

Issues: Group III Written Notice with termination (unauthorized use of State property) and Group II Written Notice (failure to follow supervisor's instructions);
Hearing Date: 04/23/03; Decision Issued: 04/24/03; Agency: VPI&SU;
AHO: David J. Latham; Case No. 5692



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5692

Hearing Date: April 23, 2003
Decision Issued: April 24, 2003

PROCEDURAL ISSUES

Grievant requested as part of the relief she seeks, monetary damages in the form of ten years severance pay and unemployment compensation. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.¹ However, hearing officers do not have authority to award monetary damages or severance pay.² The determination of whether grievant is entitled to unemployment compensation is made by the Virginia Employment Commission.³

Grievant participated in a telephonic prehearing conference conducted on April 4, 2003. A Notice of Hearing, confirming the date, time and location of the hearing was mailed to grievant on April 7, 2003. Grievant failed to appear for the

¹ § 5.9(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

² § 5.9(b)2, 4 & 7. *Ibid.*

³ Code of Virginia §§ 60.2-600ff.

hearing on April 23, 2003; the hearing was conducted with the party and witnesses who did appear.

APPEARANCES

Associate Dean for Administration
Attorney for Agency
Two witnesses for Agency

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 timely filed a grievance from a Group III Written Notice for unauthorized use of state property,⁴ and a Group II Written Notice for failure to follow a supervisor's instructions.⁵ Grievant was removed from employment on the day following issuance of the disciplinary actions. Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.⁶

Virginia Polytechnic Institute and State University (Hereinafter referred to as agency) employed the grievant as a classified employee for ten years performing data entry, payroll and account reconciliation services.

The agency's Classified Employee Handbook includes a policy on outside employment that provides, in pertinent part:

During the hours employed at Virginia Tech, employees may not engage in other employment with other state agencies or in any private business. ... No Virginia Tech leased property or equipment may be used for outside employment.⁷

The agency also has a policy regarding the use and administration of communication systems, including voice communications.⁸ The acceptable use

⁴ Exhibit 3. Written Notice, issued January 7, 2003.

⁵ Exhibit 4. Written Notice, issued January 7, 2003.

⁶ Exhibit 1. Grievance Form A, filed January 7, 2003.

⁷ Exhibit 10. Section I.D., *Classified Employee Handbook*, revised April 2001.

⁸ Exhibit 8. Agency policy no. 2015, *Acceptable Use and Administration of Computer and Communication Systems*, March 28, 2002.

guidelines state that resources must be used only for authorized purposes, and that the resources must NOT be used for commercial purposes or for personal gain.⁹

Approximately three years ago, grievant mentioned to coworkers that her husband had started a roadside truck repair business. Drivers of trucks or buses that break down on the road call the business for assistance. The business sends an employee to effect repairs on the malfunctioning vehicle. In October 2001, grievant's supervisor learned that grievant had been bringing to work a pager that received calls for the business. Grievant was receiving calls from drivers of disabled vehicles. She would then place calls to her husband or other employees of the business and dispatch them to assist the broken-down vehicles. Grievant also used the agency's telephone to make local and long distance calls pertaining to the business.¹⁰ The supervisor counseled grievant that conducting a personal business on state time was a violation of state policy.¹¹

For a time, the supervisor did not notice any further personal business being conducted by grievant. However, grievant gradually began to again receive pages for her husband's business and became the de facto dispatcher for the business. The supervisor knew that grievant was continuing to operate the private business during work hours but took no disciplinary action against her because grievant would complain whenever she spoke to her about it. The supervisor thought the grievant's complaints were disruptive and therefore stopped addressing the issue.

In July 2002, a "concerned taxpayer" wrote an anonymous letter to the agency's internal audit department complaining about grievant's operation of the private business on agency time and with agency equipment. The Internal Audit department investigated and confirmed that grievant was acting as dispatcher for her husband's business. On the Internet, the investigator found a listing for a business named "[grievant's last name] and Sons Road Service." The address for this business is 123 Witless Road; grievant works in 123 Witless Hall at the agency.¹² There is no Witless Road in the area. The business engages in bus repairs, truck repairs, trailer repairs, mobile repair, and mobile tire service. A review of grievant's long distance telephone calls revealed that over 1,200 personal and private-business related calls were made during the period between December 2000 and October 2002.¹³ The audit concluded that grievant

⁹ Exhibit 9. Policy 2015 Acceptable Use Guidelines.

¹⁰ The agency permits employees to make personal long distance calls on agency telephones but requires employees to reimburse the agency for such calls. There is apparently no system to monitor or enforce the honor system of reimbursement.

