

Issues: Group I Written Notice (disruptive behavior) and Group II Written Notice (failure to follow supervisor's instructions); Hearing Date: 06/05/03; Decision Issued: 06/11/04; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 5727



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5727

Hearing Date:	June 5, 2003
Decision Issued:	June 11, 2003

PROCEDURAL ISSUE

Grievant requested as part of the relief he seeks, to be transferred to another unit. 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 transfer employees.² Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

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

² § 5.9(b)2. *Ibid.*

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Director of Court Services
Representative for Agency
Six witnesses for Agency

ISSUE

Was the grievant's conduct subject to 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 two disciplinary actions. The first is a Group I Written Notice issued for disruptive behavior.³ The second is a Group II Written Notice issued for failure to follow a supervisor's instructions.⁴ Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁵

The Department of Juvenile Justice (Hereinafter referred to as "agency") has employed grievant for 14 years. He is a probation officer.⁶

Disruptive behavior

From 1997 to 2000 grievant's supervisor had verbally counseled him on more than one occasion regarding work errors that he refused to correct. Grievant was transferred to a different unit in June 2001. His new supervisor had occasion to counsel grievant about a work issue. Grievant became loud and attempted to leave the supervisor's office without permission. In August 2001, grievant was again transferred to a different unit under his current supervisor. The Deputy Director of the facility had a meeting with grievant and his current supervisor on one occasion in which grievant became loud and disrespectful. During the course of his career, grievant has been transferred from one unit to

³ Exhibit 1, p. 8. Written Notice, issued January 15, 2003.

⁴ Exhibit 1, p. 10. Written Notice, issued January 15, 2003.

⁵ Exhibit 1, p. 1. Grievance Form A, filed February 3, 2003.

⁶ Exhibit 5. Grievant's *Employee Work Profile*, December 14, 2002.

another in an attempt to find a niche for grievant in which he can perform satisfactorily and get along with the supervisor.

In October 2002, grievant's supervisor counseled him, in writing, about an incident in which grievant had raised his voice to her in a very loud, disrespectful manner. She suggested that he consider obtaining professional counseling. She also stated that, "If a further incident of this nature occurs again, I will do a standard of conduct, which could include a mandatory requirement for counseling."⁷

On Friday, January 10, 2003, grievant had obtained permission to take leave during the afternoon of Monday, January 13, 2003. On January 13, 2003, the grievant's supervisor left a message for grievant to come to her office when he arrived at work. Grievant arrived at work at about 8:15 a.m. and reported to his supervisor's office at 9:27 a.m. When he came in, the supervisor began to discuss an error he had made the previous week and explained that he would have to make the necessary correction. Grievant concluded that his supervisor was rescinding permission to use leave time that afternoon, although she had not stated this at that time. Grievant became angry and loud, shouting that he had preapproved leave and he walked out of the supervisor's office. The supervisor told grievant to return to her office and he did so. During this incident, one of grievant's coworkers described him as upset, argumentative, yelling, and using an inappropriate tone with his supervisor. At least two coworkers heard grievant's outburst in their own offices. One of the coworkers was sufficiently concerned that, after grievant had left, he noticed that the supervisor appeared upset and asked if she was alright.

Failure to follow supervisor's instructions

Grievant was transferred to his current work unit in August 2001. During the next two months he sat with, and observed, all nine other probation officers performing their jobs. In October 2001, he was given a formal two-week training session on all aspects of his work. Other new probation officers receive the two-week training course but do not receive the two-month on-the-job training instruction that grievant received.

Over time, grievant's supervisor learned that giving verbal instructions to grievant was not always effective because he would often deny that such instructions had been given to him. Therefore, she frequently gave grievant written instructions. On several occasions, the supervisor had instructed grievant to make changes or correct errors in his work but grievant failed to do so even after repeated written requests.⁸ She had counseled grievant in writing on August 30, 2002 regarding his failure to correct errors promptly. On November

⁷ Exhibit 1, p. 9. Counseling Memorandum from supervisor to grievant, October 7, 2002.

⁸ Exhibit 10, p. 19. See *a/so* Exhibit 11, pp. 2, 3, & 4.

18, 2002, the supervisor counseled grievant, in writing, regarding his failure to promptly comply with her instructions. She advised him, in pertinent part:

When I point out something that needs to be done, I expect it to be done immediately, unless you come talk to me about the situation.

