

Issues: Group II Written Notice (failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy) and Group I Written Notice (unsatisfactory work performance); Hearing Date: 03/17/04; Decision Issued: 03/18/04; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 601



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 601

Hearing Date: March 17, 2004
Decision Issued: March 18, 2004

PROCEDURAL ISSUE

Grievant requested as an alternate form of relief that she be transferred. A hearing officer does not have authority to transfer an employee.¹ She also requested training; that training has been already provided between the time of her request and the hearing.

APPEARANCES

Grievant
Attorney for Grievant
Department Chairperson
Advocate for Agency
Two witnesses for Agency

¹ § 5.9(b)2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

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 disciplinary actions - a Group II Written Notice issued for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy,² and a Group I Written Notice issued for inadequate or unsatisfactory work performance.³ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴ Virginia Commonwealth University (Hereinafter referred to as "agency") has employed grievant for three years as an executive secretary.

Grievant is one of three secretaries working in a department of the Health Services Division. The secretaries, and 24 other employees, are supervised by a department manager. Grievant is assigned to provide administrative support for several physicians. Her duties include answering the telephone, word processing, mail pick-up and distribution, filing, accessioning incoming pathology cases,⁵ maintenance of Excel spreadsheets and, ordering office supplies.⁶

On September 12, 2003, one of the other secretaries left work on extended medical leave (returned to work December 1, 2003). Work was realigned among the two remaining secretaries with grievant being assigned to make spreadsheet entries on consultation cases generated by agency physicians. On October 16, 2003, the other remaining secretary unexpectedly left work, also on extended medical leave (returned to work December 15, 2003). The department manager hired a temporary employee who was assigned to perform secretarial duties other than accessioning. The manager assigned some duties to a transcriptionist. She assigned to grievant accessioning and spreadsheet maintenance on all consultation cases – both from agency physicians and from physicians/hospitals outside the university. Processing outside consultations requires from half an hour to two and a half hours per day. Agency policy is that incoming consultations are to be accessioned within two hours of receipt. Consultation specimens are received either at the laboratory

² Agency Exhibit 1. Group II Written Notice issued November 14, 2003.

³ Agency Exhibit 2. Group I Written Notice, issued December 2, 2003.

⁴ Agency Exhibit 3. Grievance Form A, filed December 11, 2003.

⁵ The department uses the term "accession" to mean the assignment of a case number to an incoming specimen and logging the assignment in the computer system.

⁶ Agency Exhibit 9. Grievant's Work Description/Performance Plan, September 5, 2003.

window or by grievant; whoever receives the incoming specimen is required to time-stamp the paperwork to document time of arrival.

On October 27, 2003, grievant advised the primary physician to whom she was assigned that working conditions had deteriorated significantly since she had been moved to a different building, that the volume of work was overwhelming her, that she had just been assigned the outside consultation work, and that talking to the office manager did not help.⁷ This physician had supervised grievant during the 2003 performance cycle and gave her an overall rating of "Achiever."⁸ The physician forwarded grievant's email to the manager and concluded that grievant was "at the breaking point."⁹ On the same day, grievant advised the manager that she did not understand how to enter outside consultations on the spreadsheet and needed training.¹⁰ The manager told grievant to cease accessioning until instructions were given to her. Grievant received written instructions for internal consultations on October 28, 2003 but had questions about them, and noted that the instructions did not fully apply to outside consultation cases.¹¹

During the latter part of October, the manager directed grievant to let her know whenever she would be away from her desk. Grievant dutifully complied by sending the manager an email each time she left her desk advising where she was going and how long she expected to be gone. The manager complained during the hearing that grievant documented to the extreme by recording even her trips to the restroom. However, the manager never told grievant to stop sending the emails. On October 30, 2003, the manager counseled grievant regarding her revised responsibilities and work performance.¹² Grievant was cited for spending too much time away from her desk and for making personal telephone calls. Grievant was advised that she would be given four weeks to improve her performance before reevaluation.

On November 5, 2003, grievant again sought relief from the manager by explaining the problems she was encountering by being required to work in two different buildings each day, having people leave work for her in multiple places, and attempting to work with the inadequate spreadsheet instructions.¹³ The manager offered grievant the assistance of a coworker to show her how to better organize her desk but did not respond to the request for better spreadsheet instructions. On November 14, 2003, the manager issued a Group II Written Notice to grievant citing six incidents that occurred between October 23 and November 7, 2003. Grievant was charged with: misplacing a set of specimen slides, failing on four occasions to accession consultations within two hours

⁷ Agency Exhibit 8. Email from grievant to physician, October 27, 2003.

⁸ Grievant Exhibit 2. Grievant's performance evaluation, signed September 8, 2003.

⁹ Agency Exhibit 8. Email from physician to manager, October 27, 2003.

¹⁰ Agency Exhibit 8. Email from grievant to manager, October 27, 2003.

¹¹ Grievant Exhibit 2. Three emails from grievant to manager, October 28 & 29, 2003.

¹² Agency Exhibit 6. Memorandum from manager to grievant, October 30, 2003.

¹³ Agency Exhibit 8. Email from grievant to manager, November 5, 2003.

(delays ranged from one day to seven days) and, assigning incorrect prefixes to consultations. The manager felt that, because some of the delays affected patient care, they were sufficiently serious to constitute a Group II offense.

Ten work days after the first disciplinary action, the manager issued a Group I Written Notice listing five incidents that occurred from November 17-28, 2003. Grievant was cited for failing to accession a consultation within two hours, incorrectly differentiating between internal and external consultations, mailing slides without recording the mailing in a logbook,¹⁴ incorrectly communicating information to another employee and, being unaware that she had computer access to a spreadsheet. During late October and November, some physicians complained to the manager that grievant was not accessioning consultations on a timely basis.

In early 2004, the agency prepared a detailed 13-page instruction for the spreadsheet entry of external consultations and gave grievant training for one to four hours daily over a four-week period. Grievant has now mastered the process and is performing the work satisfactorily.

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.

¹⁴ The manager acknowledged during the hearing that there is no evidence to prove who mailed the slides; grievant denies mailing them.

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.¹⁵

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 II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹⁶ Examples of Group II offenses include failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy. Group I offenses are the least severe and include inadequate or unsatisfactory work performance.

The preponderance of testimony and evidence suggests that grievant probably has a longer learning curve than others. While she had been performing satisfactorily until the fall of 2003, a number of changes occurred in a short time that strained her ability to adapt. She was moved to a new building, had to perform work in two different buildings each day, became the sole secretary when the only two other secretaries went on medical leave, and had to learn a new spreadsheet process with virtually no training and inadequate written instructions. This situation was exacerbated by the pressure placed on the grievant's manager. The manager oversees 27 employees and has limited time for grievant. The manager is answerable to a large group of physicians, all of whom perform work critical to patient care. Understandably, the physicians want their work performed accurately and within established time frames. Moreover, the physicians are able to supplement their salaries with outside consultation work. When problems occur, they expect the manager to resolve those problems quickly. Thus, the fact that for two months the manager was under pressure to accomplish certain tasks promptly, but had only one secretary (instead of three) set the stage for the problems that occurred.

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

¹⁶ Agency Exhibit 10. DHRM Policy 1.60 Section V.B.2, *Standards of Conduct*, September 16, 1993.

Group II Written Notice

Grievant says she received no training in handling outside consultation cases in September or October. The manager testified that grievant received an intensive one-day training session in September. However, in a memorandum to grievant, the manager said grievant was "given the opportunity for questions while H_____ was still available. My understanding was that you had no questions."¹⁷ An opportunity to ask questions is not intensive one-day training. It therefore appears that grievant's testimony that she received no training is more credible than the manager's testimony on this point.

Grievant maintains that she was not asked to do outside consultations until the end of October. The manager contends that a revised duty schedule that assigned grievant this responsibility was given to grievant on October 6, 2003.¹⁸ The agency did not produce the revised duty schedule at the hearing. Grievant's testimony on this point appears to be more credible in view of her memorandum to the manager, which states, "Today is the first time I am told that I will be doing Outside Consults (PICs), and I do not know how to do them because I was never trained on how to do them."¹⁹ However, even if the manager believes she told the grievant on October 6, 2003, it is clear that grievant did not understand that to be the case.