¹¹ Exhibit 7. Written counseling memorandum from supervisor to grievant, October 25, 2001.

¹² The actual address has been changed to maintain confidentiality.

¹³ Exhibit 6. Investigation Report, December 13, 2002.

had made long distance calls in the amount of \$231 that had not been reimbursed to the agency.¹⁴

Following completion of the investigation, and review by management and the Personnel Services Department, the two written notices were issued and grievant was removed from employment.

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. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁵

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 a Standards of Conduct Policy. 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

¹⁴ Grievant reimbursed this amount to the agency when she was told about it on January 7, 2003.

¹⁵ § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

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 III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Theft of state property is one example of a Group III offense. Group II offenses include acts and behavior that are more severe in nature and are such that a second Group II offense normally should warrant removal. Failure to follow a supervisor's instructions and unauthorized use of state property are examples of Group II offenses.¹⁶

Group III Written Notice

The supervisor issued a Group III Written Notice but listed the offense as "unauthorized use or misuse of state property or records" – a Group II offense. The immediately following explanation discusses abuse of state time, alleged falsification of state records, and failure to reimburse the agency for \$231 of long distance telephone calls. It appears that the written notice should have stated more specifically that the offense also included theft of state property (long distance calls). Nonetheless, the associate dean concluded that the offense was a Group III offense because state financial assets were diverted to a private purpose.¹⁷

Grievant clearly misused state property when she utilized the agency's telephone system to make repeated calls in furtherance of a private business owned by her husband. The preponderance of evidence reflects that grievant acted as dispatcher for the business, received business calls, called employees, and dispatched them to the locations of disabled vehicles. Using this time to conduct a privately owned business also constitutes abuse of state time. Grievant made long-distance calls that she probably would never have reimbursed (until the day of her dismissal when she was advised that potentially she could be charged with grand larceny). Grievant even had the chutzpah to list as the business' address the agency office and building in which she was employed. Given the totality of these circumstances, the offense fits within the definition of a Group III offense.

Group II offense

Grievant knew, or reasonably should have known from reading the Classified Employee Handbook, that engaging in a private business during work hours is prohibited. Similarly, using agency telephones to conduct a private business is prohibited. More significantly, grievant received a specific written warning from her supervisor that receiving pager messages for her husband's

¹⁶ Section V.B.2 & 3, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

¹⁷ Exhibit 5. Memorandum from Associate Dean to supervisor, January 6, 2003.

business is a violation of policy. Grievant's failure to comply with the supervisor's instructions to cease such activity constitutes a Group II offense.

Grievant failed to submit either documents for consideration or a witness list.¹⁸ She also failed to appear for the hearing to present testimony and evidence on her own behalf. She argues (in her grievance) that the number of personal calls averaged only 2.7 per day and suggests that this is not excessive. However, grievant ignores the fact that many of those calls were made in the conduct of a private business, which is specifically prohibited by agency policy. Grievant also points out that the counseling memorandum permitted one or two personal calls per day. The supervisor did agree that purely *personal* calls (to children, etc.) are permissible, but she very clearly stated that calls in the conduct of private business constitute a violation of state policy. Grievant also acknowledged that she made calls using the agency telephone "because my family has been having financial problems."¹⁹

Mitigating circumstances

The Standards of Conduct provide for the consideration of mitigating circumstances in the implementation of disciplinary actions. The Standards of Conduct states, in pertinent part:

While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b. an employee's long service or otherwise satisfactory work performance.²⁰

The record in this case reflects that grievant has been employed for a moderate length of time and apparently has an otherwise satisfactory work record. Grievant also points out that, although she received a written counseling memorandum in October 2001, she has not been warned since that date. It would appear that the agency could have taken disciplinary action sooner than it did. Nonetheless, there is no requirement that grievant be given repeated warnings not to operate a private business during agency working hours. The written counseling memorandum, in conjunction with the admonition in the Employee Handbook, was more than ample warning to grievant that she was

¹⁸ As is standard procedure, grievant was advised during the prehearing conference and in the Notice of Hearing, that copies of all documents to be entered as evidence and a witness list must be submitted to the opposing party and the hearing officer not later than four working days prior to the date of the hearing.

¹⁹ Exhibit 1. Letter to university president from grievant, undated (after February 21, 2003).

²⁰ Section VII.C.1, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

violating policy. Despite being given a chance to correct her behavior, grievant continued to violate the policy. This aggravating circumstance offsets the mitigating factors of service and performance.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the Group II Written Notice, both issued on January 7, 2003, and the termination of grievant's employment 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.²¹ You must file a notice of appeal with the clerk of the circuit court in the

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).

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]

David J. Latham, Esq.
Hearing Officer

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