

Issues: Two Group I Written Notices with termination (due to accumulation) (abusive language and insubordination); Hearing Date: 01/22/04; Decision Issued: 01/27/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 504



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 504

Hearing Date: January 22, 2004
Decision Issued: January 26, 2004

PROCEDURAL ISSUE

Grievant requested as part of the relief he seeks, that other employees be disciplined. Hearing officers may provide certain types of relief including reinstatement to the employee's former position.¹ However, hearing officers do not have authority to take adverse action against other employees.² Grievant also asked that management issue him an apology and, that management be required to adjust to his style of working. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

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

² § 5.9(b)5. *Ibid.*

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Agribusiness Manager
Advocate for Agency
Three witnesses for Agency

ISSUES

Did grievant's conduct warrant 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 appeal from two Group I Written Notices issued for abusive language and insubordination.³ Because of an accumulation of disciplinary actions, the grievant was removed from employment effective October 13, 2003.⁴ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁵

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for eight years. He was an agricultural supervisor. At the time of removal from employment, grievant had two other active disciplinary actions - a Group I Written Notice for unsatisfactory job performance, and a Group II Written Notice for failure to follow a supervisor's instructions.⁶ Grievant did not appeal either of these disciplinary actions and they became final 30 days after their issuance in July 2002.

During the months prior to removal, grievant had been counseled on various issues.⁷ Grievant's immediate supervisor, the Agriculture Manager, became sufficiently concerned about some of the issues that he convened a meeting on September 8, 2003 with grievant, another agriculture manager, the agency's Agribusiness Manager, and a security lieutenant. The purpose of the

³ Agency Exhibit 1. Written Notices, issued October 10, 2003.

⁴ Grievant Exhibit 1. Letter from Personnel Analyst to grievant, October 15, 2003.

⁵ Agency Exhibit 2. Grievance Form A, filed October 31, 2003.

⁶ Agency Exhibit 3. Written Notices issued July 2, 2002.

⁷ Agency Exhibit 6. Various counseling memoranda and supervisory documentation.

meeting was to discuss grievant's disposition, work performance and communications skills. As the highest-ranking person present, the Agribusiness Manager took the lead in pointing out to grievant the perceived problems in his performance. He then asked grievant what he was going to do to change. Grievant responded that it was not him that needed changing but management. He further stated that management needed to change to accommodate his (grievant's) style of working.⁸

Despite being asked several times to state how he was going to change to help achieve the farm's goals and objectives, grievant had no suggestions for changes he could make. Grievant became agitated and partially stood up, while agitatedly pointing his finger and stating that everyone must be stupid because they didn't see his point. He also told the Agribusiness Manager that he was not a good manager and couldn't do his job, and that the meeting was a joke.⁹ Those present felt that grievant was being insolent, disrespectful and argumentative; the agriculture manager had to twice tell grievant to sit down and cease his behavior.

Shortly after the meeting ended, grievant's supervisor was in his office discussing a work issue with his secretary. Grievant entered the office without being invited to discuss a military leave issue. The supervisor advised grievant that he would have to be docked for some time off because he had not notified his supervisor in advance that he needed the time off. Grievant became upset and said words to the effect of, "Keep doing what you're doing and you'll see what's going to happen." The supervisor told grievant that he was not going to allow grievant to threaten him and that if he continued, the supervisor would do something about it.

Grievant was subsequently disciplined with a Group I Written Notice for being insolent and disrespectful to management during the meeting on September 9, 2003. He was also given a second Group I Written Notice for threatening his supervisor in a disrespectful and insolent manner later that same day.

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

⁸ Agency Exhibit 5. Supervisor's memorandum to file, September 11, 2003. See also Agency Exhibit 8. Agribusiness Manager's memorandum to Human Resources, September 16, 2003.

⁹ Agency Exhibit 7. Agriculture Manager's memorandum to file, September 10, 2003.

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.¹⁰

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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 *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group I offenses include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.¹¹ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.15 of the DOC Standards of Conduct addresses Group I offenses, which are defined identically to the DHRM Standards of Conduct.¹² Among the examples of Group I offenses are the use of abusive language and disruptive behavior.

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

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Agency Exhibit 9. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

The agency has demonstrated by a preponderance of evidence that grievant's behavior during the meeting with management on September 9, 2003 was disrespectful, argumentative, and disruptive. Grievant denies calling the management people in the meeting stupid, and denies telling the Agribusiness Manager that he didn't know his job. However, grievant's denial is outweighed by the sworn testimony of the Agribusiness Manager, grievant's supervisor, and the other agriculture manager – all of whom were in the meeting. In addition, the statements of these three witnesses are consistent with, and corroborated by, their memoranda written within a few days of the meeting.

The agency has also shown that grievant's subsequent confrontation with his supervisor on the same date was disrespectful and threatening. Grievant denies that he even went to his supervisor's office later on September 9, 2003 and denies that there was any confrontation on that date. However, the credible testimony of both the supervisor and his secretary establish that this confrontation did occur. Both are consistent in their description of what occurred and of grievant's threats to the supervisor. Moreover, both the Agribusiness Manager and the other agriculture manager corroborated the event because they had each received independent verbal reports from the supervisor and his secretary soon after it happened. Grievant's denial that the event even occurred therefore taints his credibility with regard to the balance of his testimony.

Grievant noted in his grievance that he was not counseled on these issues before receiving discipline. The Standards of Conduct provides for various levels of corrective action, including counseling or disciplinary action. The policy does not require that counseling occur prior to disciplinary actions. In some cases, management may choose to counsel before disciplining when the infraction is relatively minor, e.g., inadequate job performance. In other cases, management may reasonably determine that disciplinary action is warranted to emphasize the seriousness of the offense.

Grievant argues that he had not received advance notice of the September 9, 2003 meeting and that he was embarrassed by being called to task for his performance deficiencies in front of four management people. There is no requirement that advance notice be given when management decides to counsel an employee. It is understandable that grievant might be embarrassed, however, it was grievant's own performance shortcomings that precipitated the need for such counseling. When an employee does not perform up to the expectations of management, it is inevitable that management will counsel that employee sooner or later. Grievant also said that he made some of his comments out of frustration. It is understandable that grievant might have been frustrated; however, it was incumbent on him to control his temper and to avoid making comments that were disrespectful and insolent.

It appears that grievant has a basic misunderstanding about working for an employer. Grievant stated that management should adjust to *his* style. That

simply is not the way the real world works. When one works for an employer, one must adapt to the policies, procedures and practices of the employer. It would be virtually impossible for any large employer to adjust to the individual style of every single employee. While employers generally try to accommodate some individual employee preferences, the majority of the adjusting must be done by the employee – not the employer. Grievant’s stubborn insistence on trying to reverse this process will not succeed and is, in large part, the root cause of grievant’s frustration.

Grievant alleges that the Agribusiness Manager gave him the most severe discipline possible because he was ultimately removed from employment. In fact, the record reflects that the agency had been considering giving grievant three disciplinary actions – a Group III, a Group II and a Group I.¹³ However, after hearing grievant’s response and weighing the evidence, the agency issued only two Group I written notices. Moreover, the removal from employment was not the direct result of these disciplinary actions but rather the result of grievant’s accumulation of three Group I and one Group II disciplinary actions in less than two years. Further, the removal from employment had to first be reviewed and approved by the Regional Director.

DECISION

The decision of the agency is hereby affirmed.

The two Group I Written Notices issued on October 10, 2003 for abusive language and insubordination are UPHELD. Grievant’s removal from employment due to the accumulation of disciplinary actions is also UPHELD. The disciplinary actions shall remain active for the period specified in Section 5-10.19.A 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.

¹³ Grievant Exhibit 1. Predisciplinary hearing notice, October 7, 2003.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.¹⁴ 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.¹⁵

[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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¹⁴ 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).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Hearing Officer