

Issues: Formal Performance Improvement Counseling with suspension, and 90-day probation; Hearing Date: 12/08/04; Decision Issued: 12/09/04; Agency: UVA Health System; AHO: David J. Latham, Esq.; Case No. 7915



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7915

Hearing Date: December 8, 2004
Decision Issued: December 9, 2004

PROCEDURAL ISSUES

Grievant requested as part of the relief she seeks that the agency be directed to review certain policies and procedures. A hearing officer does not have authority to direct the methods or means by which an agency carries out its work activities.¹ 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
Attorney for Grievant
One witness for Grievant

¹ § 5.9(b)7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Employee Relations Manager
Four 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?

FINDINGS OF FACT

The grievant filed a timely grievance from a formal performance improvement counseling and suspension of three workdays.² Grievant was also placed on a 90-day performance warning (probation) from September 24 through December 22, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The University of Virginia Health System (Hereinafter referred to as "agency") has employed grievant for 18 years. She is currently a clinical laboratory scientist whose primary responsibility is the testing of specimens received in the Toxicology and Immunology Laboratory.

On September 7, 2004, grievant's immediate supervisor – the Immunology Laboratory Manager – counseled grievant about being argumentative and unprofessional in her interpersonal relationships, and about distracting others at their workstations when they were attempting to work. A short time later that day, the Manager found grievant distracting another employee at her workstation. He asked grievant to leave for the rest of the day. Because he was out of town for the balance of that week, the Manager counseled her for this incident on September 13, 2004.⁴

On September 10, 2004, grievant advised the Director of Clinical Pathology (grievant's second-level supervisor) that she was anxious about how much work she had to accomplish that day. He told her to focus on her work and that she should be able to handle it. About 35 minutes later, the Director noticed that grievant was at another employee's workstation having a heated discussion about an issue that did not require resolution that day. He took grievant aside in a private office, reminded her that she had told him she had a lot of work that day, and directed her not to discuss the issue with the other employee again that day. Later, the Director again found grievant at the same person's workstation discussing the same issue. He took grievant into a private office for the second time, and repeated what he had said the first time.⁵ He told her that he was once more directing her not to talk with the other employee. Later in the day, he found

² Exhibit 5. *Counseling Form*, issued September 24, 2004.

³ Exhibit 1. Grievance Form A, filed October 4, 2004.

⁴ Exhibit 4. Counseling documentation, September 13, 2004.

⁵ Exhibit 1. *Ibid.*

grievant talking with the same employee about the same issue for the third time. When grievant saw the Director, she said, "I know, I won't do it again. I'm just a stubborn person."

On September 20, 2004, grievant received a batch of four blood samples on which she was assigned to conduct testing for HIV and or hepatitis. Two of the samples were for the same patient and had been taken within a relatively short time of each other.⁶ Grievant thought it was unusual that two samples would have been drawn from the same patient within a short time for the same test. She thought it possible that the Emergency Room had mislabeled one of the samples. She brought the samples to the attention of the Immunology Laboratory Manager. He agreed to investigate the matter and called the Emergency Room. It was determined that the patient was a trauma patient who had been in an accident. A firefighter who responded to the accident was exposed to the patient's blood. Therefore, as a routine precaution, a sample of the patient's blood was taken to determine if the patient had either HIV or hepatitis. A short while later, an emergency room employee was also exposed to the patient's blood. Another sample of the patient's blood was taken by someone who was not aware that a sample had already been drawn. The second sample was labeled and also sent to the lab for HIV/Hepatitis testing.

Once the Immunology Laboratory Manager determined the above facts, he told grievant what had occurred and directed her to cancel the second sample and test the remaining samples. Grievant refused to do so because she said she did not trust the emergency room personnel and felt that they may have mislabeled someone else's blood sample. After some back and forth discussion, grievant said she would perform the test only if the Manager would enter the test results into the computer system over his own name. The Manager agreed to do so and left grievant to her work. Later, the Manager returned to grievant's workstation and found that she had still not performed the blood tests. Grievant said she still had misgivings and would not run the tests. Grievant then suggested to the Manager that they consult with grievant's coworker, who has 28 years of experience, and abide by what she said. The coworker was called over, listened to grievant's concerns, examined the sample bottles, and told grievant that she agreed with the Manager and that grievant should test the samples. The Manager again left grievant to perform her work.

Grievant then went to the office of the Quality Analysis Manager and discussed her concerns with her. The QA Manager examined the samples and told grievant that she should run the tests. She pointed out to grievant that she could run the tests and then determine if there was a problem afterwards. If the two samples showed that the blood came from the same person, that would confirm that one of the samples was simply a duplicate. If the results showed that the blood samples came from two different people, then further investigation would be warranted. Grievant still refused to run the tests.

⁶ The other two samples were from the firefighter and an unrelated case.

Grievant then spoke by telephone with a nurse in the Hospital's Occupational Health Department. The Occupational Health Department has no connection with the testing laboratory and the nurse has no supervisory or any other jurisdiction over grievant. The nurse did not see the sample bottles. Grievant did not tell the nurse that the Laboratory Manager had already investigated the matter and told her to test the samples. She also did not tell the nurse that two other colleagues had reviewed the matter and agreed with the Manager's assessment. Based only on grievant's verbal concerns, the nurse suggested that the samples be cancelled and the patient brought back to the hospital to have another blood sample taken.

