

Issue: Termination of employment for failure to perform assigned work; Hearing  
Date: 06/17/03 Decision Issued: 06/18/04; Agency UVA Health System;  
AHO: David J. Latham, Esq; Case No. 5733



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5733

Hearing Date: June 17, 2003  
Decision Issued: June 18, 2003

**PROCEDURAL ISSUES**

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>

Grievant requested as part of the relief he seeks, that he be transferred to a different unit. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.<sup>2</sup> However, hearing officers do not have authority to transfer employees from one unit to another.<sup>3</sup> 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

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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.

<sup>2</sup> § 5.9(a) EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>3</sup> § 5.9(b)2. *Ibid.*

pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

### APPEARANCES

Grievant  
One witness for Grievant  
Representative for Agency  
Two witnesses for Agency

### 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 the termination of his employment for failure to perform assigned work.<sup>4</sup> Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>5</sup>

The University of Virginia (hereinafter referred to as "agency") has employed grievant for 11 years as an administrative assistant. He worked in the implant room of the central surgical supply department for the university's hospital. Grievant was responsible for ordering special order implants, stocking incoming supplies, inventory control, and issuing supplies. The ordering of special order implants is especially critical because the items must be available when the patient is to undergo surgery.

When a physician decides that a special order implant is required for surgery, the physician or his nurse places a written order via e-mail, facsimile, or by hand-delivered written order. Effective in January 2003, the physician's order is given to a buyer who sits just behind grievant in the implant room. The buyer prepares a non-stock requisition form (NSR) and gives it to the Surgical Supply Supervisor for his review and signature. Once approved, the form is returned to the buyer who then places an order with the appropriate vendor. If the buyer is absent for any reason (such as illness, vacation, etc.), grievant is responsible for

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<sup>4</sup> Exhibit 8. Written notice of removal, issued March 5, 2003.

<sup>5</sup> Exhibit 1. Grievance Form A, filed April 3, 2003.

preparing the NSR, obtaining approval and ordering from the vendor.<sup>6</sup> The department receives an average of one or two special implant orders per day.

In March 2000, grievant was given a written counseling memorandum for failure to correctly inventory existing implant supplies and failure to order implants.<sup>7</sup> His supervisor repeatedly informally counseled grievant about failing to properly conduct inventory control; grievant's usual response was, "I forgot." In February 2002, grievant was again counseled for failing to correctly inventory existing implant supplies.<sup>8</sup> In December 2002, grievant was again counseled in writing, placed on a performance warning, and suspended from work for one day for failure to timely order a special implant.<sup>9</sup>

On February 19, 2003, a physician's nurse e-mailed grievant to advise that she had faxed an order for implants to be used in a surgery scheduled for March 4, 2003. Grievant responded by e-mail three minutes later stating that he had received the faxed order.<sup>10</sup> The special order was for a breast expander needed for a female patient who was to have a radical mastectomy and breast reconstruction. Grievant recalls receiving the message. Because the buyer was absent he loaded the information into the computer system. He also recalls printing out the purchase order request and placing it on his clipboard.<sup>11</sup> However, the order was never given to the supervisor and the implant was never ordered.

On February 28, 2003, the physician's nurse called grievant to check the status of the implant order. Grievant was absent so she left a message for him, which he received on March 3, 2003. On March 4, 2003 grievant told his supervisor that the implant had not been ordered. By that time, the patient's surgery was in progress and the mastectomy had been completed. The surgeon was forced to terminate the surgery because the implant was not available and the patient had to be rescheduled for surgery at a later date to implant the breast expander.

Because the grievant had progressed through the progressive counseling steps, the next logical disciplinary step was to remove grievant from employment. The supervisor consulted with human resources and a decision was made to terminate grievant's employment on March 5, 2003.

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<sup>6</sup> Exhibit 7. Special Order Implant Process flow chart.

<sup>7</sup> Exhibit 5. Formal Performance Improvement Counseling Form, March 20, 2000.

<sup>8</sup> Exhibit 2. Formal Performance Improvement Counseling Form, February 25, 2002.

<sup>9</sup> Exhibit 6. Formal Performance Improvement Counseling Form, December 9, 2002.

<sup>10</sup> Exhibit 1, p. 5. E-mail string, February 19, 2003.

<sup>11</sup> Grievant's testimony on this point is contradictory. He now contends that he recalls printing out the purchase order. However, on April 4, 2003, in a meeting with Support Services Administrator, grievant said he couldn't say for sure whether he had printed the order.

## 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>12</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 corrective action.

The agency has promulgated a policy that addresses Standards of Performance, which provides for progressive counseling of employees who fail to meet performance expectations.<sup>13</sup> After informal counseling, the policy provides for formal counseling, then a suspension and/or Performance Warning period (probation) and ultimately, termination of employment.

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<sup>12</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>13</sup> Exhibit 3. Policy # 701: *Employee Rights and Responsibilities*, revised June 13, 2001.

The agency has demonstrated, by a preponderance of evidence, that grievant had been counseled repeatedly for failing to remember important aspects of his responsibilities. In the incident that precipitated his discharge, grievant failed to assure that a special order implant was approved and ordered from a vendor.

Grievant contends that he was overworked and that additional help was needed in the implant room. However, grievant's most recent performance evaluation was commendable. Grievant's supervisor never told him that he was not performing all the work assigned to him. Thus, it appears that management was satisfied with the amount of work performed by grievant, and that there was not a demonstrated need for additional help in the implant room.

Grievant does not dispute either that he had received prior counseling or that he failed to follow through on the special implant order he received on February 19, 2003. Grievant argues only that termination of employment was too harsh a disciplinary measure. The agency followed its prescribed progressive disciplinary procedure. Because of grievant's previous counseling, he had reached the point where the next logical step was removal from employment. Grievant's failure to perform his job had very serious consequences for a patient undergoing surgery. Because grievant did not order the implant, the patient was required to undergo a second surgical procedure. Every surgical procedure has potentially life-threatening consequences. If grievant had ordered the implant, the patient would not have had to face the unknown and unnecessary risk of a second surgery. Given the totality of these circumstances, the agency's decision was appropriate.

### DECISION

The decision of the agency is affirmed.

The termination of grievant's employment on March 5, 2003 is 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.<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.