

Issue: Group II Written Notice (failure to follow supervisor's instructions, unsatisfactory work performance, disruptive behavior); Hearing Date: 03/31/04; Decision Issued: 04/01/04; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 631



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 631**

Hearing Date: March 31, 2004  
Decision Issued: April 1, 2004

**PROCEDURAL HISTORY**

On October 7, 2003, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, unsatisfactory work performance, and disruptive behavior for engaging in a loud, public verbal exchange with a subordinate employee on September 16 and September 19, 2003. On November 5, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 4, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 31, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative  
Witnesses

**ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as an Administrative Program Specialist III. No evidence of prior disciplinary action against Grievant was presented at the hearing.

On August 8, 2003, Grievant received a Notice of Improvement Needed/Substandard Performance stating, in relevant part:

A need for you to improve your interactions with internal customers was addressed in last year's evaluation, and in a subsequent memo from your prior supervisor. Despite numerous conversations and oral counseling sessions I've had with you, I am an able to detect sustained and effective improvement in your interactions with others. You have repeatedly interfaced with employees in an impatient, undiplomatic, abrupt, frustrated, and defensive manner during this calendar year. \*\*\*

A continued pattern of the inappropriate behaviors enumerated herein will constitute failure to follow supervisor instructions, and disruptive behavior. As you are aware, these offenses are actionable under the Commonwealth's Standards of Conduct. I shall address any such future offenses as disciplinary matters; this action could bring about sanctions up to and including your termination.

Immediately improve your approach with internal customers. Let no action that you take be construed as lacking respect for your customer. Be a consistent diplomat & problem-solver. Patiently process and thoroughly respond to all questions & requests in a tactful manner. Consider the implications of your actions, and how they might be perceived -- or misperceived. Consult with me or other management staff when dealing

with difficult situations. Ensure that you consistently maintain your composure, and that your demeanor is perceived as tactful and respectful.

On September 16, 2003, Grievant gave instructions to a subordinate employee. That employee refused to follow Grievant's instructions and began arguing with Grievant. Grievant began yelling at the employee. Grievant argued with a subordinate in plain view of the public and coworkers. Following the altercation, Grievant notified a manager. On September 19, 2003, Grievant engaged in similar behavior with a different subordinate employee and later reported the matter to another manager.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. 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." DHRM § 1.60(V)(B).<sup>1</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.<sup>2</sup> Yelling at a subordinate employee in plain view of the public and other employees is contrary to the instructions Grievant was given.<sup>3</sup> His behavior rises to the level of a Group II offense.

Grievant argues that he complied with the instructions he was given because he brought the matters to the attention of a manager. Grievant's argument fails because he contacted a manager only after he had engaged in conflict with a subordinate employee. To comply with his supervisor's instruction, Grievant should have contacted a manager prior to yelling at the employees.

Grievant contends that the Agency failed to discipline its subordinate employees even though they had disregarded their supervisor's instructions. The evidence showed, however, that *some* corrective action was taken against those employees. It is not necessary for the Agency to show that other employees were disciplined in the

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>2</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>3</sup> The Hearing Officer would have preferred to have heard the testimony of the two subordinate employees but neither party called those employees as witnesses. Grievant chose not to testify. Evidence of what happened on September 16, 2003 and September 19, 2003 came from the testimony of Mr. RK who investigated the matter.

same manner as was Grievant. Disciplinary action is individual in nature. No evidence was presented suggesting these employees had been forewarned that their failure to follow a supervisor's instructions would result in disciplinary action. Grievant had been warned that his failure to follow a supervisor's instructions would result in disciplinary action.

Grievant presented evidence that Mr. RK and some other managers sometimes are loud and inappropriate in their behavior.<sup>4</sup> Even though other employees are sometimes loud, the Hearing Officer cannot ignore that Grievant was given a specific instruction on how to react in situations before he had to become loud. Grievant failed to follow those instructions. No evidence was presented suggesting other employees had been given similar supervisory instructions.

Grievant contends that the Agency discriminated against him on the basis of his race and retaliated against him. Grievant asserts that the discipline he received is harsher because of his race than the disciplinary action taken against other employees of another race. Without detailed information about the nature of those employees' misbehavior, the Hearing Officer cannot conclude that the employees were inconsistently disciplined. In addition, the evidence showed that the Agency disciplined Grievant because of his actions and not in order to retaliate against him for engaging in some protected activity.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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. Please address your request to:

Director

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<sup>4</sup> See Grievant Exhibit 2.

Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 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. 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>5</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.