By this time, the Immunology Laboratory Manager had contacted his superior – the Director of Clinical Pathology – and the two were discussing the matter in the former's office. Grievant came to the office and advised that, based on her phone conversation with the Occupational Health nurse, she was going to cancel the samples and have the patient return to the hospital for a venipuncture to draw another blood sample. The Director said that he had reviewed the matter and agreed with the Immunology Manager that grievant should test the existing samples. He advised her that her failure to do was insubordinate.⁷ Grievant continued to refuse to test the samples and adamantly said she would not do so if directed "100 times."

Later that day, the Director and Immunology Manager met with grievant to give her an opportunity to present her side of what had occurred that morning. In response to being told that her refusal to conduct the blood tests was insubordination, grievant responded that "I understand that but I'm just a stubborn woman." The Director and Manager then discussed the matter with Human Resources and decided to issue the disciplinary action at issue herein. Although others have raised questions about samples in the past, once management has resolved the questions no other employee has ever refused to conduct the tests as directed.

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).

⁷ Exhibit 1. Attachment to Counseling Form.

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, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.⁸

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.⁹

The agency has promulgated its own Standards of Performance policy, which provides, in pertinent part, that insubordination or refusing to perform responsibilities reasonably requested, assigned or directed is considered serious misconduct.¹⁰ The policy provides that serious misconduct must result in either termination of employment or, suspension of not more than 10 days.

The agency has demonstrated that grievant was instructed to perform tests on blood samples on September 20, 2004, and that she adamantly and repeatedly refused to do so. Grievant raised a concern to her manager who resolved the concern and told grievant to run the tests. Grievant solicited the advice of two very experienced coworkers, both of whom told her to run the tests. Grievant's manager even agreed to report the test results over his name in the

⁸ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

⁹ Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁰ Exhibit 6. Policy # 701: *Employee Rights and Responsibilities*, revised July 1, 2003.

computer system so that grievant would not be held accountable. Finally, the Laboratory Director told grievant to perform the tests and that she would be considered insubordinate if she did not run the tests. Grievant refused on each occasion even after two superiors and two knowledgeable coworkers had told her to conduct the tests. Under these circumstances, the agency has demonstrated, by a preponderance of evidence, that grievant's repeated refusal to follow her supervisor's instructions was insubordinate.

It is commendable that grievant considers patient care to be of utmost importance in performing her job. When she detected an anomaly in the work assigned to her, she was entirely correct to question it and bring it to her supervisor's attention. However, grievant is, by her own admission a stubborn person. Moreover, grievant had been twice counseled during the preceding two weeks about her refusal to comply with supervisory instructions. In this case, her stubbornness blinded her to the reasoned advice of experienced coworkers and the direct instructions of both her Manager and the Laboratory Director.

There is no logical reason for grievant not to have performed the tests for several reasons. First, her supervisor had explained to grievant how and why the duplicate sample was obtained from the same patient. Second, the explanation was logical and should have quelled any concerns grievant may have had. Third, grievant could have performed the test, viewed the results, and then determined whether there was a problem. During the hearing, grievant acknowledged that she could have tested first but just didn't consider it at the time.

When grievant was unable to find anyone on the laboratory staff who agreed with her refusal, she spoke with a person who works in a department outside the laboratory. That person has no jurisdiction in the laboratory. Grievant neither disclosed all the relevant facts to that person nor did she give that person an opportunity to view the samples. Acting in an overabundance of caution, that person suggested that grievant cancel the samples and request the patient to come back to the hospital for another venipuncture. Grievant cites this as justification for her refusal to conduct the tests. However, the fact is that grievant simply kept going to more and more people until she finally found someone who would agree with her. Grievant ignores the fact this person was only given a portion of the relevant information about the matter. More importantly, grievant does not seem to recognize that the opinion of someone outside her department and supervisory chain of command cannot justify disobeying the direct instructions of her Manager and Director.

Grievant alleged during the hearing that her supervisor was disciplining grievant for no real reason. The evidence demonstrates otherwise. The agency presented undisputed evidence that grievant had been counseled twice during the previous two weeks about argumentativeness and refusal to follow supervisory instructions. Further, grievant's repeated refusal to comply with her supervisor's unambiguous instructions on September 20, 2004 constituted flagrant insubordination – an offense for which some employers would have

discharged the employee. Grievant's discipline was, under the circumstances, relatively mild and certainly well within the bounds of reasonableness.

Grievant is commended on keeping patient care uppermost in her mind. However, grievant must recognize that such concerns must be kept in perspective and tempered by the experienced judgments of coworkers and the reasoned decisions of superiors.

DECISION

The disciplinary action of the agency is affirmed.

The Performance Improvement Counseling issued on September 24, 2004, three-day suspension, and 90-day Performance Warning, are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.¹¹ 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.¹²

[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

¹¹ 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).

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.