A preponderance of evidence establishes that grievant was unable to complete spreadsheet entries timely, may have misplaced a set of slides, incorrectly communicated information on one occasion, and did not understand fully the spreadsheet entry process. However, there is insufficient evidence to show that grievant deliberately failed to follow instructions, perform assigned work or, follow written policy. Instead, her mistakes and inability to complete work resulted from either lack of ability to learn quickly, lack of training, or both. Generally, in order to sustain the Group II offense cited by the agency, the grievant must be shown to have had some degree of intent or willfulness. No such deliberate conduct was proven in this case. The evidence presented does constitute a Group I offense of unsatisfactory or inadequate work performance.

However, the Group II disciplinary action must be rescinded because of a due process issue. When grievant was counseled on October 30, 2003, the manager advised grievant that she would be given four weeks in which to improve her performance after which her performance would be reevaluated. The manager instead issued the disciplinary action only two weeks later. When management gives an employee a specified time within which to improve, fair play requires that the employee be given that time before disciplinary action is taken. Accordingly, the premature issuance of discipline requires that the action be rescinded.

¹⁷ Agency Exhibit 8. Email from manager to grievant, October 27, 2003.

¹⁸ Agency Exhibit 8. Email from manager to grievant, October 27, 2003.

¹⁹ Agency Exhibit 8. Email from grievant to manager, October 27, 2003.

Group I Written Notice

The agency has demonstrated, by a preponderance of evidence, that grievant's work performance was unsatisfactory or inadequate.²⁰ Some evidence suggests that the agency could have trained grievant more thoroughly. Other evidence reflects that grievant did not apply herself sufficiently diligently to her work. Based on grievant's work experience and training, one may conclude that she should have been able to handle both the volume and type of work assigned to her. The evidence indicates that the general type of work assigned to grievant is well within her job description. If grievant expects to retain her position, she must rise to the challenges presented by the tasks at hand. From time-to-time, there are temporary situations in the workplace (such as absences of coworkers) that require one to absorb either a higher volume of work, slightly different but related work, or both. Grievant's failure to perform satisfactorily in October and November is at least partly her responsibility. Therefore, the Group I Written Notice issued on December 2, 2003 is supported by the evidence.

Harassment

Grievant alleged harassment in her grievance. To establish a claim for racial harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on race; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. The grievant has claimed only that she did not like having to report her whereabouts to the manager. However, she has not demonstrated that the management policy of reporting one's whereabouts was based on race. Moreover, there is no evidence to show that the policy was so severe as to create an abusive work environment. The employer has shown that the policy was applied equally to all secretaries in the department, and that there was a reasonable basis for the policy.

Retaliation

Grievant alleges that the second disciplinary action was retaliatory because the manager knew that she intended to file a grievance. 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.²¹ To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant meets the first two prongs of the test because she filed a grievance and, she was disciplined after the agency had

²⁰ See Agency Exhibit 5. Email from department chairperson to employee relations manager, December 18, 2003, which corroborates grievant's unsatisfactory performance.

²¹ EDR *Grievance Procedure Manual*, p.24

knowledge that she intended to grieve. In order to establish retaliation, grievant must show a nexus between the knowledge and the discipline. Grievant has not established any such connection between the two. She did tell the Director of Laboratory Operations on December 1, 2003 that she intended to file a grievance. However, the manager had already prepared the Group I disciplinary action before that date. Even if a nexus could be found, the agency has established nonretaliatory reasons disciplining grievant. Grievant has not shown that the agency's reasons for the discipline were pretextual in nature.

DECISION

The agency's disciplinary actions are hereby modified.

The Group II Written Notice issued on November 14, 2003 is hereby **RESCINDED**.

The Group I Written Notice issued on December 2, 2003 for unsatisfactory or inadequate work performance is hereby **AFFIRMED**.

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.²² 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.²³

[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

²² 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).

²³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.