

Issue: Group II Written Notice with termination (failure to follow supervisor's instructions and failure to perform assigned work); Hearing Date: 05/06/03; Decision Issued: 05/15/03; Agency: UVA; AHO: David J. Latham, Esq.; Case No. 5711; **Administrative Review: DHRM Ruling requested 05/23/03; DHRM Ruling date: 6/10/03; Outcome: Issues raised are procedural, and should be addressed by EDR; EDR Ruling date: 07/17/03 [Ruling No. 2003-124]; Outcome: HO neither abused his discretion nor exceeded his authority.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5711

Hearing Date: May 6, 2003  
Decision Issued: May 15, 2003

**PROCEDURAL ISSUE**

Grievant alleged that the agency prevented her from accessing her e-mail to prepare a defense. She requested a compliance ruling from the Director of the Department of Employment Dispute Resolution (EDR). Following an investigation, the EDR Director issued a Compliance Ruling that held that the agency had timely offered grievant access to her email, subject to reasonable restrictions on patient privacy.<sup>1</sup>

**APPEARANCES**

Grievant  
Attorney for Grievant  
One witness for Grievant  
Division Administrator  
Attorney for Agency  
Three witnesses for Agency

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<sup>1</sup> EDR *Compliance Ruling of Director*, No. 2002-238, March 12, 2003.

## 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 failure to follow a supervisor's instructions and failure to perform assigned work.<sup>2</sup> Because grievant had one other active Group II disciplinary action, she was removed from employment on October 22, 2002. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>3</sup>

The University of Virginia (hereinafter referred to as "agency") has employed grievant for a total of nine years, including three years in her most recent position. Grievant has one prior Group II Written Notice for failure to follow a supervisor's instructions.<sup>4</sup> The disciplinary action was issued on May 17, 2002 for conduct that occurred during the period from February through April 2002. The hearing officer's decision upholding that disciplinary action became final when grievant failed to appeal the decision to Circuit Court prior to December 1, 2002.<sup>5</sup>

Grievant, eight other secretaries and five support staff are supervised by the Division Administrator; he has the authority to employ and dismiss, and he completes the grievant's performance evaluation. However, grievant (and each of the other secretaries) is assigned to provide administrative, organizational and secretarial support for a physician and nurse. Grievant's duties include transcription, correspondence, preparation of office charts, ordering laboratory tests, answering the telephone, and scheduling patient visits.<sup>6</sup> Thus, the physician and nurse give grievant day-to-day instructions, subject to oversight from the Division Administrator.

The physician to whom grievant was assigned is a dedicated person who works up to 16 hours per day, is meticulous in following up on details, and sets high standards for those he works with. He recognizes that other employees such as grievant cannot be expected to work beyond eight hours per day and that, on occasion, it may not be possible for grievant to complete all of the

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<sup>2</sup> Exhibit 2. Written Notice, issued October 22, 2002.

<sup>3</sup> Exhibit 1. Grievance Form A, filed November 15, 2002.

<sup>4</sup> Exhibit 8. Written Notice, issued May 17, 2002.

<sup>5</sup> EDR *Decision of Hearing Officer*, Case Numbers 5514/5547, issued October 24, 2002.

<sup>6</sup> Exhibit 19. Position Description, March 27, 2000. The job descriptions for other secretaries are virtually identical except that the medical specialty varies from one department to the next.

assigned work in the same day. Therefore, the physician directed grievant to keep her desk and work organized in a logical fashion so that, during the evening, he can easily ascertain what work remains uncompleted and follow up on it himself when necessary.

In early 2002, the physician designed a data collection form and instructed grievant to utilize this form for new patients.<sup>7</sup> He also instructed grievant to utilize boxes on her desk to keep completed work separate from uncompleted work. Similarly, he instructed grievant to use boxes to keep transcribed tapes separate from tapes that had not yet been transcribed. The physician also requested that grievant maintain a daily telephone log, recording details such as the name of caller, telephone number, and reason for the call. When grievant contended that she was overworked, the physician requested that she keep a daily log documenting what work she was performing and how long each task took. Grievant did not utilize the data collection form, kept a daily log only sporadically, and failed to record sufficient detail when taking telephone messages.<sup>8</sup>

Grievant was also expected to schedule patients for return visits to see the physician. Following a patient interaction, the physician completed a Request for Scheduling form that directed grievant to schedule the patient for a follow-up visit on a specified future date.<sup>9</sup> Grievant failed to schedule some patients for follow-up visits by the date specified by the physician. Although grievant's job description requires her to schedule patients, she repeatedly directed patients to ask the nurse to schedule their appointments.<sup>10</sup>

Grievant does not have any medical education or training, other than a first aid course. The physician concluded that grievant spent an inordinate amount of time reviewing patient medical records, writing summaries, and drawing her own conclusions about the patient's medical status.<sup>11</sup> He found grievant's summaries to be unhelpful because she lacked the necessary education or medical training to be able to make appropriate judgements about patient status. Grievant also interjected herself into patient affairs more deeply than is appropriate for someone who is assigned to provide secretarial and administrative support by spending time with them in the waiting area and making repeated telephone calls to them at home.

The Commonwealth requires all employees to provide verification for sick leave upon request by their supervisor. The policy states:

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<sup>7</sup> Exhibit 3. E-mail from physician to grievant, February 13, 2002. See also Exhibit 5. Draft of data collection form.

<sup>8</sup> Exhibit 3. Various email messages between May 17 and October 17, 2002.

<sup>9</sup> Exhibit 4. Request for Scheduling forms.

<sup>10</sup> Exhibit 9. E-mail from nurse to division administrator, September 20, 2002.

<sup>11</sup> Exhibit 7. Example of grievant's review of medical records and written summary. Grievant failed to contact the physician about this patient and failed to schedule an appointment.

1. An employee who wishes to use sick leave **must comply** with a **management request** for verification of the need to use sick leave.
2. An employee's use of paid sick leave may be denied if the employee fails to comply with a management request for verification of the need for sick leave.<sup>12</sup> (Emphasis added)

For an employee to request or continue to use sick leave due to temporary disability, the employee may be required to submit a physician's certification of disability at any time.<sup>13</sup>

The current division administrator started in his position at the beginning of September 2002. Soon afterwards, grievant was absent to attend the funeral of a relative. She was then absent for three additional days following the funeral, first stating that she was tired from traveling, and later claiming that she was sick. Pursuant to the policy cited above, the division administrator routinely requested that grievant provide a written recommendation to support the absence.<sup>14</sup> Grievant then exchanged several e-mails with the administrator over the next several days in which she consistently resisted compliance with his instruction. After the physician and nurse had apprised him of grievant's continuing unwillingness to follow instructions, and after observing the situation for two weeks, the division administrator and the physician conducted informal verbal counseling with grievant regarding her responsibilities. Seeing no improvement during the next week, the administrator and the human resources liaison formally counseled grievant on September 24, 2002.<sup>15</sup>

During the morning of October 4, 2002, the administrator directed grievant to meet with him and the physician at 12:30 p.m. Grievant refused to attend the meeting and went home claiming that she was "stressed out." On October 7, 2002, grievant told the administrator that he should allow another employee to work part-time hours while getting paid for full-time hours. She then added that creating a problem with the other employee was "not worth the administrator losing his job over."<sup>16</sup> On October 11, 2002, the administrator and the physician met with grievant to review the shortcomings in her performance. Grievant was resistant claiming that she determines what she should do based on her interpretation of her job description.<sup>17</sup> She rejected the concept that her supervisors have the right to interpret her job description.

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<sup>12</sup> Section III.A, Department of Human Resource Management (DHRM) Policy No. 4.65, *Sick Leave*, September 16, 1993.