You have been in [the unit] for over a year, and it is your responsibility to ensure that you have the knowledge, and tools (e.g. Supreme Court access) to do your job properly. Please let me know if you still need additional training on the detention risk assessment, and I need a printed copy of every one you complete.⁹

On November 25, 2002, the supervisor gave grievant a typed memorandum that explained an error grievant had made and directed him to correct it immediately.¹⁰ The error involved the issuance of a pickup order for a child and could have resulted in the wrong child being picked up and placed in detention. On December 3, 2002, the supervisor checked and found that grievant had not made the correction; she sent him a note with the original memorandum stating, "Do today." On December 9, 2002, the supervisor found that grievant had still failed to correct the problem and sent him another note stating, "Need to delete it today." (The word today was underlined three times). By December 20, 2002, grievant had still not corrected the error. He made the correction on December 20, 2002 only after being told he could not leave the office until he did so.

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 . . .

⁹ Exhibit 1, p. 12. Counseling Memorandum to grievant from supervisor, November 18, 2002.

¹⁰ Exhibit 1, p. 11. Counseling Memorandum to grievant from supervisor, November 25, 2002.

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 his evidence first and must prove her claim by a preponderance of the evidence.¹¹

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.1 of the Commonwealth of Virginia's Standards of Conduct Policy No. 1.60 provides that Group I offenses are the least severe, and include such acts as disruptive behavior. Section V.B.2 defines Group II offenses as 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. One example of a Group II offense is failure to follow a supervisor's instructions.¹²

Group I Written Notice

The agency has demonstrated, by a preponderance of evidence, that grievant's behavior on January 13, 2003 was disruptive. His yelling and argumentative tone were heard by other employees, thereby distracting them from the performance of their work. Further, the evidence is sufficient to conclude that grievant had established a pattern of being disrespectful, argumentative, and resistant to the authority of multiple supervisors over several years. Moreover, the evidence supports a conclusion that grievant was disrespectful and insubordinate to his supervisor when he walked out of her office without permission during a counseling session. Although insubordination is a Group II offense, the agency elected to issue only a Group I Written Notice. It is concluded that the evidence easily supports this disciplinary action. Grievant offered no evidence that would sufficiently mitigate his offense.

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

¹² Exhibit 2. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant denied that he was loud and disrespectful on October 4, 2002. The preponderance of testimony from the supervisor and the deputy director make it more likely than not that the event did occur as described in the counseling memorandum. However, even if grievant was correct, the fact remains that he received written counseling notifying him that any future incidents of being loud and disrespectful would result in issuance of a written notice. Thus, he was on notice that such behavior was not acceptable and that it would result in disciplinary action.

Group II Written Notice

Grievant has alleged that other employees have altered his work. However, grievant failed to present any evidence to support this allegation.

Grievant contends that he did not *deliberately* fail to follow his supervisor's instructions. There is no evidence to either prove or disprove this contention. Since the agency has the burden of proof, it has not shown that grievant's failure was deliberate. However, the agency has demonstrated, by a preponderance of evidence, that grievant did not follow supervisory instructions on repeated occasions. In the instant case, grievant failed to comply with his supervisor's instructions for nearly a month. Thus, there can be no doubt that grievant's failure to follow instructions was a *willful* disregard of his supervisor's instructions.

Based on the prior written counseling he had received, grievant knew that he was expected to comply with his supervisor's instructions immediately, unless he discussed the matter with the supervisor. Grievant did not advise his supervisor that he was unable to comply with her instructions. He was told on December 3, 2002 and December 9, 2002 to "Do it today." This instruction is clear and unambiguous. If grievant was unable to accomplish the task immediately he had a duty and obligation to notify his supervisor; he failed to do so.

Grievant argues that when he would approach his supervisor with a question, she would frequently refer him to the senior probation officer or another experienced officer. However, grievant acknowledged that all of his coworkers were available and always willing to answer any work-related questions. Thus, even if grievant had a technical question, ample resources were available to answer the question. Further, grievant was unable to remember why he did not make the corrections when told to do so. When he was given an ultimatum on December 20, 2002, he corrected the errors the same day. Therefore, he managed to resolve whatever problem he may have had, if any.

Grievant also points out that he was absent for his mother-in-law's funeral for a total of three and a half days in early December. However, grievant nonetheless had a total of 13 workdays in the office during the period between

November 25 and December 20 on which he had ample opportunity to comply with his supervisor's instructions.

As noted earlier, grievant's insubordinate behavior would have justified the issuance of a Group II Written Notice. A second Group II Notice normally results in removal of the employee from employment. Thus, the agency could have discharged the grievant but elected not to do so. Moreover, the agency did not impose a suspension from work in connection with the disciplinary actions. Accordingly, it appears that the agency took the minimum disciplinary action it could, consistent with the requirements of the Standards of Conduct. It is concluded that the agency's discipline was measured and appropriate to the circumstances.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on January 15, 2003 for disruptive behavior is hereby UPHELD.

The Group II Written Notice issued on January 15, 2003 for failure to follow a supervisor's instructions is hereby UPHELD.

The disciplinary actions shall remain active for the period specified 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.¹³ 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.¹⁴

[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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.