

Issue: Group III Written Notice with termination (theft/unauthorized removal of State property); Hearing Date: 07/28/04; Decision Issued: 07/29/04; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 773



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 773

Hearing Date: July 28, 2004
Decision Issued: July 29, 2004

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Representative for Agency
Four witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 III Written Notice for theft/unauthorized removal of state property.¹ As part of the disciplinary action,

¹ Exhibit 7. Written Notice, issued June 9, 2004.

grievant was removed from state employment effective June 10, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.²

The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a health services care worker for 11 years. Grievant had a satisfactory performance record prior to this disciplinary action.

In the building where grievant works, the staff has its own bathroom for employees only; clients have their own separate bathroom. On June 5, 2004, a coworker observed grievant go into the staff office where she had a small personal black duffel bag. Grievant then entered the client bathroom, removed hair care products and lotions from the supply cabinet, and placed them inside her black duffel bag. Grievant exited the bathroom, and said she had to leave to get gas in her car. She set her bag on the floor, walked to the office to get her jacket, picked up the duffel bag, walked down one flight of stairs, went to her car with the duffel bag, and left the facility.³ The coworker attempted to telephone the supervisor but was unable to contact her. She went home after the shift and discussed the matter with her husband, who told her to do what she thought was right. On the next workday, the coworker advised her supervisor of what she had seen.

The incident was reported to the facility police department which conducted an investigation.⁴ The police interviewed the reporting coworker, grievant, and two other employees. Although grievant initially denied taking any client supplies, she subsequently admitted that on June 5, 2004 she had taken towels, a tube of Vaseline, and a bottle of hair oil.⁵ She then wrote statements in which she admitted, that during the course of her employment, she had taken Vaseline, ink pens, shaving cream, oil, several towels, and wash cloths.⁶

The reporting coworker has been employed at the facility for about one year. She has no social interaction or connection with grievant outside of work. She and the grievant have never had any adverse interactions at work. Grievant could offer no reason that the coworker would testify falsely against her.

Grievant was given a due process notification that possible disciplinary action was being considered.⁷ She was given 24 hours to provide any response to the accusation against her. The following day, grievant prepared a five-page, handwritten response.⁸ The agency considered her response but after

² Exhibit 8. *Grievance Form A*, filed June 16, 2004.

³ Exhibit 1. Coworker's written statement, June 9, 2004.

⁴ Exhibit 2. Police offense report and supporting memoranda.

⁵ Exhibit 3, p.2 of 3. Witness statement form, written and signed by grievant, June 8, 2004.

⁶ Exhibit 3. *Ibid.*

⁷ Exhibit 4. Letter to grievant from center director, June 8, 2004.

⁸ Exhibit 5. Grievant's response to charge, June 9, 2004.

consultation among facility management, human resources, and the central office it was decided that grievant should be removed from state employment.

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.

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 grievant must present her evidence first and prove her claim by a preponderance of the evidence.⁹

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.3 of the *Standards of Conduct* policy provides that Group III

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

offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁰ Theft or unauthorized removal of state records, state property, or the property of other persons is one example of a Group III offense.

The agency has demonstrated, by a preponderance of evidence, that grievant removed state property without authorization. A witness provided credible testimony that she had seen grievant place supplies intended only for client use into her personal bag and remove them from the facility. Grievant admitted both verbally and in writing that she had taken the items in question. Moreover, in her own handwritten statement, grievant admitted that she had taken other items including several towels, shaving cream, wash cloths, Vaseline, and hair oil during her employment at the facility.

At the beginning of the police department's interview of grievant, the officers asked whether she was aware of items missing from her building. Grievant alleges that one officer asked whether she had taken a DVD player.¹¹ During this grievance hearing, grievant adamantly insisted that the police officer was the first one to raise the issue of a missing DVD player. However, in her written response to the due process notice, grievant states that *she* first raised the issue of a DVD player.¹² Grievant's inconsistent statements on this point taint her credibility.

Grievant argues that her written admissions should be discounted because she was under pressure when she wrote them. The police officer who testified stated that the interview with grievant was routine and that no pressure or coercion was used. Grievant has offered no testimony or evidence to suggest otherwise. She has not asserted that the police officers threatened her, browbeat her, or did anything other than interview and ask questions. Grievant wrote not one but three different statements. On two of them, she specifically admits to taking supplies.

Grievant further argues that she made a mistake when she wrote that she had taken items. She now contends that she meant to say that she had "used" the various supply items. Grievant's argument is not persuasive for three reasons. First, grievant's native language is English. It is simply not credible that when being accused of theft, grievant would mistakenly write that she had taken supplies if she had only used the items. Second, grievant admits in writing that,

¹⁰ Exhibit 6. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

¹¹ The reporting coworker had brought a personal DVD player to work several months ago. The DVD player disappeared and has never been found.

¹² Exhibit 5. Grievant's response to due process notice, June 9, 2004. Grievant states, in pertinent part: "An officer asked did I know why I was there. I said "No." Well, they stated let's get to the point. Are you aware of items being missed on [her] building. **My response was** (my first thought what I was going to be question (sic) again about a previous case) When asked about items being missed on the building **I told of how I had heard of a staff persons DVD player missing some months ago...**" (Emphasis added).

had her house been searched, wash cloths would have been found.¹³ In the same letter she admits that she dropped a tube of Vaseline in her bag and went home. Third, from the tone of grievant's letter it is apparent that she does not consider it wrong to take such items from the facility. She apparently believes that she is entitled to freely use client supplies for her own personal use and, if the items just happen to "drop in her bag," she takes them home for continuing personal use.

Grievant claims in her written response to the due process notice that other staff have used state property. However, during the hearing, grievant did not identify any employees who took state property, and did not offer any witnesses or other evidence to support her allegation. Grievant argues that all employees have used such items as toilet paper at work, or take-home plates after parties. It is obvious that employees will use certain expendable supplies during the course of a work day. The agency does not expect employees to bring their own toilet paper to work. The agency does not discipline anyone for using a paper plate to take food home after a party. However, when an employee takes supplies intended *only* for client use and uses the items or takes them home, the employee has removed state property without authorization.

While the monetary value of the items that grievant expropriated on June 5, 2004 is relatively small, the fact is that removal of state property constitutes theft regardless of the dollar value of the items. Moreover, it is clear from grievant's own admission that this was not the first time she had removed client supplies from the facility.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on June 10, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in 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

¹³ Exhibit 9. Letter from grievant, June 16, 2004.

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.¹⁴ 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.¹⁵

[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]

¹⁴ 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).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer