

Issue: Group II Written Notice (failure to follow supervisor's instructions);  
Hearing Date: 04/16/03; Decision Issued: 04/21/03; Agency: VCCS; AHO:  
David J. Latham, Esq.; Case No. 5681



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5681

Hearing Date: April 16, 2003  
Decision Issued: April 21, 2003

**PROCEDURAL ISSUE**

Grievant requested as part of the relief he seeks, a transfer of his position. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.<sup>1</sup> However, hearing officers do not have authority to transfer any employee.<sup>2</sup>

**APPEARANCES**

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

---

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

<sup>2</sup> § 5.9(b)2 *Ibid.*

Three 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 a Group II Written Notice issued for failure to follow a supervisor's instructions.<sup>3</sup> Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>4</sup> J. Sargeant Reynolds Community College (hereinafter referred to as "agency") has employed grievant for 15 years. He is a security officer III and functions as a supervisor at one of the college's three campuses.<sup>5</sup>

Prior to March 2000, the security department at each of the college's three campuses reported only to management at its own location. In March 2002, the college reorganized the security function so that all three campus security supervisors reported to a security manager (who had been supervisor at one of the three campuses). Part of the security manager's responsibility was to standardize procedures at all three locations. She encountered some resistance to change and varying degrees of cooperation from the supervisors. Grievant appeared to be somewhat slower to adapt to procedural change. He had become upset in the past when the manager directed him to make work schedule changes. Both the manager and the Director of Financial Operations had counseled grievant about the necessity to adapt to the changes taking place.<sup>6</sup> Accordingly, in May 2002, the Director of Financial Operations and the security manager wrote a procedure manual to assure consistent application of practices and policies at the three campuses.

Grievant was on annual leave for three days from November 5-7, 2002. Another security officer at his campus was absent on medical leave. The security manager (grievant's immediate supervisor) learned on the morning of November 7<sup>th</sup> that the officer on medical leave, who had been scheduled to return on November 8, 2002, was still ill and could not return to work as scheduled. Accordingly, she went to the security station at mid-morning and made adjustments in the work schedule to assure that there would be adequate

---

<sup>3</sup> Exhibit 1. Written Notice, issued December 13, 2002.

<sup>4</sup> Exhibit 2. Grievance Form A, filed January 10, 2003.

<sup>5</sup> Exhibit 4. Employee Work Profile, November 1, 2002.

<sup>6</sup> See Exhibit 1. Memoranda from security manager to grievant, May 23, 2002, June 3, 2002, September 10 & 16, 2002.

coverage on November 8<sup>th</sup>. She then notified affected officers of the schedule change.

Because grievant was on annual leave, she called his home to leave a message advising him about the adjustment of his own hours. Grievant answered the phone and became upset that the manager had made schedule changes in his absence. He began talking to her so loudly that the manager held the phone away from her ear and other employees could hear grievant talking. Grievant told the manager that she didn't know how to do her job and that it was his responsibility to make the work schedule for his own subordinates. He was also angry because his changed hours would interfere with his personal plans in the evening.<sup>7</sup> The manager repeatedly told grievant to "Calm down, calm down"

Because grievant was so upset, and other officers were in the front of the security station, the manager ended the call and then called grievant back several minutes later from a more secluded telephone in the back of the security station. She explained to grievant that she made the schedule change only to assure adequate security coverage, and because grievant was on annual leave. Grievant continued to express displeasure stating that the manager should not have done his job. He further told the manager that she should have called him before making schedule changes. At length, the manager told grievant that she would permit him to make the schedule adjustments but that he should call her back for approval as soon as he had done so.

Grievant then revised the schedule, changing the hours of two subordinates but not changing his own hours. He called one of the two officers and asked if the officer would be able to work the revised schedule. That officer responded affirmatively and the conversation ended. Grievant did not tell the officer that the change was tentative, that it was subject to management approval, or that he would call the officer back later to confirm the change. Grievant did not call the officer back at any time thereafter and the officer worked the revised hours. That officer mentioned to other security officers and the security manager that grievant had changed his work schedule and that he was going to be working different hours.

About an hour after the second telephone call, grievant called to advise the security manager of his changes. Grievant told her of his revisions, said "this is the way it's going to be," and that the manager was not going to micromanage him. The security manager advised grievant that he had failed to comply with her instruction because he implemented the schedule change (by telling one officer of his revised hours) without first obtaining her approval. She further said that she would reluctantly approve his revised schedule since he had already told his subordinate.<sup>8</sup>

---

<sup>7</sup> Grievant had never advised the manager of any personal plans, and to date has not disclosed what those plans were.

<sup>8</sup> Exhibit 7. Revised Work Schedule, November 8-14, 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>9</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. 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>10</sup> An example of a Group II offense is failure to follow supervisory instructions.

---

<sup>9</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>10</sup> Exhibit 4. DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

The underlying facts are relatively undisputed. While grievant was absent on three days annual leave, the security manager learned that a work schedule change was necessary to assure adequate security coverage of the campus. She made the necessary changes, notified the affected officers and then called grievant's home to leave a message advising him of the changes. As it happens, grievant was home, answered the manager's call, became upset at what he considered to be a usurpation of his authority, and loudly objected to her actions. After some discussion, the manager agreed to allow grievant to make revisions as he saw fit, but required that he obtain her approval before implementing the changes.

Each party interprets the remaining facts differently. Grievant asserts that he made only tentative changes, did not actually write the changes on the schedule, and did obtain the manager's approval. The agency contends that, by calling one of the officers and telling him of the change in hours, grievant effectively implemented the change prior to obtaining approval. It is concluded that the agency's contention is more persuasive for the following reasons.

First, grievant made only two quick changes to the existing work schedule. He could have called the manager back within 5-10 minutes to seek her approval but failed to do so. In fact, it was nearly an hour before he called the security manager. When he called, he was belligerent and confrontational, telling the security manager that his schedule was "the way it was going to be," and that she was not going to micromanage him. Second, grievant notified his subordinate of the schedule change in a manner that left no doubt in that subordinate's mind that the change was definite and that he should plan to work new hours as revised by grievant. Grievant's notification to that subordinate, prior to obtaining approval from the manager, was insubordinate and a failure to follow her explicit instructions.

Third, grievant's argument that he did not *personally* write the changes on the work schedule in the security office is both fatuous and self-serving. The person who wields the pen is not always the decision-maker. The decision-maker is the person who makes the decision and then takes some action to effectuate the decision. In this case, grievant made the decision and effectuated it by notifying an officer that his hours had been changed. Fourth, by taking that action, grievant effectively put the manager in a corner forcing her either to ratify his action by agreeing to his changes, or to escalate the situation by overruling him. The manager, faced with that choice, wisely chose to ratify and thereby deescalated the confrontation.

There are at least three dynamics surrounding this incident that may have been contributing factors. First, prior to March 2000, grievant and the manager were peers, each supervising the security function at different campuses. After

that date, grievant became the manager's subordinate and he may have harbored some lingering feeling that their positions should be reversed. Second, grievant had been slow to respond to standardization and other changes being implemented by the security manager. This may have some correlation to the first factor. Finally, and most significantly, grievant clearly chafed under what he perceived to be extensive micromanagement by the manager. Both the Director of Financial Operations (security manager's immediate superior) and the security manager readily acknowledge that, by design, there was closer management of some functions. The agency determined that standardization of procedures and practices among the three campuses was an important goal. The security manager was charged with the responsibility to achieve that goal. Security staff had been advised that once that goal was achieved, more autonomy could be granted to each of the campus supervisors.

Grievant objects strenuously to the fact that the security manager altered the campus work schedule when he is charged with the responsibility for that task. Grievant's objection is difficult to fathom for at least five reasons. First, the manager has the inherent authority to approve or disapprove a subordinate's work, or to make alterations when necessary.<sup>11</sup> In this case, it is undisputed that the work schedule had to be changed because of the unexpected absence of a security officer. Second, the manager's action was reasonable in that she made only such changes as were necessary to respond to the changed conditions. Third, the manager acted appropriately to provide immediate notification to grievant of the changes she had made. Fourth, the manager had advised supervisors in the past, that when they were absent, she would assume their responsibilities for the duration of the absence. Finally, since grievant was on annual leave, the manager did not know when she called him that he would be at home or out of town. It would have been derelict for the manager to assume that grievant was going to address this issue during his annual leave.

