Issues: Formal Peformance Counseling, 3 day suspension and performance warning; Hearing Date: 02/12/03; Decision Issued: 02/13/03; Agency: UVA Health System; AHO: David J. Latham, Esq.; Case No.: 5632

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5632

Hearing Date: February 12, 2003
Decision Issued: February 13, 2003

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Employee Relations Manager
Four witnesses for Agency
Observer for EDR

ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Performance policy? 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 Formal Performance Improvement Counseling for verbal harassment and insubordination.[1] Grievant was suspended for three days as part of the disciplinary action. Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The University of Virginia Health System (Hereinafter referred to as agency) has employed the grievant for 19 years. He is a linen distributor.

Grievant has felt for some time that he should be a supervisor. He does not get along well with his own supervisor, considers her vague, and disagrees with her management style. In October 2001, grievant had a disagreement with a coworker over a linen delivery. Grievant had told his supervisor, "I won't go to that damn place again." When his supervisor told him that he would go if she directed him to, grievant said, "You have been trying to screw me for five years." As a consequence of this incident, grievant's supervisor referred him to the Employee Assistance Program. Grievant refused to meet with his supervisor and was then out of work for three months on medical leave.

Grievant's responsibility for some time has included maintaining the telephone log of linen requests from various departments in the hospital system. Some departments had a standard clinic order for linens that called for the same number of linen supplies each week. This had proven unsatisfactory, and in 2002 some departments had begun to call in their requests each week in order to obtain the exact number of supplies they required. This meant that grievant gradually began to have more requests to record on the telephone log. This had been frustrating to him.

On the morning of September 17, 2002, grievant's coworker had a difference of opinion with grievant over the order for a particular department. She walked into the front office where the Linen Manager (grievant's supervisor) was working and told her that the supervisor needed to speak to grievant about the telephone log. Grievant then entered the office with a standard clinic order card for the department and said that this department is not on phone order. The supervisor pointed out that the department in question had been ordering by telephone for several months. The supervisor then took the old clinic order card, tore it up, threw it away, and told grievant it was no longer in effect. Grievant was upset and angry, took the telephone log, and tore it up. This discussion took place in a front office in view of other employees. The supervisor then told the grievant to come to her office to discuss the matter further. The grievant then said, "That woman is trying to screw me and treats me like a dog." He did not direct his comment at a specific person.

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[1] Exhibit 1. Performance Improvement Counseling form, issued September 23, 2002.
[2] Exhibit 3. Grievance Form A, filed October 17, 2002.

The discussion continued in the supervisor's office. Grievant was angry and upset, and raised his voice sufficiently that the coworker shut the office door to prevent other employees from hearing what was going on. Grievant repeated the statement quoted in the preceding paragraph. He also said, "You want me to get mad and go off and hit somebody." The supervisor became concerned that grievant was escalating and she became nervous about the situation. She called the Employee Relations Manager but she was not available. She then called her own supervisor (Director of Facility Services) and told him that grievant's behavior was disruptive. The Director told her that if she felt the behavior was sufficiently disruptive, she should tell grievant to leave for the day and if he didn't leave, security would be called to escort him out. The supervisor relayed this instruction to grievant. He left her office and went to his own office but did not leave the facility. About 30-45 minutes later, the Director called the supervisor for a status report. She informed him that the grievant had still not left the premises. The Director told her to more firmly direct grievant to go home, and that security would be called if he did not leave. She did so, and grievant thereafter went home.

Grievant failed to report to work on September 18, 2002. He did report for work on September 19, 2002. On that date, the Director and the Linen Manager met with grievant to discuss the incident. Grievant denied any inappropriate behavior during the incident. Subsequently, grievant's supervisor issued the Performance Improvement Counseling form to grievant, suspended him for three days and placed him on a Performance Warning for 90 days.

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.[3]

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.

