

Issue: Group II Written Notice (failure to follow written procedure); Hearing
Date: 12/04/03; Decision Issued: 12/08/03; Agency: DMV; AHO: David J.
Latham, Esq.; Case No. 438



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 438

Hearing Date: December 4, 2003
Decision Issued: December 8, 2003

PROCEDURAL ISSUE

Grievant requested as part of her relief that she be given a written acknowledgement that her Written Notice had been issued unfairly, arbitrarily and capriciously. Hearing officers may provide certain types of relief including reduction or rescission of discipline and payment of back wages and benefits.¹ However, hearing officers do not have authority to require an agency to provide a written acknowledgement such as that requested by grievant.² Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

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

² § 5.9(b)6 & 7. *Ibid.*

APPEARANCES

Grievant
Assistant for Grievant
Three witnesses for Grievant
Station Manager
Representative for Agency
Five 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? Was the grievant discriminated against on the basis of her gender? Was she subject to a hostile work environment? Was the discipline issued for retaliatory reasons?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failure to follow written procedure.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 Motor Vehicles (Hereinafter referred to as "agency") has employed grievant for five years; she is a weigh scale technician.

Grievant worked at an agency customer service center (CSC) for the first two and a half years of her employment. During that time she was trained on liquidated damages. After beginning work at the weigh station, grievant received a day and a half of training in May 2002 on procedures used by weigh scale technicians.⁵ The training included training on liquidated damages, money handling, voiding payments, and correcting errors. During the course of this training, grievant remarked on about six occasions that it was a waste of time because she had previously received the same training while working at the CSC. When processing errors occur, technicians are expected to correct the errors promptly. If they are unable to correct the error, they should call the station manager, call central office technicians (if available), or notify the next

³ Exhibit 2. Written Notice, issued July 14, 2003.

⁴ Exhibit 1. Grievance Form A, filed August 13, 2003.

⁵ Exhibit 16. *Record of Technician Training*, May 13, 2002. Training is conducted from the Motor Carrier Service Center (MCSC) Training Manual. See also Exhibits 14 & 19, excerpts from the Manual.

shift to correct the error.⁶ Employees who have questions routinely call the station manager at all times of the day and night.

Grievant and one coworker were working at a weigh station on the evening of June 25, 2003 from 3:00 p.m. to 11:00 p.m. Every hour, the two alternated between weighing trucks and handling driver paperwork. At 10:00 p.m. grievant had been working with truck drivers and was scheduled to weigh trucks for the last hour of her shift. Because she did not expect to be handling driver paperwork thereafter, she closed out her paperwork and switched positions with her coworker. She told her coworker that there was one driver who was still in the process of paying a suspension fine and that he should process the payment from that truck driver. The coworker does not like to take payments from truck drivers. He repeatedly asked grievant over the intercom to return and process the driver's payment. After three or four calls, the coworker came to the weigh room and asked grievant to process the payment. Grievant was annoyed at the coworker but agreed to switch places with him again and process the payment.

By this time, other drivers had arrived. The driver at issue herein had to pay two amounts. His truck was cited as overweight that evening resulting in a fine of \$59. In addition, the company for which he was employed was on suspension because of a previous overweight citation on another driver's truck; the amount necessary to clear the suspension was \$95. At first, it appeared that the driver was going to pay \$154 to clear both the existing suspension and his overweight citation. Grievant began processing the payment in the computer system. At this point two anomalies occurred that disrupted grievant. First, the trucking company (with whom the driver had been in telephone contact) decided that it would only pay \$95 in order to remove its suspension.⁷ Second, grievant erroneously entered the \$95 payment for the suspension under the citation number for the overweight penalty.

She recognized her data entry error almost as soon as she made it. By this time it was almost 11:00 p.m. and her shift was at an end.⁸ She was tired and could not remember how to immediately correct the error. The correction of such an error would normally take ten minutes.⁹ Grievant was aware that employees had been admonished not to work overtime due to budget constraints. She felt that she could correct the error but that it would take her 45-60 minutes to figure out how to correct the error.¹⁰ It did not occur to her to ask the oncoming shift personnel for help in correcting the error. She did not call the

⁶ Exhibit 19, p. 31. Management has the ability to void a specific citation payment. In addition, testimony established that weigh technicians are also trained on the voiding procedure.

⁷ The company elected not to pay the overweight citation received on June 25, 2003 because DMV regulations allow a company to continue operating for up to 21 days following a citation. Thus, the company decided to let the \$59 overweight citation ride and pay it at a later time.

⁸ Exhibit 18. Transaction List showing that the \$95 payment was processed at 10:52 p.m.

