

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date:
02/03/04; Decision Issued: 02/09/04; Agency: GMU; AHO: David J.
Latham, Esq.; Case No. 516



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 516

Hearing Date: February 3, 2004
Decision Issued: February 9, 2004

APPEARANCES

Grievant
Two witnesses for Grievant
Observer for Grievant
Occupational Health Manager
Representative 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 grievance from a Group I Written Notice for unsatisfactory job performance.¹ She also grieved a Notice of Improvement Needed/Substandard Performance issued on the same date.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance of the disciplinary action for a hearing.³ At the same time, the agency head advised grievant that the Notice of Improvement Needed/Substandard Performance does not qualify for a hearing pursuant to the Commonwealth's grievance procedure. Grievant requested that the Department of Employment Dispute Resolution (EDR) issue a ruling regarding her request for qualification of the Notice of Improvement Needed. The EDR Director reviewed the request and issued a ruling that the Notice of Improvement Needed does not qualify for a hearing.⁴

George Mason University (Hereinafter referred to as "agency") has employed grievant for four years. She is the Virginia Sickness and Disability Plan (VSDP) coordinator for the agency. Grievant has generally performed most of her work well. She has a good work ethic and has worked diligently to accomplish her responsibilities. She has been noted as having good interpersonal relations with clients and outside contacts.

After the Commonwealth implemented the VSDP plan in 1999, the agency decided that a full-time coordinator should be hired to oversee the program. After a thorough interview process, the agency hired the grievant, in part because of her prior experience with Virginia Blue Cross Blue Shield. Grievant was trained on the agency database, editing, proofreading, benefits administration, workers' compensation, and VSDP. Grievant is the only person coordinating the VSDP program for the agency. During the period at issue herein, the agency's Occupational Health (OH) Manager supervised grievant. The OH Manager has teaching responsibilities and other non human resource responsibilities at the University; grievant was her only subordinate.⁵

During the first two years of grievant's employment, she and her supervisor worked together satisfactorily. During the past two years, the working relationship became more problematic. Grievant felt that her supervisor became more controlling in certain aspects of her work. The supervisor acknowledges that grievant's ability to draft correspondence has been a weak point and that she had directed grievant to let the supervisor review all letters before mailing.

¹ Agency Exhibit 5. Written Notice, issued June 26, 2003.

² Agency Exhibit 7. *Notice of Improvement Needed/Substandard Performance*, June 26, 2003.

³ Agency Exhibit 1. Grievance Form A, filed October 16, 2003.

⁴ Agency Exhibit 1. *EDR Qualification Ruling of Director*, Number 2003-448, December 9, 2003.

⁵ In September 2003, grievant was placed under the supervision of a different supervisor.

One of grievant's routine functions is to notify employees who are approaching the end of their short-term disability (STD) period that an enrollment/waiver form must be completed, signed and returned to the agency for approval.⁶ It is vital that disabled employees comply with the paperwork requirements to assure proper transition from STD to long-term disability (LTD), and to assure that their health insurance coverage continues without interruption. As the end of the six-month period approaches, grievant sends a letter to the disabled employee advising them of their status and the necessity to submit the Health Benefits Enrollment form within a specified period. The form must be returned to the agency for the signature of a Benefits Manager. The agency then forwards the form to the Virginia Retirement System (VRS) for further processing.

In November 2002, grievant sent such a status/instruction letter via certified mail to a disabled employee.⁷ For unknown reasons, the employee apparently did not pick the letter up from the post office. The postal service returned the unopened letter to the University sometime in mid-December 2002.⁸ The letter was placed in the employee's VSDP file and no further action was taken. Grievant did not contact the employee and did not advise her supervisor that the letter had been returned. In March 2003, the employee contacted the agency complaining that he was being billed by a hospital for several thousand dollars because his health insurance had lapsed.⁹ Grievant's supervisor and the Employee Benefits Manager verbally counseled grievant about the importance of following up on such a matter so as to avoid placing an employee in danger of losing health insurance.

In January 2003, grievant sent a similar letter to another disabled employee.¹⁰ The letter instructed the employee to complete and return the LTD packet, and to return the health benefits enrollment form within 31 days of February 11, 2003. The employee completed the enrollment form but instead of returning it to the agency, the employee erroneously mailed it directly to VRS. On March 4, 2003, the employee called grievant and advised her that she had sent the enrollment form directly to VRS.¹¹ Grievant made a note in the file but did not advise her supervisor, did not contact VRS, and did not tell the employee to have the form sent to the university. Because the form had not been signed by a university Benefits Manager, VRS did not enroll the employee in the health benefits program. Regrettably, VRS let the unsigned form sit in its file without notifying either the employee or the university. As a result, the employee's health

⁶ The VSDP program provides that employees have up to six months of short-term disability benefits. If an employee is still certified as disabled at six months, the employee is moved into an inactive employee status and transferred into the long-term disability program.

⁷ Agency Exhibit 4. Letter from grievant to disabled employee, November 20, 2002.

