2, 2002 is hereby UPHELD.

The disciplinary actions shall remain active pursuant to the guidelines in 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.<sup>21</sup> 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>22</sup>

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<sup>21</sup> An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 2002 Va. App. Lexis 756, (December 17, 2002).

<sup>22</sup> 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]

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David J. Latham, Esq.  
Hearing Officer