Issue: Group III Written Notice with 5-day suspension (violating safety rules where there is a threat of bodily harm and failure to comply with applicable established written policy); Hearing Date: 04/03/03; Decision Issued: 04/08/03; Agency: VCU; AHO: David J. Latham, Esq.; Case No. 5661

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5661

Hearing Date: April 3, 2003
Decision Issued: April 8, 2003

APPEARANCES

Grievant
Two Student Advocates for Grievant
One witness for Grievant
Operations Center Supervisor
Attorney for Agency
Student Advocate for Agency
Four 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?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice issued for violating safety rules where there is a threat of bodily harm and failing to comply with applicable established written policy.[1] Grievant was suspended for five days as part of the disciplinary action. Following failure to resolve the grievance during the resolution process, the agency head qualified the grievance for a hearing.[2]

Virginia Commonwealth University (hereinafter referred to as "agency") has employed the grievant as an administrative and program specialist for six years.[3] Grievant has an active Group I Written Notice issued for unsatisfactory job performance.[4] She has also been counseled in writing for failure to report to work as scheduled.[5]

Grievant works in the Operations Center receiving and determining the appropriate process for dispatch of requests for physical plant services, various computer systems displays and detecting malfunctions in fire, life support, heating, ventilation and energy management.[6] Employees working in the Center have a working title of Physical Plant Operations Specialists but are known as operators and receive extensive 12-week training in the operations of computer monitoring equipment and in the correct procedures for responding to fire alarms, and other types of emergencies. The Center is responsible for both the university's main campus and the Medical College of Virginia campus. The center is required to comply with the National Fire Alarm Code, which states, in pertinent part:

> 5-3.2.1 Proprietary supervising stations shall be operated by trained, competent personnel in constant attendance who are responsible to the owner of the protected property.
> 5-3.5.1 At least two operators shall be on duty at all times. One of the two operators shall be permitted to be a runner.[7]

The agency's Physical Plant Service Center has promulgated operational criteria. Grievant is aware of this policy. The policy states, in pertinent part:

> IT IS MANDATORY THAT THE DESIGNATED ON-CALL PERSON OR AN OPERATOR STAYS IF PERSONNEL ARE LATE TO INSURE THE 2 PER SHIFT MINIMUM. THEY SHOULD NOT LEAVE THE CENTER UNTIL THE 2 PER SHIFT MINIMUM IS ACHIEVED.

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[1] Exhibit 1. Written Notice, issued January 23, 2003.
[2] Exhibit 2. Grievance Form A, filed February 12, 2003.
[3] Exhibit 7. Grievant's Employee Work Profile (EWP) role title, signed December 16, 2002.
[4] Exhibit 17. Written Notice, issued August 22, 2001.
[5] Exhibit 18. Notice of Improvement Needed, August 23, 2002.
[6] Exhibit 7. Grievant's EWP, *Ibid.*
[7] Exhibit 6. Excerpts, National Fire Alarm Code, 1999 Edition.

IT IS CRITICAL FOR THE UNIVERSITY AND HOSPITAL ACCREDITATION, AND STATE FIRE CODES, THAT THE (2) TWO PER SHIFT MINIMUM IS MAINTAINED.[8]

Grievant had received the Control Center On Call Policy, which contains the same language.[9] This requirement had also been addressed in department meetings on September 20, 2001 and March 21, 2002.[10] Grievant had been counseled in writing in 1998 because she had left the Center when only one operator was present.[11]

Until November 1, 2002, the practice had been to have two fully trained operators on duty at all times. However, the state budget crisis resulted in reduced staffing at the university. Two adjustments were made to assure compliance with the two-operator rule. First, when necessary, trained operators sometimes work a double shift. Second, when two trained operators are not available, other university employees (security officers, grounds, general services, support shop, and others) substitute as the second operator.[12] While these backup employees receive some basic training, they do not receive the extensive training given to fully qualified operators. Therefore, one fully trained operator is required to be in the Center at all times, with the supplemental employee functioning as a backup or runner.

Grievant had volunteered to work a double shift beginning at 3:00 p.m. on December 20 and ending at 7:00 a.m. on December 21, 2002.[13] Grievant worked both shifts as scheduled. The second person working with grievant on the 11:00 p.m. to 7:00 a.m. shift was a female security officer. Security officers work shifts that run from 12:00 a.m. to 8:00 a.m. At 7:00 a.m., the trained operator scheduled to relieve grievant had not yet arrived for work. At about 7:10 a.m., grievant advised the security officer that she had worked 16 hours, could not work any more, and then left to go home. During the next 15 minutes, grievant called the security officer twice, the latter time from her home, to ascertain whether her relief had arrived yet. By the second call at 7:25 a.m., grievant's relief had not yet arrived. Grievant directed the security officer to call the Operations Center Supervisor to apprise her of the situation.

