

Issue: Group II Written Notice with 10-day suspension (damaging state property, endangering the life of an employee, and damaging the reputation of the security function and the college); Hearing Date: 04/07/03; Decision Issued: 04/16/03; Agency: Va. Community College System; AHO: David J. Latham, Esq.; Case No. 5672



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5672

Hearing Date: April 7, 2003  
Decision Issued: April 16, 2003

**PROCEDURAL ISSUE**

Due to availability of participants, the hearing could not be docketed for hearing until the 33<sup>rd</sup> day following appointment of the hearing officer.<sup>1</sup>

**APPEARANCES**

Grievant  
Attorney for Grievant  
One witness for Grievant  
Director of Financial Operations  
Vice President, Finance and Administration  
Three witnesses for Agency

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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.

## 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 a Group II Written Notice issued for damaging state property, endangering the life of an employee, and damaging the reputation of the security function and the college.<sup>2</sup> The grievant was suspended for ten days in conjunction with the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>3</sup> J. Sergeant Reynolds Community College (hereinafter referred to as "ag") has employed grievant for five years. She is a security officer supervisor.

In late October 2002, grievant received a cardboard box containing camera equipment to be used by the security department for making photo identification cards. Grievant's name was written on the outside of the box; she placed the box in her office but did not open it or look at the packing slip, which was in a plastic sleeve on the outside of the carton. Early on November 22, 2002, grievant's supervisor (Safety and Security Manager) came to grievant's office looking for the camera equipment. Grievant reported for work at 10:00 a.m. (her scheduled reporting time) and soon thereafter learned that the Security Manager had been looking for the equipment earlier that morning. When she went to her office, grievant found that her locked office had been opened, the carton containing the camera equipment had been opened, and the packing slip taken out of the sleeve. She noted that the addressee name on the packing slip had been covered with correction fluid.

Grievant took the packing slip to the adjacent security office where three security officers were talking. Grievant asked who had "whited out" her name on the packing slip; all three officers denied knowledge. Grievant went to her office and then returned to the security office carrying the carton containing the camera equipment. She placed the carton on the desk directly in front of the officer sitting behind the desk. The carton is about 12 x 48 x 6 inches and was estimated to weigh no more than 12-15 pounds.<sup>4</sup> She said, "Here's what you wanted; take it.", and then returned to her office. The security officer and grievant did not shove the box

after placing it on the desk. It is possible that the end of the long carton may have made incidental contact with the officer behind the desk.

At some point after this incident grievant went to a college official outside of her chain of command to discuss the matter.

### 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>5</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 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

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<sup>5</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

corrective action. 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.<sup>6</sup> An example of a Group II offense is misuse of state property.

The testimony in this case produced two different versions of the November 22, 2002 incident. On one hand, two security officers allege that grievant was in a rage, slammed doors, and threw the shipping carton. However, grievant and the third security officer testified that grievant was not raging, that no doors were slammed, and that grievant did not throw the carton. These two conflicting versions require that a credibility determination be made. The following factors were considered in making this determination.

The written statements of the two security officers make allegations that are not supported by facts. One officer states that grievant verbally assaulted the officer behind the desk, however, his description indicates only that grievant questioned that officer. He further alleges in his written statement that grievant physically assaulted the officer and threw the carton at him.<sup>7</sup> However under examination during the hearing, he testified that grievant *placed* the carton on the desk, and then shoved it towards the officer behind the desk. There is a significant difference between *throwing* something and *placing* it. This same officer alleges that the “chair fell backwards,” however, even the officer sitting in the chair did not make that claim. He also testified that grievant brought the packing slip into the security office after she had brought the carton in; however, in his written statement he contends that these events happened in the reverse order. He testified that the officer behind the desk said, “You hit me,” but this does not appear in his written statement, and the officer behind the desk did not state that in his affidavit. This same officer also denied being interviewed during a telephone conversation with the Security Manager on November 25, 2002, although it appears that he was in fact interviewed. This witness is either very confused, has a questionable memory, or cannot keep his story straight. In either case, his overall credibility is significantly diminished by the inconsistencies in his statements and testimony.

A preponderance of evidence also indicates that this officer (Caucasian) is racially biased against blacks (grievant). Both grievant and another witness testified that he frequently addresses black women as “gals” but addresses white women as “ladies.” While the officer denies this, the testimony of grievant and her witness was very credible on this point. Further, grievant had counseled this officer on a previous occasion because he had been showing favoritism to white students over black students when issuing parking decals. Moreover, it is undisputed that this officer had been acting supervisor for a period of time before grievant was promoted into the supervisor’s position. Although the officer denies harboring any resentment about this, the tenor of his written statement and the

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<sup>6</sup> Exhibit 4. DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>7</sup> Exhibit 1. Written statement of Officer W.

overall evidence in this case suggest that he was less than candid about his reaction to grievant's promotion.

The security officer sitting behind the desk did not testify.<sup>8</sup> Although the agency offered affidavits of this officer's written statements, this evidence must be accorded less evidentiary weight because the officer could not be cross-examined by either the grievant or the hearing officer. He maintains that grievant threw the box at him. However his statement varies from the first officer's statement in the respects discussed above.

Grievant's testimony during the hearing was calm, collected and thoughtful. She did not display any behavior that would suggest she is one who gets into "rages." Her explanations were clear and consistent. She was also willing to acknowledge error when it was pointed out to her. For example, she agreed that the sender might have altered the packing slip. In acknowledging this, she effectively conceded that she might have been hasty in assuming that someone in her department made the alteration. Grievant presented undisputed evidence that she is under a physician's care and taking medications (such as Clonazepam) which have a calming, sedative effect that would be inconsistent with flying into a rage. Grievant's physician finds it "totally inconceivable" that grievant would have exhibited the alleged behavior, given the medication she takes.<sup>9</sup>

Finally, the most objective witness in this case was the third security officer. The college employed him for only seven months; he resigned from the college in January 2003 to take another job. He has no reason to testify for or against either the grievant or the other two security officers. He testified that grievant carried the box into the security office and placed it on the desk. He had a clear view of the event and said that the carton did not contact the officer behind the desk and that grievant did not shove the carton. The agency offered no evidence to discredit this witness. Because of his lack of bias, credible testimony and demeanor, substantial evidentiary weight must be accorded to the testimony of this witness. For all of the above reasons, the sworn testimony of grievant and the third security officer not only outweighs, but is also more credible than, the questionable testimony of the first officer and the affidavit of the officer behind the desk.

This witness also testified that, after grievant left the security office following the carton incident, one of the other two officers said to the other, "We better get our stories straight on this." He was left with the impression that the two were colluding so that their versions of the incident would be consistent with each other. The two officers wrote their statements on November 23, 2002.

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<sup>8</sup> This officer claimed to have a more important appointment. However, it was not shown that this witness could not have testified by telephone either before or after his appointment.

<sup>9</sup> Exhibit 12. Physician's statement, January 13, 2002.

The Written Notice cites four specific offenses, each of which must be individually addressed. First, the agency contends that grievant damaged and mishandled state property. During the hearing, the agency conceded that there was no damage to state property. The only state property involved in the November 22, 2002 incident was a cardboard shipping carton containing camera equipment and packing material. The evidence established that grievant carried the shipping carton into an adjacent office and placed it on top of the desk. She did not throw the box or otherwise mishandle it in any way. Accordingly, there is no evidence to sustain the first offense cited in the Written Notice.

The second allegation is that grievant endangered the life of an employee. There is no evidence to support this allegation. For reasons stated above, the testimony and statements of the two officers who allege that grievant threw the box have been found less credible than the testimony of grievant and the third security officer. Even if one were to believe the testimony of the other two officers, the agency has failed to demonstrate how such a relatively light carton could have endangered anyone's life.

The agency's third and fourth allegations are that grievant damaged the reputation of the college's security function and operations, and diminished the overall reputation of the college. However, no evidence was presented to demonstrate what the reputations were preceding this incident, how the reputations were purportedly damaged, or who, if anyone, now has a less favorable view of the reputations. This incident occurred *inside* the security office. The only people present were grievant and three of her subordinates. There is no evidence that anyone else was in the area. Therefore, any suggestion that grievant's actions may have adversely affected the department's or college's reputation is speculative. In any case, grievant's actions were so benign that, even if anyone else had witnessed them, it is more likely than not that they would have taken no notice.

Grievant asked her subordinates who had altered the packing slip. Grievant did not accuse any of the officers of doing it; she was seeking only to find out who was responsible. She assumed that one of them might know because the only other key to her office was kept in a key box in the security office. Only her subordinates and her supervisor knew that her office key was in that box. It was reasonable for her to assume that they would know who had been in her office, and therefore, who might have altered the packing slip. Accordingly, the grievant neither made any accusations nor did so publicly. There is no evidence that grievant presented herself unprofessionally or used unacceptable language. After asking about the packing slip, grievant returned to the security office only once – not three times as stated in the Written Notice.

It also appears that this disciplinary action was taken, at least in part, because of a rift between the Security Manager and grievant. It is possible that

this rift had its genesis in July 2002 when grievant filed a grievance concerning a counseling memorandum issued by the Security Manager. The president of the college rescinded the counseling memorandum after concluding that there was inadequate communication between grievant and her manager. The Security Manager may have been displeased that grievant was successful in getting the president to overrule her counseling. The Security Manager had also undermined grievant's supervisory authority by telling her not to discipline any Caucasian security officers, and by assigning work to these officers without telling grievant first. Her animus surfaces in the language of the Written Notice, in which she frames the incident as involving damage to equipment and endangering an employee's life. Given that there was no damage to equipment and no one's life was endangered, the Security Manager's characterizations are almost vitriolic. At the very least, it must be concluded that her assessment of the event was not objective.

Even though this disciplinary action must be rescinded for the reasons already discussed, it should also be noted that grievant may not have been given the due process rights required by state policy. The Standards of Conduct require that:

Prior to any (1) disciplinary suspension, demotion and/or transfer, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a *reasonable* opportunity to respond.<sup>10</sup> (Italics added)

Grievant did not receive any written notice of the offenses cited in the Written Notice until she was given that document during the meeting on December 13, 2002 – the day of issuance. Grievant's supervisor and the Director of Financial Operations met with grievant on November 25, 2002 to "obtain statements from [grievant] as to her version of the course of events that had taken place."<sup>11</sup> However, grievant testified that, during this meeting, she was not given either written or oral notice of the specific charges cited in the Written Notice, or that the agency was planning to take disciplinary action against her.<sup>12</sup> A preponderance of the evidence supports the conclusion that grievant was first given notice of the charges at the same time she was given the disciplinary action. This does not provide grievant a *reasonable* opportunity to respond. Typically, after formally notifying an employee of specific charges and proposed disciplinary action, most agencies give an employee from 24-72 hours to respond.<sup>13</sup>

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<sup>10</sup> Exhibit 4. Section VII.E.2. DHRM Policy 1.60, *Ibid*.

<sup>11</sup> Exhibit 1. Memorandum to Director of Financial Operations from Security Manager, December 13, 2002.

<sup>12</sup> The Director of Financial Operations was present at the hearing but did not contradict grievant's testimony on this point.

<sup>13</sup> The amount of response time varies among agencies with some allowing up to a week for response.



## DECISION

The decision of the agency is reversed.

The Group II Written Notice issued on December 13, 2002 and the 10-day suspension are hereby RESCINDED. The agency shall reimburse grievant for wages lost during the suspension and restore to her any leave time and benefits lost as a result of the suspension.

It is recommended that grievant be counseled regarding the necessity to follow her chain of command when reporting problems.

## 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>14</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>15</sup>

[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

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<sup>14</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, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>15</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.