Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions); Hearing Date: 10/14/04; Decision Issued: 10/22/04; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 7879

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7879

Hearing Date: October 14, 2004
Decision Issued: October 22, 2004

PROCEDURAL ISSUES

Grievant requested as part of the relief he seeks that documentation of a counseling session in October 2003 be removed from his record. Although the agency erroneously qualified this issue for a hearing, no relief can be afforded with regard to this issue for the following reasons. The Grievance Procedure provides that grievances must be initiated within 30 calendar days of the date that the employee knew of the event that formed the basis of the dispute.[1] The grievance was filed on July 27, 2004 – nearly nine months after grievant was counseled. Therefore, this issue would not normally be qualified for hearing because it occurred more than 30 days prior to filing of the grievance. However, when the agency qualified this issue for hearing, it waived its right to disqualify the issue on the basis of the 30-day time limit for appeal.

Nonetheless, a counseling discussion is not a formal disciplinary action and therefore is not a qualifiable issue for hearing.[2] While counseling may be

[1] §2.2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[2] Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, September 16, 1993. This policy provides for two forms of corrective action – counseling and disciplinary action. Counseling discussions (even when documented in

grieved, only certain actions qualify for hearing; counseling does not qualify for a hearing.[3] Counseling is not a disciplinary action (see footnote 2), and therefore it is impossible to provide relief for what is a routine part of a supervisor's daily responsibility in managing employees – the counseling of subordinates about their performance and behavior.

Grievant also requested as part of his relief that certain management employees be investigated and disciplined. A hearing officer does not have authority to take adverse action against any employee (other than upholding or reducing the disciplinary action challenged by the grievance).[4] 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."

APPEARANCES

Grievant
Four witnesses for Grievant
Human Resource Representative
Representative for Agency
Three witnesses 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? Was the disciplinary action retaliatory?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for failure to follow supervisor's instructions.[5] Grievant was suspended for five days as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[6] The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant as a control room shift supervisor for two years.

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writing) are not part of an employee's personnel file. They are retained in the supervisor's work file and, therefore, are not formal disciplinary action. Disciplinary action involves the issuance of a formal Written Notice that is made part of an employee's personnel file.

[3] §4.1, EDR *Grievance Procedure Manual*, effective August 30, 2004.

[4] § 5.9(b)6 & 7. EDR *Grievance Procedure Manual*, effective August 30, 2004.

[5] Agency Exhibit 2. Written Notice, issued June 28, 2004.

[6] Agency Exhibit 1. Grievance Form A, filed July 27, 2004.

The Commonwealth has promulgated a Workplace Violence Policy that defines workplace violence to include verbal abuse in the workplace by employees.[7] The agency has its own workplace violence policy which defines workplace violence to include the use of vulgar or profane language towards others, derogatory comments, slurs, and name calling.[8] The policy states that the agency has a standard of **zero tolerance** for such behavior.

Adjoining the building in which grievant works is another building housing a substation of the Virginia State Police (VSP). In front of the two buildings is a driveway used by both agencies with parking spaces along one side. Grievant and another employee are the only two VDOT employees working on the night shift. Because of security concerns, two parking spaces in the driveway have been marked as reserved for VDOT night-shift employees. The number of state police who use the driveway at night varies from none to four or more. At times, VSP cars have filled the driveway and prevented VDOT employees from parking in their assigned spaces. This has been an ongoing source of frustration for VDOT employees for several months. Grievant and his coworkers complained to VDOT management but the problem remained unresolved.

During a staff meeting on October 15, 2003, grievant became angry and stated that he would like to damage a VSP patrol car that was blocking the driveway.[9] His comments were sufficiently descriptive and expressed in a sufficiently angry manner that his supervisor felt it necessary to counsel grievant in writing. Grievant was specifically advised that displays of anger in the workplace would not be tolerated, and that violations of the Workplace Violence policy would be dealt with pursuant to the disciplinary section of the Standards of Conduct.

On May 26, 2004, grievant's supervisor conducted a monthly staff meeting with grievant and others who worked in the unit. The supervisor advised the group that if state troopers continued to block the driveway, employees were to notify her and her manager and let them handle it. In response to a question raised by grievant, the supervisor authorized him to take pictures if troopers blocked the driveway during the night shift.[10] On the evening of May 27, 2004, grievant observed state police cars blocking the driveway. He went outside and took pictures of the patrol cars. A uniformed trooper who was near the cars asked grievant what he was doing and which vehicle belonged to grievant. Grievant responded that he was taking pictures and that he owned the motorcycle parked in the driveway. Grievant then returned to the VDOT building and the trooper entered the VSP substation.

[7] Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*, May 1, 2002.
[8] Agency Exhibit 4. VDOT *Preventing Violence in the Workplace Policy*, May 1, 2002.
[9] Agency Exhibit 2. Counseling memorandum, October 30, 2003.
[10] Grievant Exhibit 3. Staff Meeting Notes, May 26, 2004.

A few minutes later a different uniformed state trooper approached the door of the VDOT building, rapped on the full-length glass door with his knuckle, and asked to be let in. Grievant responded "No." Grievant and a VDOT security guard were in the lobby. Grievant told the trooper that the security guard had to open the door; the trooper said "Let me in now." Grievant told the trooper to display his name tag so grievant could read it. As the security guard approached the door, grievant told the trooper "You have no right to come to my place of work and tell me what to do."[11] When the security guard opened the door, the trooper came in and told grievant he wanted to talk with him. Grievant responded that he had nothing to talk about with the trooper. The trooper told grievant to shut up and let him talk. Grievant said, "I'm in my place of business and I don't have to talk to you."

When the grievant continued to refuse to talk with the trooper, the trooper told grievant that his motorcycle "better be right," and turned to leave. Grievant said, "He (trooper) thinks he's a bad ass trooper because he has a badge and gun."[12] The trooper told grievant that his verbal abuse was grounds for arrest. However, the trooper decided instead to leave and did so. Grievant called his supervisor at home. She came to the facility and took detailed notes about the incident after speaking with the security guard and with grievant.[13]

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

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[11] Agency Exhibit 1. Grievant's shift summary report, May 27, 2004.

[12] Agency Exhibit 5. Grievant's statement to his supervisor on May 27, 2004. *See also* Agency Exhibit 6. Trooper's statement to District Maintenance Engineer, June 10, 2004. The trooper states that grievant's comment was, "You're a bad ass trooper, but I'm not afraid of you."

[13] Agency Exhibit 5. *Ibid.*

> 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 his evidence first and must prove his claim by a preponderance of the evidence.[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 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* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions is a Group II offense.[15]

Grievant argues that he did not violate the Violence in the Workplace policy. However, the agency did not discipline grievant for violating this policy and, therefore, this is not an issue that requires resolution in this decision. Rather, the agency disciplined grievant for his failure to comply with supervisory instructions and that is the relevant issue to be adjudicated in this decision. Grievant also argues that the supervisor did not complete within 24 hours an Initial Report form required by the Violence in the Workplace policy. This is also a moot issue because the discipline was for *grievant's failure* to follow instructions – not the supervisor's alleged failure to perform her responsibilities. If the agency believes that the supervisor did not perform satisfactorily, it may take whatever corrective action is deemed appropriate.

The agency has demonstrated, by a preponderance of evidence, that grievant failed to follow his supervisor's instruction not to display anger in the workplace, that he behaved in such a manner as to unnecessarily aggravate a state police officer, and that he called the officer a derogatory name.

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[14] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.
[15] Agency Exhibit 3. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant was confrontational from the moment the police officer knocked on the door. The state trooper was in full uniform and visible through a full-length glass door. Grievant knew that the trooper was a fellow state employee, that he was on duty, and that he had reasonably requested that the door be opened. Grievant had no reason to believe that the officer did not have a lawful and legitimate reason for requesting that the door be opened. Grievant refused the trooper entry despite repeated requests that the door be opened. While the security guard is posted to open the door for strangers, there is no reason that grievant could not have opened the door as a courtesy to the police officer. Instead, grievant went to the door and insisted that the officer display his name tag. Grievant then continued to refuse the trooper entry telling him he had "no right" to enter. Grievant's continuing refusal, confrontational statements, and obstinate behavior were unnecessary and, understandably, caused the trooper to become frustrated by the time the security guard opened the door.

Even after the trooper entered the building, grievant continued to be confrontational by telling the trooper he wasn't going to talk with him. When the trooper told grievant to shut up and let him talk, grievant persisted in escalating the situation, arguing that he didn't have to talk with the trooper because grievant was in his place of business. It is entirely understandable that grievant's recalcitrance frustrated an officer who had only asked to talk to grievant. It was only after grievant's extended defiance of authority that the trooper made a veiled threat about grievant's motorcycle. While the trooper should not have made such a statement, the frustration that prompted his comment is understandable. At this point, the trooper turned to leave but grievant continued the confrontation by referring to him as a "bad ass trooper." Grievant had no reason to make such a statement; it was insulting, confrontational, challenging, and totally unnecessary. Only then did the trooper suggest that grievant could be subject to arrest for verbal abuse.[16] That was clearly a warning to grievant that he should quit before he reached a point of no return.

During the hearing, grievant denied calling the trooper a "bad ass." Later in the hearing he claimed that he did not remember exactly what he said. The preponderance of evidence indicates that during the encounter grievant was angry, made confrontational statements, was shaking, and by the end of the encounter was almost in a rage. It is therefore more likely than not that what he told his supervisor immediately afterwards is accurate. Only after grievant was disciplined did he begin to deny that he had called the trooper a name. His denial of the name-calling is self-serving and, therefore, not credible. Moreover, the trooper corroborates what grievant had admitted to his supervisor on the night of the incident. Since the trooper was not interviewed until two weeks after

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[16] Va. Code § 8.01-45 provides that "All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace." Va. Code § 18.2-416 provides punishment for using abusive language to another, stating: "If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a Class 3 misdemeanor."

the supervisor wrote her notes, it cannot be coincidental that both the supervisor and the trooper stated that grievant used the words "bad ass."

Grievant contends that the security guard's brief handwritten note[17] is at odds with her interview conducted on June 7, 2004. The handwritten note provides only a sketchy outline of the incident. Because, the guard did not include any details, a more thorough interview was conducted. The interview is consistent with the note but provides significantly more details that were lacking in her first statement. The guard did not see or hear the trooper pounding on the door as alleged by grievant. If the trooper had been "pounding" or "banging loudly"[18] on the door, the guard sitting in the lobby would have heard it even if she didn't see it.

The security guard is employed by a company contracted by VDOT to provide security at its facility. Absent any showing to the contrary, her recollections about the incident are more likely than not to be reasonably objective. She characterizes the trooper as frustrated when he finally was allowed to enter the building. She also stated that the trooper never had his hand on his firearm. By the end of the confrontation, she said that the trooper was angry and that grievant was probably in a rage. Grievant's coworker, who observed him after the incident, said grievant was "totally upset" and "shaking."[19]

Grievant's defense is essentially to blame everyone else by pointing out what he considers to be their shortcomings in order to divert attention from his own misconduct. He believes that others fabricated just enough details to make him look bad. Grievant asserts that agency management is to blame because it did not act promptly to correct the parking situation, that the police officer was acting like an "out-of-control fascist with a gun," that the security guard falsified her testimony, and that his supervisor fabricated her written account of the event. While it is true that the parking problem might have been resolved more quickly, the failure to do so does not excuse grievant's behavior. And although the police officer acknowledged that he was heated, grievant's provocative statements were a major reason for the officer's demeanor. There is no evidence to support grievant's assertion that the security guard and his supervisor falsified their statements.

<u>Retaliation</u>

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[20] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the

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[17] Agency Exhibit 1. Security Guard's handwritten note, written on May 27, 2004.
[18] Agency Exhibit 5. Grievant's characterization to his supervisor on May 27, 2004.
[19] Agency Exhibit 1. Coworker's typewritten memorandum, June 10, 2004.
[20] EDR *Grievance Procedure Manual*, p.24

protected activity and the adverse employment action. Grievant meets the first two prongs of the test because he reported unpleasant working conditions to higher management in 2003 and, he has received the written disciplinary action at issue herein. However, in order to establish retaliation, grievant must show a nexus between his 2003 complaint and the current disciplinary action. Grievant has not established any such connection between the two events. However, even if such a nexus could be found, the agency has established a nonretaliatory reason for disciplining grievant. For the reasons stated previously, grievant has not shown that the agency's reason for issuing discipline was pretextual in nature. Therefore, grievant has not borne the burden of proof to show that the disciplinary action was retaliatory.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued for failing to follow a supervisor's instructions and the five-day suspension are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

Grievant has failed to prove that the disciplinary action was retaliatory.

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.[21] 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.[22]

[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

[21] 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).

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