The security officer was concerned about grievant's absence because the security officer is not fully trained in how to respond to all types of emergencies. The security officer called the supervisor. A few minutes later, the supervisor called the security officer back and told her that someone would be there soon. By 8:00 a.m., no one had arrived to replace either the grievant or the security

[8] Exhibit 4. Physical Plant Service Center Operational Criteria.
[9] Exhibit 4. Control Center On Call Policy, signed by grievant June 1999.
[10] Exhibit 8. Department Meeting notes.
[11] Exhibit 11. Counseling Memorandum to grievant from manager, July 15, 1998.
[12] Exhibit 14. Backup support personnel schedule memorandum, November 5, 2002.
[13] Exhibit 5. Work Schedule, December 2002. (Although the schedule indicates shifts from 4-12 and 12-8, the actual work shifts were 3-11 and 11-7).

officer. An off-duty male security officer had come to the Operations Center to drive the female security officer home when her shift ended at 8:00 a.m. Both officers left at 8:00 a.m., leaving the Center unstaffed. The relief operators arrived at 8:02 a.m. and 8:07 a.m.; both were counseled for arriving late.

The Commonwealth's policy on hours of work provides that, "In emergency situations, an employee's schedule may be adjusted temporarily," and that, "Employees are expected to work overtime hours as required."[14]

Grievant was given ample opportunity to provide information regarding this incident prior to issuance of disciplinary action.[15] She wrote a memorandum presenting her views and alluded to having an emergency at home on the morning of December 21, 2002.[16] However, she provided no details about the purported emergency until this hearing. Grievant was disciplined for violating safety rules where there is a threat of bodily harm and failure to comply with established applicable written policy. Over the past several years, others who have failed to show up or who logged in but were absent have been appropriately disciplined.

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.

[14] Exhibit 3. DHRM Policy No. 1.25, *Hours of Work*, September 16, 1993.
[15] Exhibit 1. Memorandum of Intent, January 9, 2003.
[16] Exhibit 1. Grievant's response to Memorandum of Intent, January 16, 2003.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[17]

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. One example of a Group III offense is violating safety rules where there is a threat of physical harm.[18] The policy also states:

> The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgment of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.[19]

The undisputed facts establish that grievant left the Operations Center before her relief operator had arrived, and that grievant did not call the contact person as required by the unambiguous Operational Criteria and On-Call policy. By leaving the Center without a fully trained operator, grievant placed the agency in violation of the National Fire Alarm Code and, more importantly, potentially jeopardized the safety of students, employees, and hospital patients. Thus, a preponderance of evidence establishes that grievant committed an offense subject to discipline under the Standards of Conduct.

Grievant argues that, during the period from 7:10 a.m. to 8:02 a.m. there were no emergencies and therefore there was no threat of bodily harm to anyone. However, grievant misinterprets the language of the example cited in the Standards of Conduct. The language does not state that there must be an "actual" threat. The use of the unmodified word "threat" is sufficiently broad to include both actual and *potential* threats. When grievant left the Center, she

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[17] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.
[18] Exhibit 3. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[19] Section V.A. *Ibid*.

could not predict that an emergency would not occur after she left. If an emergency had occurred, there was no assurance that the remaining security officer would have been capable of handling it properly. Moreover, the cited Standards of Conduct offense is merely an example. In determining the appropriate level of discipline for any offense, one must be guided primarily by the overarching definition of each Group level. In this case, the agency determined that grievant's offense was such that it should normally warrant removal from employment – the definition of a Group III offense.

Grievant had her cell phone when she left the Center and twice used it to call the security officer to ascertain whether her relief had arrived. Grievant knew that she was required to call the contact person (in this instance the supervisor) when the relief operator was late. Grievant could have called her supervisor before she left the Center, or at any time thereafter. The fact that grievant was concerned about the arrival of her relief demonstrates that she knew she was violating policy when she left the center without at least one trained operator. The fact that grievant chose not to directly call the supervisor suggests that she knew the supervisor would have told her to stay at the Center until relief arrived. Grievant was understandably tired after working a double shift and did not want to confront the supervisor directly because she didn't want to wait for the relief operator.

The heart of the problem in this case is what appeared to grievant to be an apparent conflict between two rules. The agency agrees with grievant that policy prohibits any employee from working three consecutive shifts. In fact, the agency enforces the policy by never scheduling any employee for more than two consecutive shifts. Grievant asserts this policy as the basis for leaving her post after she had worked two full shifts. This prohibition against working a third straight shift appeared to grievant to conflict with the agency's rules that require an operator to remain in the Center until relief arrives and the two-per-shift minimum is achieved. First, there is no doubt that the agency will not require employees to work three full consecutive shifts. Working for 24 straight hours would so diminish an employee's alertness and mental acuity that their effectiveness would be significantly degraded.