The agency has promulgated its own policy regarding Standards of Performance. The policy provides that performance issues such as failure to follow applicable policy or to meet performance expectations are subject to a four-step process consisting of informal coaching, formal counseling, suspension, and termination of employment. Serious misconduct such as verbal harassment of fellow employees and insubordination is subject to immediate suspension and/or performance warning, or removal from employment without prior counseling.[4]

The agency has demonstrated, by a preponderance of evidence, that grievant's behavior on September 17, 2002 was contrary to the Standards of Performance for four reasons. First, the Linen Manager testified consistently and credibly about the sequence of events that occurred on that date. Despite cross-examination requiring her to repeat most of her direct testimony, her repetition the second time was completely consistent with her initial testimony. Second, the Director of Facility Services corroborated the portions of her testimony relating to their two telephone conversations on September 17, 2002. The Linen Manager had told him that grievant was loud, aggressive and disruptive. He had told her to request the grievant to leave the facility for the day, and that security should be called if grievant did not leave voluntarily. He also corroborated her testimony with regard to grievant's prior similar inappropriate behavior.

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[3] § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

[4] Exhibit 2. Agency Policy # 701: *Employee Rights and Responsibilities*, effective October 4, 1998, revised June 13, 2001.

Third, the employee with whom grievant had the initial disagreement about the phone order also corroborated the testimony of the Linen Manager up to the point when the employee left the Manager's office and closed the door. Fourth, a male coworker who heard part of the encounter corroborates grievant's statement to the Manager that, "You want me to get mad and go off and hit somebody." This coworker further testified that grievant was sufficiently loud and angry that the coworker stood around in the general area to intervene in case grievant attempted to do something that would jeopardize his job. The fact that this coworker was so concerned about grievant's behavior also corroborates the nervousness and concern expressed by the Manager.

Grievant contends that the entire incident was blown out of proportion. However, the weight of the evidence suggests that the incident was not blown out of proportion but rather that grievant is attempting to minimize its seriousness. Three agency witnesses presented testimony that was corroborative of the Linen Manager's testimony. Based on their collective testimony, the incident was plainly serious enough to warrant concern by two witnesses, a call to the Director, and the necessity to instruct grievant to leave the premises.

Grievant points to the fact that two witnesses did not hear him use profanity. The fact that they did not hear the profanity does not prove that it did not occur. Both witnesses testified that they were not really paying attention to the details of what was being said. One of the two could only recall that he heard something about a "phone" and assumed they were talking about telephone calls. Thus the testimony of these two witnesses is not probative with regard to the exact words used.

The Director of Facility Services felt that grievant's insubordinate and disruptive behavior might be sufficient to warrant removal from employment. However, he deferred to the judgment of the Linen Manager, who believed that a less severe form of discipline would accomplish the necessary change in grievant's behavior. While the exact words used by grievant are somewhat in dispute, the weight of the evidence is sufficient to conclude that grievant's statements were alarming to others. Although grievant may not have intended his statements to make others nervous and concerned, it is clear that his words had that very effect. His words may not have amounted to verbal harassment but they had a threatening effect and this is clearly unacceptable behavior in any workplace.

More significantly, grievant refused to comply with his supervisor's direct instruction to leave the premises. Such a refusal in the face of an unambiguous instruction is insubordination. Taken individually, either the grievant's threatening behavior, or the insubordinate behavior, would warrant the discipline issued even if each had occurred separately. Therefore, the discipline must be affirmed.

From the testimony elicited during the hearing, it appears that grievant has significantly improved his interpersonal relations and communications since he was placed on the Performance Warning. Thus, it appears that the disciplinary action has had the desired effect, i.e., it has forced grievant to modify his actions so that his workplace behavior is acceptable.

It should be noted that grievant complained that he has not yet received his annual performance evaluation. This issue was not grieved and was not part of the relief sought by grievant. Therefore, the hearing officer has no jurisdiction to address this issue. Grievant's manager testified that the completion of the performance evaluation was delayed until the 90-day performance warning period had expired. As the 90-day period expired on December 23, 2002, it is recommended that the agency take steps to promptly comply with the requirement to complete grievant's performance evaluation.

DECISION

The disciplinary action of the agency is affirmed.

The Formal Performance Counseling, three-day suspension, and performance warning are hereby UPHELD.

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.[5] 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.[6]

[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

[5] 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, Record No. 2853-01-4, Va. App., (December 17, 2002).

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