⁸ Agency Exhibit 4. Returned letter, form and envelope in which they were mailed.

⁹ In this case, the agency interceded on the employee's behalf and was eventually able to rectify the situation by having the employee's health insurance coverage reinstated.

¹⁰ Agency Exhibit 5. Letter from grievant to second disabled employee, January 24, 2003.

¹¹ Agency Exhibit 5. VSDP notes for March 4, 2003 written by grievant and placed in the disabled employee's VSDP file.

insurance coverage lapsed because the enrollment form had not been signed by a Benefits Manager and submitted to VRS. On June 3, 2003, the employee's mother called the agency because VRS had advised her that the employee was not enrolled since it did not have a *signed* enrollment form. In this case, a sufficient amount of time had elapsed that the health insurance carrier would not agree to reinstate the employee unless she paid a substantial amount of back premiums.

After this situation came to light, the supervisor issued the Group I Written Notice at issue herein, as well as a Notice of Improvement Needed/Substandard Performance.

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. In all other actions, such as claims of retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹²

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

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 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 Standards provide that Group I offenses include inadequate or unsatisfactory job performance.¹³

It is undisputed that grievant is the only VSDP coordinator at the agency. She is the person with primary responsibility to oversee the VSDP paperwork process and to assure that all requirements are complied with in a timely manner. The agency has demonstrated, by a preponderance of evidence, that grievant did not fulfill her responsibility with regard to the employee whose STD benefits were ending on February 11, 2003. The employee advised grievant on March 4, 2003 that she had mailed her Health Benefits Enrollment form directly to VRS rather than returning it to grievant. Grievant knew that the Health Benefits Enrollment form would be invalid unless a university Benefits Manager approved and signed the form before it was sent to VRS. At that point, grievant could have contacted VRS and asked them to send the form back to the university. She could also have asked the employee to contact VRS and have VRS send the form to the university. Finally, grievant could have notified her supervisor of the problem and sought her advice. Grievant failed to take any of these actions.

Grievant contends that her supervisor had taken over “handling the case” on March 12, 2003. It is undisputed that the supervisor had interceded in one aspect of the case – the calculation of the employee’s leave balances.¹⁴ The supervisor maintains that she assigned another person to conduct an independent audit of the employee’s leave balances but that the employee’s VSDP file remained in grievant’s custody. Grievant contends that the supervisor took over the entire case and kept the file until the problem surfaced on June 3, 2003. Both supervisor and grievant testified credibly regarding custody of the file and there was no other evidence to resolve the difference of opinion. However, by grievant’s own testimony, she was handling the case (and had possession of the file) until March 12, 2003. Grievant did not take any action to resolve the Health Benefits Enrollment form problem between the time she learned of it on March 4, 2003 and March 12, 2003. During that eight-day period, grievant had

¹³ Agency Exhibit 6. DHRM Policy 1.60 Section V.B.1.a, *Standards of Conduct*, September 16, 1993. NOTE: Substandard performance may result in the issuance of both a disciplinary action in the form of a Written Notice, and a Notice of Improvement Needed. See DHRM Policy 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

¹⁴ Grievant had calculated the employee’s remaining leave balances prior to this time. However, it was not uncommon that the supervisor would assign another person to perform an independent audit of employee leave records to assure that the final leave balance payout was accurate.

ample opportunity to take one of the three options referred to in the preceding paragraph. As the sole VSDP coordinator, it was her responsibility to take the appropriate action to assure that the paperwork was properly processed.

Grievant argues that once her supervisor took possession of the file, grievant had no further responsibility for any aspect of the case. Assuming for the sake of argument that the supervisor did retain physical possession of the file after March 12, 2003, grievant was nonetheless obligated either to follow up on the incomplete enrollment form or, to advise the supervisor that this was an outstanding issue that required resolution. Grievant's failure to take either of these actions was inadequate or unsatisfactory job performance – a Group I offense under the Standards of Conduct.

Grievant was verbally counseled sometime in March 2003 about her failure to follow up on the employee to whom she had written in November 2002. The evidence did not establish the exact date when this counseling took place. However, even if the counseling occurred after grievant contends her supervisor took over the second employee's file, such counseling should have made grievant acutely aware of the importance of follow-up on all VSDP cases she was involved in. Thus, even if grievant thought her supervisor had taken over the second employee's case, grievant had an obligation to fully inform the supervisor that the employee's Health Benefits Enrollment form was sitting in limbo at VRS.

Grievant contends that her supervisor was overcontrolling. The supervisor acknowledged being more involved in overseeing one aspect of grievant's performance deemed in need of improvement – letter writing skill. There was insufficient evidence presented in this hearing to draw a conclusion on grievant's contention. However, even if grievant is correct about this aspect of supervision, it does not alter the fact that grievant did not fulfill her own responsibility in this case.

DECISION

The decision of the agency is hereby affirmed.

The Group I Written Notice issued on June 26, 2003 is 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. 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.¹⁵ 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.¹⁶

[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]

¹⁵ 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).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer