

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 03/29/04; Decision Issued: 03/31/04; Agency: VCCS; AHO: David J. Latham, Esq.; Case No. 610



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 610

Hearing Date: March 29, 2004
Decision Issued: March 31, 2004

APPEARANCES

Grievant
Representative for Grievant
Three witnesses for Grievant
Director of Information Technology
Representative for Agency
One witness for Agency

ISSUES

Was the grievant's conduct such as to 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

Grievant filed a timely grievance from a Group I Written Notice issued for inadequate or unsatisfactory work performance.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Virginia Community College System (Hereinafter referred to as "agency") has employed grievant for 14 years (10 years as a classified employee; four years as a wage employee). She is an information technology specialist. She has one prior active disciplinary action – a Group II Written Notice issued for accessing and disclosing confidential data unrelated to her job.³

As a consequence of the earlier Group II disciplinary action, grievant was suspended from work for 20 days from September 19 through October 16, 2003. Three other employees were implicated in the confidential data disclosure and were disciplined as a result. However, the other three employees received Group I Written Notices and were suspended for only five days each. Grievant felt that she had been singled out for harsher discipline and had been made a scapegoat by her coworkers. When grievant returned to work, her coworkers and the Director noted a distinct difference in grievant's behavior. Although she conversed as necessary to accomplish work tasks, she did not otherwise speak with her coworkers.

Grievant received her annual performance evaluation at the end of October and was dissatisfied with the ratings on three of seven core responsibilities. On October 30, 2003, she advised the Director of her intent to file a grievance alleging that he had treated her unfairly.

During grievant's absence, the Director of Information Technology (grievant's immediate supervisor) had directed another technology specialist to install a new tape backup application. On November 4, 2003, the Director asked grievant for an update on the backup application. Grievant advised him that application was not functioning properly; the Director asked her to print out the software documentation for his review. The Director reviewed the documentation and, on the morning of November 6, 2003, he attempted to configure the application. When he repeatedly received an error message, he asked grievant to assist him in investigating the problem in the server room. The Director asked

¹ Agency Exhibit 2. Group I Written Notice, issued November 7, 2003.

² Agency Exhibit 1. Grievance Form A, filed December 4, 2003.

³ Agency Exhibit 6. Group II Written Notice, issued September 18, 2003. NOTE: Grievant had filed a grievance of the Group II disciplinary action but the agency declined to qualify it for hearing on the basis that grievant failed to initiate her grievance within the 30-calendar day period required by the grievance procedure. Grievant requested that the Director of the Department of Employment Dispute Resolution (EDR) issue a compliance ruling. The EDR Director ruled that the grievance was not filed within the 30-calendar day period and was therefore untimely. EDR *Compliance Ruling of Director, Ruling Number 2003-469*, issued December 5, 2003.

grievant several technical questions to which grievant responded that she did not know the answers because she had not installed the application. The Director then asked the other specialist who had installed the application to join them. When he entered the server room, grievant excused herself and returned to her desk. A few minutes later, the Director asked grievant to return so that the three of them could brainstorm and troubleshoot the problem. It became obvious to the Director that grievant did not want to be in her coworker's presence. The Director felt that he had to act as a bridge in communications between grievant and the other employee, which made the troubleshooting process more cumbersome than necessary.

In the early afternoon of the same day, the Director went to grievant's cubicle at a time when no one else was in the Information Technology area. Before doing so, he closed the door to the area. The door automatically locks when closed; it can be opened without a key from the inside but from the outside a key is required to enter. Grievant was sitting at her desk; the Director stood in the doorway of the cubicle about three feet from grievant. He initially discussed with grievant the communication problem he had observed that morning. The Director then noticed two tape drives on grievant's bookshelf. The Director had asked grievant nearly three weeks earlier to return the tape drives to the manufacturer. He raised his voice, pointed over grievant's head at the tape drives, and said he wanted something done with the tape drives today. The Director left and returned a few minutes later and asked, "What didn't you understand about my order to back up the file servers?" Grievant said she didn't know and that she must have misunderstood his earlier instructions. The Director again raised his voice and three times repeated, "What about that did you not understand?" Grievant felt intimidated, physically and emotionally threatened, and excused herself from the office.

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.

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. Section V.B.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses are the least severe. One example of a Group I offense is inadequate or unsatisfactory work performance.⁴

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁵

During the three weeks preceding issuance of the Group I Written Notice, there were multiple dynamics in play which must be considered when judging whether the disciplinary action was warranted and appropriate. First, grievant had been more severely disciplined than her coworkers for an offense for which she believes they were all equally culpable.⁶ Not only did she receive a Group II Written Notice and a 20-day suspension while the others received only a Group I Written Notice and five-day suspension, but the length of her suspension exceeded DHRM policy.⁷ Whether grievant deserved harsher discipline for her offense is not the subject of this grievance or Decision. However, grievant's *perception* of undeserved harsh discipline is a factor that explains, in part, her behavior in the period leading up to the events of November 6, 2003.

⁴ Agency Exhibit 3. Section V.B.1.d, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁵ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

⁶ This Decision does not purport to adjudicate the merits of the Group II Written Notice. The Director of EDR has ruled that grievant did not timely file a grievance. Therefore, the Group II disciplinary action has become final. However, it is necessary to address the grievant's perceptions regarding the Group II Written Notice because those perceptions clearly affected her behavior in the workplace.

⁷ Agency Exhibit 3. Section VII.D.2.a, *Ibid.*, provides that for Group II offenses, the disciplinary action may include a suspension without pay of "up to ten workdays." (Emphasis added)

Second, grievant was dismayed that the agency refused to allow her grievance of the Group II disciplinary action to proceed through the grievance resolution steps. Although the agency was within its rights because grievant filed her grievance three days after the time limit, grievant perceived that the agency used that technicality to avoid discussion and resolution of the matter. When the grievant advised the agency that she was going to ask EDR for a compliance ruling, she was told that she would have to use personal time to work on her request.⁸ Grievant perceived this denial of time to work on her grievance as further evidence that she was being treated unfairly.

A third factor is the Director's management style. The Director has a military background. His personal interactions with employees are authoritative and have instilled fear in both grievant and a female coworker. The coworker testified very credibly that several encounters with the Director have caused her to break down in tears. She feels so cowed by his behavior that she has been reluctant to ask for medical leave (for dental appointments) to which she is clearly entitled, and is afraid to voice her opinion about work-related issues. The coworker's testimony is consistent with grievant's description of the Director's behavior in her office on the afternoon of November 6, 2003. In writing about her encounter with the Director on the day it occurred, grievant stated that she was so fearful that she was getting ready to yell for help. Another witness – an assistant professor – testified that the Director had become livid on one occasion because she had discussed a computer-related issue with a vice president.

Fourth, the Director's recollection of the events of November 6, 2003 has changed with time. In his typed description, which is dated on the day it happened, the Director fails to make any mention of what happened in grievant's office.⁹ However, at the hearing, he acknowledged the event. In a later memorandum, the Director states that he never raised his voice towards grievant.¹⁰ However, during the hearing, he testified that he had raised his voice at grievant on November 6, 2003. In view of these inconsistencies, the hearing officer finds the grievant's version of what happened in her office to be more credible.

The agency has not shown, by a preponderance of evidence, that grievant was so unwilling to communicate regarding the tape backup application that disciplinary action was warranted. She did not perform the installation and was therefore less knowledgeable about problems than the coworker who had installed it. She answered the Director's questions to the limited extent of her knowledge on the subject. She excused herself from the server room on two

⁸ § 8.6, EDR *Grievance Procedure Manual*, effective July 1, 2001, provides that: "Employees are also granted administrative leave to participate in the steps of the grievance process." One of the steps in the grievance process is the right to appeal to the Director of EDR if the agency head does not qualify the grievance for a hearing. See § 4.3, EDR *Grievance Procedure Manual*.

⁹ Agency Exhibit 2. *Ibid*.

¹⁰ Agency Exhibit 1. Memorandum signed by Director, December 10, 2003.

occasions – once to answer a telephone call, and once because she did not believe she could contribute to a solution of the problem. It is true that the Director had noticed the coolness between grievant and her coworker and that she didn't want to speak to the coworker any more than necessary. In view of this, counseling was certainly appropriate and, in fact, the Director did counsel grievant that same afternoon. The dynamics discussed above serve to mitigate grievant's behavior. Grievant's reluctance to fully communicate with her coworker on November 6, 2003 was not excusable, and therefore it warranted counseling. However, neither was her behavior so egregious that it warranted a disciplinary action.

The vice president concluded that there should be mediation between grievant and the Director. In view of the testimony in this hearing, it may well be that a group mediation between the Director and his subordinates would be even more beneficial. EDR can facilitate this mediation process should the parties agree to pursue it.

DECISION

The decision of the agency is reversed.

The Group I Written Notice issued on November 7, 2003 is hereby **RESCINDED**. The agency shall remove this disciplinary action from grievant's personnel file.

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.¹¹ 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.¹²

[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

¹¹ 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).

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.