

Issue: Group I Written Notice and termination [due to accumulation] (abuse of State time); Hearing Date: 05/24/04; Decision Issued: 05/25/04; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 710



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 710

Hearing Date: May 24, 2004  
Decision Issued: May 25, 2004

PROCEDURAL ISSUE

Grievant asserted prior to the hearing that it was her intent to grieve the two most recently issued Written Notices. In her written grievance, grievant specifically identified the fourth Written Notice by mentioning the date of offense (March 10, 2004) and by addressing why she was reading a book; it is undisputed that this disciplinary action was qualified for hearing. However, in an attachment to the grievance form, grievant attempted to explain why she had left work early on January 30, 2004 – the substance of the third Written Notice that had been issued on February 20, 2004. Grievant averred that she did not receive the third Written Notice until March 25, 2004 when she signed the fourth Written Notice. Because of this allegation, the hearing officer agreed to take testimony and evidence on the issue at the beginning of the hearing to resolve whether the third written notice qualifies for hearing.

APPEARANCES

Grievant  
Observer for Grievant

District Manager  
Representative for Agency  
Two 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 issued for abuse of state time.<sup>1</sup> As part of the disciplinary action, grievant was removed from state employment due to the accumulation of prior active disciplinary actions. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup>

The Department of Motor Vehicles (Hereinafter referred to as "agency") employed grievant for five years; she was a customer service generalist.<sup>3</sup> The grievant has three prior active Group I Written Notices - one for unsatisfactory work performance,<sup>4</sup> one for continuous tardiness,<sup>5</sup> and one for leaving the work site without permission.<sup>6</sup>

The agency incorporates into employee training and culture a Code of Professionalism, which grievant received.<sup>7</sup> Among the principles of the code are promoting teamwork, always putting the customer first, demonstrating a sense of immediacy in service delivery, taking responsibility for one's actions, and acting with honesty and integrity at all times. Agency policy provides that employees who find personal belongings left behind by customers should immediately turn the items into a member of branch management. Grievant knew about this policy.<sup>8</sup> Management is responsible to identify the owner if possible and return the item to the customer.

Grievant was assigned to a customer service window of a branch office providing service to the public. On March 1, 2004, a customer inadvertently left a hardback book on the counter at grievant's service window. Another employee

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<sup>1</sup> Exhibit 11. Written Notice, issued March 25, 2004.

<sup>2</sup> Exhibit 16. Grievance Form A, filed March 26, 2004.

<sup>3</sup> Exhibit 1. Grievant's Employee Work Profile, September 30, 2003.

<sup>4</sup> Exhibit 5. Written Notice, issued September 13, 2002.

<sup>5</sup> Exhibit 5. Written Notice, issued August 5, 2003.

<sup>6</sup> Exhibit 8. Written Notice, issued February 20, 2004.

<sup>7</sup> Exhibit 2. Code of Professionalism, signed by grievant May 1, 2001.

<sup>8</sup> Exhibit 17, p.2, question #6. During the second resolution step meeting, grievant admitted that she knew the policy requires her to take personal belongings left by customers to the manager or to lost & found.

noticed the book sitting on the counter ledge after the customer had left and handed it to grievant. Grievant did not turn the book in to a manager but instead retained it at her service window.

An assistant manager, who had been temporarily assigned to grievant's office from March 1-21, 2004, noticed the book from time-to-time as she passed grievant's counter. On March 9, 2004, the assistant manager was coping with the heavy customer volume that normally occurs during the lunch hour and was working the customer service window next to grievant's window. She observed grievant sitting at her counter with the book in her lap and her head down looking at the book. Grievant was not servicing a customer, was looking at the book for two or three minutes, and appeared to be reading the book. The assistant manager then directed grievant to call a customer. Subsequently, she called the regional manager and reported the incident to him.

Grievant's employment record includes, counseling, disciplinary actions, substandard progress reviews, and marginal performance evaluations. In addition to the three Written Notices cited above, grievant was counseled once in 2002<sup>9</sup> and twice in 2003.<sup>10</sup> The 2002 counseling memorandum specifically directed grievant not to read magazines and newspapers at the front counter. She also received a "Below Contributor" rating on a progress review,<sup>11</sup> adverse comments on an interim evaluation form,<sup>12</sup> and "Below Contributor" performance evaluations on some of her core responsibilities.<sup>13</sup>

The third Written Notice was issued on February 20, 2004. Grievant signed the form on that date and was given a copy of the disciplinary action at the same time.

### 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).

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<sup>9</sup> Exhibit 15. Memorandum of counseling, July 22, 2002.

<sup>10</sup> Exhibit 4. Memoranda of counseling, May 9, 2003 & July 11, 2003.

<sup>11</sup> Exhibit 3. Probationary Progress Review, August 27, 2001.

<sup>12</sup> Exhibit 4. Interim Evaluation Form, February 10, 2004.

<sup>13</sup> Exhibit 6. Performance Evaluations, September 27, 2002 & September 30, 2003.

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.<sup>14</sup>

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 of Conduct policy provides that abuse of state time is a Group I offense.<sup>15</sup> The policy also provides that a fourth active Group I Written Notice normally should result in discharge.<sup>16</sup>

#### Written Notice of February 20, 2004

Grievant testified that she did not receive the third written notice until March 25, 2004, at the same time she received the fourth written notice. The hearing officer finds grievant's testimony to be not credible for the following reasons. First, the branch manager credibly testified that she issued the third written notice to grievant on the date it was signed – February 20, 2004. Second, grievant averred that the manager told her to backdate the document. The branch manager credibly and directly denied that she has ever asked grievant or any employee to falsify a date. The totality of the branch manager's testimony was exceptionally credible.

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<sup>14</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>15</sup> Exhibit 10. Section V.B.1.(b), DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>16</sup> Exhibit 10. Section VII.D.1.b.(2), *Ibid*.

Third, during the hearing, the hearing officer viewed the originals (retained in the Human Resources personnel file for grievant) of both written notices. The February 20, 2004 notice is signed in blue ink; the March 25, 2004 notice is signed in black ink. If, as grievant contends, she had received them at the same time, there is no logical reason for two different color pens to have been used. Grievant had no explanation for the difference. Grievant's failure to support her allegations with any credible evidence or testimony tainted her overall credibility.

Accordingly, the hearing officer concludes that the third written notice was, in fact, issued to grievant on the date she signed it – February 20, 2004. Since grievant filed her written grievance on March 26, 2004, this issue does not qualify for a hearing.<sup>17</sup>

#### Written Notice of March 25, 2004

The agency has shown that grievant committed the offense of abuse of state time. The credible testimony of an assistant manager establishes that during a very busy lunch work time, she observed grievant reading a book when grievant should have been servicing customers waiting in the lobby. The assistant manager was working in grievant's office only for a three-week temporary assignment. She had no previous history with grievant and grievant has not shown that the assistant manager would have any reason to fabricate her testimony.

Grievant asserts that she was merely checking the book to determine whether it contained any identification of the owner. Grievant's assertion is less than credible for three reasons. First, grievant had the book in her possession since March 1, 2004 when the customer was in the branch office. If grievant had only wanted to check the owner's identity, the logical time to have done so would have been when she first discovered the book. In fact, the owner's name was written on the first page inside the front cover. On March 1, 2004, grievant could have quickly scanned the applications she had received that day and ascertained that the owner had indeed been her customer on that day. Grievant never turned the book in to management, even after she was removed from employment. She maintained that she was very concerned about identifying the owner and returning it to that person. In fact, she brought the book to the hearing.<sup>18</sup>

Second, the assistant manager credibly testified that grievant was reading the book for two or three minutes. Thus, grievant was not just looking for the owner's identity; she was reading the text of the book. Finally, grievant knew that

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<sup>17</sup> § 2.2 EDR *Grievance Procedure Manual*, effective July 1, 2001 provides, in pertinent part: "The written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute."

<sup>18</sup> Interestingly, grievant's rationale for keeping the book even after her discharge is that she could not have been abusing state time because the book proves that she is not the owner.

she should have turned the book in to management but never did so. It is more likely than not that grievant found the book's subject matter interesting and decided to read the book herself. Therefore, grievant's assertion that she held the book for nine days and only then decided to look for owner identification is self-serving and not credible.

In her written response<sup>19</sup> to the predisciplinary notice letter,<sup>20</sup> grievant explains that she was reading due to alleged depression caused by the fact that trees had fallen on the roof of her house several months ago. Grievant failed to provide any testimony or evidence that would explain how reading a personal book at work could be justified by such an event.

Grievant had been specifically counseled in writing less than two years ago that reading of non-agency publications was forbidden at the front counter. Moreover, the written counseling warned grievant that she could be subject to disciplinary action if she violated this prohibition.

#### Level of Discipline

The agency has demonstrated, by a preponderance of evidence, that grievant abused state time by reading a book during a very busy time when she should have been servicing customers. Accordingly, her offense warrants a Group I Written Notice. Because grievant has accumulated four active Group I Written Notices, termination of employment is the normal disciplinary action. Grievant claims that she is depressed and has carpal tunnel syndrome, and that these are factors that should constitute mitigating circumstances. In support of her argument, grievant submitted a handwritten note from a licensed clinical psychologist. However, the psychologist specifically states that grievant's depression is "because she lost her job."<sup>21</sup> Thus, this condition developed *after* grievant's removal from employment and cannot be considered a mitigating circumstance. On the other hand, grievant's spotty record of previous counseling, disciplinary actions, and substandard performance evaluations constitute aggravating circumstances that would significantly outweigh any possible mitigation.

#### DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on March 25, 2004 and the removal of grievant from state employment are hereby UPHOLD. The disciplinary action

shall remain active for the period specified in Section V.B.2 of the Standards of Conduct.

### 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>22</sup> You must file a notice of appeal with the clerk of the circuit court in the

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<sup>22</sup> 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).



jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>23</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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David J. Latham, Esq.  
Hearing Officer

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