Grievant notes that he was not advised that he might be disciplined for this incident prior to the actual issuance of discipline on December 13, 2002. The Standards of Conduct require only 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>12</sup> In the instant case, grievant was not suspended, demoted, transferred, or removed from his position. Therefore, there is no requirement that grievant receive advance notification of the written notice.

Grievant testified, and the agency did not dispute, that he has always been a conscientious employee and does the job to the best of his ability. As evidence of this, grievant noted that, early in the morning of November 7, 2002,

---

<sup>11</sup> It is instructive to note that, in response to a question about this subject, grievant responded in such a manner as to make it apparent that he does not fully agree with this principle.

<sup>12</sup> Exhibit 3. Section VII.E.2. DHRM Policy 1.60, *Ibid*.

he had called the security office to ascertain the status of the sick officer so that he could adjust the schedule if necessary. Grievant's willingness to undertake this task during his annual leave time is indeed commendable. However, this positive attribute is counterbalanced by grievant's resistance to the authority of the security manager. During the hearing, grievant stated, "I intended to follow all *reasonable* requests and directions." Grievant's inclusion of the qualifying word "reasonable" makes it apparent that he will not follow all requests and directions – rather, he will comply only with those he deems reasonable. When one is employed, one is expected to comply with all instructions (except those that are either illegal or immoral). If an employee considers a request to be unreasonable, it is certainly permissible to question one's superiors about the request. However, if the superior listens to the subordinate's concern and thereafter continues to direct compliance, the employee who fails to comply is insubordinate.

Grievant's resistance to the authority of his manager is corroborated by the tenor of his written attachment to the grievance form. He registers his objection to the security manager's request to call her back for approval of his revised schedule and then, in capital letters, states that her request was "not a written or approved departmental procedure." Grievant's assertion is irrelevant. It is a normal and usual work practice that a manager may request a subordinate to submit work product for approval. Grievant's emphatic assertion is but an ineffectual attempt to justify his own insubordinate behavior.

Grievant contends that the manager treated him arbitrarily, however, he failed to present any testimony or evidence to demonstrate that he was treated differently from anyone else. Grievant also disagrees with the security manager's written admonition that he should not subject staff to any type of reprisal.<sup>13</sup> This memorandum was written several weeks before the incident at issue herein and is therefore irrelevant. Moreover, the statement is plainly a preemptive admonition – not an accusation, as grievant seems wont to infer.

### Workplace Harassment

Grievant alleges that he experienced a hostile work environment. The Commonwealth's policy on workplace harassment is found in Policy No. 2.30.<sup>14</sup> To establish such a claim, grievant must prove that: (i) the conduct was based on a protected class; (ii) had the purpose or effect of creating an intimidating, hostile or offensive work environment; (iii) has the purpose or effect of unreasonably interfering with an employee's work performance, or (iv) affects an employee's opportunities or compensation. Grievant has failed to prove any of the four elements of this test. The mere fact that an employee does not agree with or like management's changed rules and practices is insufficient to rise to the level of hostile work environment.

---

<sup>13</sup> Exhibit 1. Memorandum from security manager to grievant, September 10, 2002.

<sup>14</sup> DHRM Policy No. 2.30. Workplace Harassment, May 1, 2002.

## Retaliation

Grievant also alleges that he was retaliated against. 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>15</sup> To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. While grievant was disciplined (second prong of the test), he has not provided any evidence to show that he met either the first or third prong of this test.

## DECISION

The decision of the agency is affirmed.

The Group II Written Notice issued on December 13, 2002 is 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.

---

<sup>15</sup> EDR *Grievance Procedure Manual*, p.24

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>16</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>17</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]

---

David J. Latham, Esq.  
Hearing Officer

---

<sup>16</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>17</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.