

Issue: Group II Written Notice (failure to improve interpersonal communication with staff); Hearing Date: 05/25/04; Decision Issued: 06/01/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 708



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 708

Hearing Date: May 25, 2004
Decision Issued: June 1, 2004

PROCEDURAL ISSUE

Grievant requested as part of the relief she seeks that counseling memoranda be removed and that certain comments be expunged from her performance evaluations. Hearing officers may provide certain types of relief including reduction or rescission of the disciplinary action.¹ However, hearing officers do not have authority to order the removal of counseling memoranda or to expunge portions of performance evaluations.² 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)2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

² § 5.9(b)4, 6 & 7. *Ibid.*

APPEARANCES

Grievant
Attorney for Grievant
Five witnesses for Grievant
Two observers for Grievant
Human Resource Manager
Advocate for Agency
Seven 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 II Written Notice issued for failure to improve her interpersonal communications with staff, causing a perceived hostile work environment.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 The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 18 years. She is a corrections lieutenant.

On February 6, 2003, the Chief of Security and an Assistant Warden counseled grievant regarding staff complaints that she talked to corrections officers in a demeaning and sarcastic manner.⁵ Although grievant was initially defensive and argumentative during the counseling session, she became reasonable and insightful, and the meeting ended on a positive note. On February 12, 2003 grievant was directed by a captain to draft an officer for overtime. She responded that another lieutenant normally handles that task. Her response was perceived as curt, unprofessional, and disrespectful of the lieutenant.⁶ At the time, grievant was unaware that the other lieutenant was in the sick bay with what was believed to be a sudden heart attack. The warden counseled grievant the following day and found her rude and unprofessional during his meeting with her. As a result, the warden decided to refer grievant for counseling on anger management and communications with coworkers.⁷

³ Agency Exhibit 1. Written Notice, issued December 1, 2003.

⁴ Agency Exhibit 2. Grievance Form A, filed December 28, 2003.

⁵ Agency Exhibit 3. Memorandum to file from assistant warden, February 13, 2003.

⁶ Agency Exhibit 3. Written counseling from warden to grievant, February 14, 2003.

⁷ Agency Exhibit 3. Memorandum from warden to file, February 13, 2003.

Grievant complied with the warden's recommendation and arranged for counseling from a licensed clinical psychologist. She met with the psychologist nine times from March through May, twice in June, and once during the months of July, August, September and December 2003 for a total of 15 sessions. In October 2003, the psychologist wrote to the warden requesting feedback in order to assure that issues of concern to the institution had been addressed in the counseling.⁸ After receiving no response from the warden or the institution, the psychologist concluded treatment with the December 2003 session. Grievant followed up on the psychologist's request in a memorandum to the human resource officer; the human resource officer failed to respond to her request.⁹ The psychologist considered grievant an excellent client who completed all reading and homework assignments and came ready to participate in each session. She stressed to grievant that how others perceive her in the workplace is very important in improving her interactions.

In early October 2003, the warden received complaints from corrections officers about grievant's sarcasm and abrasiveness. He directed a captain to conduct an investigation. The captain talked with the corrections officers who had regular interactions with grievant. He obtained written statements from six officers.¹⁰ Officers complained that grievant "over-manages," demeaned one by telling him that he does "piss-poor work" and is "lazy and a procrastinator," "micromanages," "talks to you like you're beneath her," and "makes us feel incompetent." She told one officer that she was "surprised that one of my officers knows how to do something." Grievant's subordinates complain that she sometimes fails to respect employee confidentiality by making comments to individuals on an open radio channel when a telephone call would have been more appropriate. On occasion she has failed to notify sergeants when moving their subordinates from one post to another.¹¹ Some officers said that they felt like quitting or calling in sick rather than come to work on her shift.¹² The corrections officers who testified were clear, consistent and credible.

During 2003, grievant applied for training at the agency's Academy for Staff Development. She specifically applied for courses titled: Workplace Behavior, Cross-Gender Communications, Genderstyles, and Team Building Thru Experiential Acts.¹³ Each of these courses would have been at least partially relevant in improving grievant's interpersonal interactions with employees. Upper management disapproved grievant's attendance at the first two listed courses; the latter two courses were cancelled because statewide enrollment was too low to justify the classes.

APPLICABLE LAW AND OPINION

⁸ Grievant Exhibit CC. Letter from psychologist to warden, October 23, 2003.

⁹ Grievant Exhibit X. Memorandum from grievant to human resource officer, December 14, 2003.

¹⁰ Agency Exhibit 3, Attachments 13a – 13f.

¹¹ Agency Exhibit 3. Memorandum from sergeant to chief of security, March 4, 2003.

¹² Testimony from two agency witnesses - a captain and a sergeant - and one of grievant's witnesses - a corrections officer.

¹³ Grievant Exhibit Y. Training registration forms and attached memoranda, 2003.

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.¹⁴

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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹⁵ 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 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.¹⁶

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

¹⁵ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁶ Agency Exhibit 4. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy are examples of a Group II offense.

The agency has not shown by a preponderance of the evidence that grievant committed a Group II offense. The agency did not offer any evidence that grievant failed to perform assigned work. To the contrary, the evidence reflects that grievant performed all work assigned to her. She is considered to be an efficient, effective employee who can be counted on to get the job done. The agency also did not offer any evidence that grievant failed to comply with established written policy. In fact, the agency did not proffer any written policies with which grievant failed to comply. The evidence further established that grievant followed the instructions of her supervisor. When the warden directed grievant to seek counseling, grievant arranged through the Employee Assistance Program to obtain counseling from a Licensed Clinical Psychologist. The psychologist provided testimony and evidence that grievant actively participated in the counseling sessions, completed homework assignments, and made every effort to learn from the experience. Moreover, on her own initiative, grievant applied for several training courses that would have been beneficial in improving her interactions with employees. Therefore, the agency has not borne the burden of proving that grievant committed a Group II offense.

However, the agency has demonstrated that grievant's job performance was not satisfactory with regard to her personal interaction with coworkers. Although grievant may have made a bona fide effort to improve her interpersonal interactions with employees, corrections officers continue to perceive her behavior as offensive. Grievant believes that she has significantly altered her behavior during the past year. Nonetheless, corrections officers interviewed in October continued to have legitimate concerns about how grievant interacts with them. It is important for grievant to recognize that her subordinates' perception of her behavior is the key determinant in this situation. Even though grievant does not believe she is abrasive, officers feel that she is.

Grievant's argumentative nature is exemplified in her memorandum to the regional administrator.¹⁷ She states that the agency does not have a written policy covering sarcasm and condescending communication. Because there is no *written* policy, grievant infers that such behavior is not prohibited. No employer has written policies governing every aspect of management behavior toward employees. It is common knowledge (which grievant should have acquired in her years on the job) that managers must treat employees with the same respect and dignity that they expect to receive from upper management. Grievant's insistence in pointing out that there is no written policy on this subject is argumentative and unproductive.

During the hearing, three indicators surfaced that may illustrate the difficult nature of this problem. First, the psychologist emphasized that grievant had been a willing participant in the therapy sessions and that she wants to improve her behavior. However, the psychologist stated that she doesn't know whether part of grievant's

¹⁷ Grievant Exhibit K. Memorandum from grievant to regional administrator, February 7, 2003.

problem is “fixable” due to the manner in which grievant carries herself (very erect bearing) and due to her unique speech pattern. Such behaviors are difficult to change since they have become second nature to grievant. The psychologist suggests that this may be a factor that *partially* explains why some officers perceive her communication style as too authoritarian.

Second, one of the agency’s witnesses was a female lieutenant of the same race as grievant, and thus in a virtually identical situation to that of grievant. She testified that staff reacts well to her and that she has not received any adverse comments from staff. She has a very pleasant and amiable demeanor, which is reflected in her verbal communication. She has spoken with grievant and offered suggestions on how to improve her approach to subordinates. She particularly advised grievant not to micromanage but to let sergeants handle most of the daily problems and become directly involved in only the more serious situations. The witness’s demeanor and method of supervision is in direct contrast to grievant’s sterner, authoritarian, detail-oriented style of management. Both grievant and the witness may “get the job done,” but the witness uses honey while grievant’s approach is *perceived*¹⁸ by her subordinates as too dictatorial and controlling.¹⁹

Third, grievant’s demeanor during the hearing, although outwardly respectful and polite, nonetheless demonstrated why officers are offended by her manner. At one point, grievant made a sarcastic comment regarding similarities in the written witness statements. Then in response to her attorney’s next question, she averred that “I am never sarcastic.” Also, at times, she responded to her own attorney’s questions in a tone and with an inflection that was almost haughty. The hearing officer assumes that grievant *believes* she is neither sarcastic nor offensive; however, her demeanor spoke for itself.

In summary, although the agency has not shown a deliberate disregard of supervisory instructions, it has demonstrated that grievant’s interactions with subordinates continued to be unsatisfactory. As grievant had previously been counseled about this issue, a Group I Written Notice is the next logical step of the progressive disciplinary plan in the Standards of Conduct.

DECISION

The decision of the agency is modified.

The Group II Written Notice issued on December 1, 2003 is hereby REDUCED to a Group I Written Notice for unsatisfactory work performance. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

¹⁸ Grievant’s psychologist testified that she tried to get grievant to understand that the perception of others in the workplace is very important.

¹⁹ Grievant’s psychologist emphasized to grievant that she cannot allow her life to be consumed by her job.

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.²⁰ 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.²¹

²⁰ 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).

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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