<sup>13</sup> Section III.D., DHRM Policy No. 4.65, *Ibid*.

<sup>14</sup> Exhibit 10. E-mail from division administrator to grievant, September 19, 2002.

<sup>15</sup> Exhibit 10. Written Memorandum of Counseling from division administrator to grievant, September 24, 2002.

<sup>16</sup> Exhibit 11. Division administrator's Memorandum for the Record, October 15, 2002

<sup>17</sup> Exhibit 11. *Ibid*.

By October 15, 2002, the division administrator concluded that grievant's resistance to authority was such that further disciplinary action was necessary. He observed that she spent too much time on non-work related activities, particularly by involving herself in researching patient medical information beyond the scope of her job description. Due process notice was given to grievant in a meeting on October 17, 2002 and she was given until October 21, 2002 to prepare any response. Grievant did not report to work on October 21, 2002, again claiming that she was sick. Discipline was issued on October 22, 2002.

### 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>18</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

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<sup>18</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate 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>19</sup> Examples of Group II offenses include failure to follow supervisory instructions and failure to perform assigned work.

The agency has demonstrated, by a preponderance of evidence, that grievant failed to follow the unambiguous instructions of both her supervisor and the physician to whom she was assigned to perform work. The testimony and documentation presented by the agency is replete with multiple examples of grievant's resistance to reasonable instructions. In addition, the agency has shown that grievant neglected her assigned work by spending time on tasks for which she did not have the medical education and, more importantly, tasks that were not part of her job description.

Grievant's attempts to integrate herself into patient care were not only beyond the scope of her education and training, but also were not included in her job description. Grievant had her own view of what she wanted her job to be, and when that view conflicted with her job description and instructions from supervision, she chose to go her own way. She apparently considered her role to be more of a patient counselor rather than a secretary. She had advised coworkers that she wanted to independently counsel patients. On October 4, 2002, she told the administrator and the physician that she wanted her position upgraded so that she would no longer have to take direction from the physician.<sup>20</sup> While it is certainly acceptable to aspire to a different role, the job for which grievant was being paid was that of a secretary – not an independent counselor.

Grievant complained that she was overworked and spoke to a human resources representative about it. She was advised to keep a detailed record of her daily work so that human resources could analyze it. When she advised the physician, he agreed this would be a good idea and asked to see the results. Grievant never bothered to maintain a daily log of her work, claiming that she did not have time to do it.

Grievant has attempted to rationalize her behavior by contending that she had "been doing it that way for a long time." The physician acknowledged that, for some time, he had not been aware that grievant was contacting patients to obtain medical information, or that grievant had foisted off on the nurse the task of scheduling patient appointments. However, when he learned of this conduct, he instructed grievant to cease contacting patients for medical information and to schedule patient appointments. Even when one has been following a procedure for some time, supervision retains the right to change the procedure at any time.

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<sup>19</sup> Exhibit 12. DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>20</sup> Exhibit 11. Administrator's Memorandum for the Record, October 15, 2002.

Grievant's job is to comply with changes in directives – not resist by failing to comply with instructions. Moreover, grievant admitted that she did not use the data collection form requested by the physician because she “didn't like it.”

Grievant's resistance to authority is illustrated by the incident in which her supervisor requested medical documentation for an extended absence. After nine years of state employment, grievant knew, or reasonably should have known, that a supervisor may request such documentation for sick leave. In this case, the supervisor was especially justified in requesting a physician's explanation since grievant had first reported that she was tired from traveling as the reason for her absence. When she later claimed that she was ill, the supervisor had reasonable justification for questioning whether the illness was bona fide. Grievant's protracted e-mail exchange claiming that she didn't have to provide a physician's note because it violated her right of privacy was not only bogus, but also appears designed to buy time. Ultimately grievant obtained a note from her physician, but only after being told she would be disciplined if she did not comply with the instruction.

Grievant contends that she was discharged as retaliation for having engaged in the protected activities of: 1) filing a grievance regarding her prior disciplinary action, and 2) whistleblowing by reporting that the physician for whom she worked was putting information about other patients into patient files. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.<sup>21</sup> To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. While grievant did engage in protected activity and has now been discharged, she has not established any connection between the two events. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for disciplining grievant. For the reasons stated previously, grievant has not shown that the agency's reasons for discipline were pretextual in nature.

Grievant objected to the agency's proffer of testimony and evidence that repeated facts discussed in the October 15, 2002 hearing relating to her prior disciplinary action. In general, when the facts that precipitated prior discipline have been adjudicated by a Decision of Hearing Officer, it is not necessary to cover the same ground in a hearing for a subsequent disciplinary action. However, when the current offense involves the same type of behavior as the prior offense, the two grievances may become inextricably intertwined. In order to understand the agency's rationale for its current discipline, it is necessary to more fully understand the previous behavior and actions that led up to issuance of the current written notice. Here, grievant received a Group II Written Notice on May 17, 2002 for failure to follow supervisor's instructions. Notwithstanding this

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<sup>21</sup> EDR *Grievance Procedure Manual*, p.24



discipline, grievant continued to fail to follow the same instructions between May 18, 2002 and October 17, 2002. This resulted in the issuance of the second written notice for the same offense.

Grievant also objected to the fact that the agency terminated her access to the computer system and electronic mail when she was suspended on October 17, 2002. She alleges that the agency did so in order to prevent her from contacting higher management. However, grievant could easily have contacted higher management by telephone, letter, or through a computer outside the agency's system. When employees are notified that they are being dismissed or are about to be dismissed, they often become angry and frequently seek retribution against the employer. Many employers have learned the hard way that disgruntled employees can easily sabotage a computer system if allowed access following notification of impending discharge. Therefore, it has become routine in both government and the private sector to terminate an employee's access to the computer system immediately following notice to the employee that they might be removed from employment. Accordingly, the agency's decision to terminate grievant's access to the computer system was a prudent and reasonable business decision.

Grievant complains that inability to access her e-mail inhibited her ability to prepare her defense for this grievance hearing. In fact, the agency offered grievant access to her email, subject to reasonable restrictions on patient privacy. Despite this offer, grievant did not bother to access her email until the week prior to this hearing. Grievant has not proffered any specific evidence to show that her email messages would have affected the outcome of this decision.

The hearing for grievant's first disciplinary action was conducted on October 15, 2002. During that hearing, the hearing officer routinely instructed witnesses and parties not to discuss their testimony until the hearing had ended. On October 17, 2002, grievant's supervisor and the physician met with grievant and discussed the perceived ongoing deficiencies in her performance. Grievant contends that this meeting violated the previous hearing officer's admonition. Grievant's contention is rejected for two reasons. First, the hearing officer's admonition only extended until the end of the hearing on that day.<sup>22</sup> Second, the discussion involved ongoing deficiencies that had occurred subsequent to issuance of the disciplinary action that was the subject of the first hearing.

In summary, grievant's behavior is most aptly described as recalcitrant, i.e., obstinately defiant of authority or restraint and difficult to manage. After receiving a Group II disciplinary action for specific behavior, grievant continued to engage in the same behavior by failing to follow unambiguous instructions, and by involving herself in patient interactions wholly outside the scope of her employment. Grievant's failure to respond in a positive manner to the first

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<sup>22</sup> Hearing officers routinely admonish witnesses and parties to a hearing not to discuss their testimony so as to avoid affecting the testimony of witnesses who are still waiting to testify.

disciplinary action inevitably led to the second disciplinary action for committing the same offense.

### DECISION

The decision of the agency is affirmed.

The Group II Written Notice issued on October 22, 2002, and the termination of grievant's employment are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in 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.<sup>23</sup> You must file a notice of appeal with the clerk of the circuit court in the

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<sup>23</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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>24</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>24</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.