However, the rule prohibiting working three full shifts does not automatically preclude staying beyond the end of a shift until one's relief arrives. The agency's written policies require that the Operations Center be appropriately staffed at all times, and that employees remain on duty following the normal end of their shift until they are properly relieved. Grievant acknowledged that she would normally wait until relief arrives and that usually, it is a matter of 10 minutes or less. In fact, in this case, grievant waited for 10 minutes beyond the end of her shift before she left, thereby acknowledging her duty to wait for a relief operator. Accordingly, grievant knew that there was no real conflict between the rules.

Grievant contended a state law prohibits an employee working more than 16 hours. However, grievant was unable to cite any such statute. Under cross-

examination, grievant acknowledged that she had just "heard" that such a prohibition exists.

Grievant and her nine-year-old daughter live with grievant's sister and brother-in-law. On the morning of December 21, 2002, grievant's sister was in the hospital. The brother-in-law was the only adult in the house with grievant's daughter. Grievant avers that she received a telephone call from her brother-in-law at about 6:30 a.m. stating that he had received a tree-cutting job and that he was supposed to be at work by 7:00 a.m. Grievant now avers that this is the "emergency" she referred to in her January 16, 2003 response to her supervisor. This story is deemed less than credible for four reasons. First, grievant never provided these details to her supervisor or anyone else during the grievance resolution process. Second, grievant failed to provide any corroboration of the story. She could have asked her brother-in-law to testify at the hearing, or she could have obtained an affidavit from him. Third, it does not seem likely that the brother-in-law would be called at 6:30 a.m. on Saturday morning for a routine tree-trimming job. Fourth, the female security officer on duty with grievant testified credibly that grievant did not receive any telephone calls in the Operations Center between 6:00 a.m. and 7:00 a.m. on December 21, 2002.[20] She also testified that the only reason grievant gave for leaving was that she had worked her 16 hours.

However, even if one assumes for the sake of argument, that grievant's brother-in-law did have a job to go to, he did not leave at 7:00 a.m. Grievant testified that he was still at the residence when she arrived home at 7:30 a.m. If he was able to wait that long, grievant has not shown that he could not have waited until grievant was properly relieved by another operator.

Grievant also gave two other reasons for leaving before she was relieved: because she was tired, and because she did not believe she would be paid for waiting time beyond 16 hours. It is understandable that grievant was tired after working a double shift, however grievant had worked double shifts before and knew that being tired is to be expected. Grievant's belief that she would not be paid for the time beyond 16 hours is not a sufficient reason to ignore the agency policy requiring that she remain in the Center until properly relieved. If grievant had a question about pay practices, she could have discussed this issue with Human Resources or checked with the U.S. Department of Labor.

Grievant argues that when she called back to the Center after arriving at home, the security officer told her that the supervisor was "taking care of it." Indeed, the supervisor was taking care of it but only because grievant left her no choice by leaving the Center. The fact that the supervisor dealt with the situation after the fact does not exonerate grievant. The fact remains that grievant left the

[20] The security officer sat within eight feet of grievant in a relatively small room and would have heard any telephone calls received by grievant.

facility without being relieved, and she failed to notify the supervisor before leaving.

Grievant contends that the change in staffing (from two trained operators to one trained operator at the Center) was only seven weeks old at the time of this incident and therefore her understanding was still "fuzzy." This contention is simply not credible. It is self-evident that when only one trained operator is present, the agency must rely even more on that person than it did when two operators were in attendance. Thus, it is even more critical that the sole trained operator on duty must remain until the relief operator arrives.

Grievant suggests that the discipline should have been a lower level written notice. However, grievant has not offered any persuasive evidence to show that the offense was anything other than a Group III. Normally, a Group III Written Notice results in removal from employment. In this case, an aggravating circumstance existed because grievant has another active disciplinary action. The agency could also have terminated grievant's employment based on this accumulation of disciplinary actions. The agency concluded that a mitigating circumstance existed because grievant was tired after working two consecutive shifts. Even with such mitigation, the agency could have demoted her, transferred her to another position, or suspended her for 30 days. Yet, the agency elected to suspend grievant for only five days – an unusually light discipline under the circumstances.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued to the grievant on January 23, 2003 for violating safety rules where there is a threat of bodily harm and failing to comply with established written policy is hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines 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.[21] 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.[22]

[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

[21] 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, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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