

Issues 1) Group II Written Notice with termination; 2) Discrimination and retaliation;
Hearing Date: 03/05/03; Decision Issued: 03/17/03; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 5655/5673; **Administrative Review: EDR Ruling
Request received 03/25/03; EDR Ruling issued 04/18/03; Outcome: HO did not
violate grievance procedure [EDR Ruling No. 2003-063]**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5655 / 5673

Hearing Date: March 5, 2003
Decision Issued: March 17, 2003

PROCEDURAL HISTORY

On November 21, 2002, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

As part of Res. Investigation of circumstances of [Grievant's] complaint of Discrimination 0902-033, Res. Notes on pg 4 of attach., for March 2002, [Grievant] indicates she "had made copies of the document that he [Co-worker] brought back with the time that he was charged" regarding time [Co-worker] had to go to court. [Grievant] further notes "currently all the records are kept locked up." Discussion with [Co-worker] 10/01/02 indicates that he did not share info. w/ [Grievant]. Only other source of information was the desk of the maint. Supervisor.

On November 22, 2002, Grievant timely filed a grievance to challenge the Agency's disciplinary action. On November 15, 2002, Grievant filed a grievance alleging the Agency had not adequately addressed safety concerns and that management had discriminated and retaliated against her. On March 3, 2003, the EDR Director consolidated the two grievances. On February 6, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 5, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Resident Engineer
Asst. Resident Engineer
TOM II
Captain
Maintenance Manager
Supervisor
Road Maintenance Operator
Truck Driver

ISSUE

1. Whether Grievant should receive a Group II Written Notice of disciplinary action with removal.
2. Whether the Agency adequately addressed Grievant's safety concern and discriminated and retaliated against her.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employed Grievant as a Transportation Maintenance Crew Member until her removal on November 21, 2002. Grievant received a Group I Written Notice for disruptive behavior on September 17, 2001. Grievant received a Group II Written Notice on November 5, 2001 for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.¹

Under certain circumstances, Agency employees attending court may receive administrative leave. In order to receive administrative leave, an employee must ask his or her supervisor for permission to be absent from work, and present the supervisor with (1) an Employee Leave Request signed by the employee, (2) some documentation of the need to attend court (e.g. a copy of a witness subpoena), and (3) a statement from a court official indicating the length of time the employee was in court. After an employee presents an Employee Leave Request, the supervisor fills in the employee's identification number on the form. This number is assigned by the Agency to assist in

¹ Agency Exhibit 3.

leave record keeping. Many employees do not know their employee number since it is used primarily for the Agency's convenience.

When Grievant's Supervisor received requests for administrative leave, he would keep copies (or originals) of supporting documentation in a file and forward originals (or copies) to a regional office for data process entry. He kept supporting documentation for all of his employees in one file² and kept that file in his desk.

Grievant believed the Supervisor and the Co-worker were engaged in fraud because the Supervisor was granting the Co-worker more administrative leave than the time for him to travel and attend court. In order to prove the fraud, she opened the Supervisor's file and removed copies of the supporting documentation for the Co-worker. She made photographs of the documents and then returned them to the file folder.

On November 12, 2002, one of Grievant's Co-workers was operating a machine and it "threw a nut." The nut hit Grievant's arm causing her injury. Grievant believed the Co-worker's actions were intentional. At 8 p.m. on November 12, 2002, Grievant called the Transportation Operations Manager II ("TOM II") at home and told him of her injury. He responded "ok."³ On November 13, 2002, Grievant spoke with her Supervisor in order to file a written report. The Supervisor discouraged her from filing the report. He told Grievant reporting the injury would create problem in another Agency office. The TOM II also expressed reluctance to process Grievant's report. In front of Grievant and several other employees, the TOM II referred to Grievant's filing an injury report as "taking care of junk." The TOM II later apologized to the workers for his comments. Grievant persisted in her request to file a report and on November 14, 2002, the Supervisor completed an Employee's Notice of Injury and Grievant signed it.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).⁴ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior

² The file was labeled "Court and Dr. Slips". Agency Exhibit 5.

³ The TOM II testified that he also instructed Grievant to seek immediate medical help if she needed it. Grievant testified the TOM II never suggested she seek medical help. Based on the credibility of the witnesses, the Hearing Officer finds that the TOM II did not instruct Grievant to see immediate medical help.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“Unauthorized use or misuse of state property or records” is a Group III offense.⁵ When the Co-worker submitted to the Supervisor documents justifying the Co-worker’s administrative leave, those documents became State property. By photographing the documents, Grievant used the information contained in those documents without authorization.

Accumulation of a second active Group II Written Notice “normally should result in discharge.”⁶ Grievant received a Group II Written Notice on November 5, 2001. The issuance of the Group II Written Notice giving rise to this appeal creates a basis for the Agency to remove Grievant from employment.

Grievant contends the documents were incorrectly filed in “her” personnel file. The evidence, however, showed that the file was not labeled with Grievant’s name and that for the prior four years, the Supervisor had been placing the court documents for all of his employees in that file folder. Although Grievant’s records were sometimes placed in the file, the file was not a file devoted to Grievant.

Grievant contends the documents were not personnel records because they were not kept in a secure location. Whether or not the documents were personnel records, is not of significance. Grievant knew that the Supervisor did not authorized her to access the court documents. She also knew that if she had asked the Supervisor to view the documents, he would have denied her request because the documents related to another employee’s leave.

Grievant argues her actions were justified because she was pursuing an allegation of fraud against the Co-worker and the Supervisor. None of Grievant’s duties permit her to act as an investigator. Her motive does not excuse her unauthorized access of State records.

Grievant contends she was not allowed to file an injury form until two days after she was injured. *Va. Code § 65.2-600* requires an injured employee to give written notice immediately to his or her employer. Grievant notified one of her supervisors a few hours after she was injured. She tried to file a written notice on November 13, 2002. The Hearing Officer agrees that her two supervisors displayed an attitude of resistance to Grievant’s filing of a claim and accepted her claim reluctantly on November 14, 2002. Grievant has not presented evidence of any policy requiring the Agency to process a written notice of injury on the day following an injury. The fact remains that the Agency did accept a written notice of injury from Grievant. Thus, Grievant has not established that the Agency failed to follow State policy. What

⁵ DHRM § 1.60(V)(B)(2)(e).

⁶ DHRM § 1.60(VII)(D)(2)(b).

Grievant has shown, however, is that the TOM II and the Supervisor displayed the wrong attitude upon learning of Grievant's injury. The Hearing Officer recommends that the Agency, at its sole discretion, inform the TOM II and the Supervisor of its expectations regarding the proper method to timely process and assist employees suffering work-related injuries.

No credible evidence was presented supporting Grievant's contention that she was discriminated and retaliated against by the Agency.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**. Grievant's request for relief for discrimination and retaliation is denied.

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.⁷

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.