⁹ Station Manager's testimony.

¹⁰ Attachment to grievance, Issue 1.

station manager. She took the driver's check for \$95 and, because he had fulfilled the company's monetary obligation to clear the suspension, told him he could leave.¹¹ She also told the driver to contact the DMV Motor Carrier telephone number about the problem the following day and made a note on his receipt reminding him to call.¹² Because she had already filled out a receipts verification form (FS-54) at about 10:00 p.m., she completed a second such form and noted that it was an amendment.¹³ However, she failed to complete the information stamped on the back of the driver's check.¹⁴

Once the error was discovered, grievant was disciplined because she had not corrected the error, had not called the station manager, and did not notify the next shift. The agency determined that a disciplinary action was appropriate because grievant had previously been verbally counseled about an excessive number of errors in the past. She had received written counseling on two occasions regarding her unacceptably high error rate.¹⁵ Further, she received an interim evaluation in April 2003 that cited data entry errors, failure to sign forms, and failure to correctly verify money.¹⁶ Grievant had the highest error rate of any employee at her weigh station. The average error rate for weigh technicians at grievant's weigh station is six percent; grievant's error rate is thirteen percent.¹⁷

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:

¹¹ From the company's viewpoint, it was no longer suspended because it had paid the full amount of the fee necessary for reinstatement. However, because the error had not yet been corrected in the DMV computer system, there was a potential that other drivers on the road that night could have been detained at other weigh stations.

¹² The Motor Carrier personnel work only regular daytime business hours. See *also* Exhibit 7. Affidavit from truck driver, November 18, 2003.

¹³ Exhibit 15. Two receipt verification forms completed by grievant on June 25, 2003.

¹⁴ Exhibit 15. Photocopy of both sides of \$95 check, June 25, 2003.

¹⁵ Exhibit 11. Counseling memoranda, June 21, 2002 and January 14, 2003.

¹⁶ Exhibit 12. Interim Evaluation Form. April 10, 2003.

¹⁷ Exhibit 13. Grievant's *Performance Evaluation*, October 8, 2003.

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 discrimination, hostile work environment, or retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁸

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, 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 failure to follow established procedures is a Group II offense.¹⁹

Grievant does not dispute that she made an error on June 25, 2003 and that she failed to correct the error or seek assistance from her manager or others who might have helped her correct the error. Thus, the agency has shown, by a preponderance of evidence that it had a reasonable basis to take corrective action. The burden of persuasion now shifts to grievant to establish any mitigating circumstances.

Grievant contends that she was not adequately trained on the procedure for correcting errors. However, the preponderance of evidence establishes that grievant was trained on multiple occasions and that she knew, or reasonably should have known, the required procedures. Moreover, grievant stated "I felt I could correct the error."²⁰ It is understandable that she may have been tired at the end of her shift, and may even have temporarily forgotten the procedures. However, she could have called her manager, or at the least, notified the next shift employees so that they could correct the error.

¹⁸ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

¹⁹ Exhibit 4. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

²⁰ Attachment to Grievance, Issue 1.

Grievant also argues that other employees made various types of errors that did not result in disciplinary action. The types of errors made by the other employees were different from grievant's situation. Grievant was not aware of anyone who had made the same type of error as she had. The situations of other employees were sufficiently different from her case that comparisons are not meaningful. In any case, the evidence established that grievant is the only person who has a significantly higher error rate than other employees and who has been repeatedly counseled about her errors.

Gender discrimination

To sustain a claim of gender discrimination, grievant must show that: (i) she is a member of a protected gender group (female); (ii) she suffered an adverse job action; (iii) she was performing at a level that met the employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's gender.²¹ Grievant has satisfied the first three prongs of this test because she is female, received a disciplinary action, and has been performing at a satisfactory level, based on her most recent performance evaluation. She claims that only females have been disciplined at her weigh station. In fact, only one other disciplinary action has been issued in the past two years. That disciplinary action was issued to a female but was subsequently rescinded as a consequence of being grieved. Because of the relatively small number of employees employed at grievant's work site, it is impossible to draw a statistically reliable conclusion from the fact that no males have been disciplined in the past two years. Moreover, the agency has established bona fide nonretaliatory reasons for issuing discipline in this case. Grievant had been repeatedly counseled about her excessive error rate and warned that failure to improve would result in discipline under the Standards of Conduct. Therefore, grievant has not demonstrated that she was the subject of gender discrimination.

Hostile work environment

To establish a claim for hostile work environment harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on a protected classification such as gender; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. Grievant elicited testimony from two coworkers who acknowledged limiting their conversation with her only to that which is necessary to conduct daily work. Both coworkers averred that they have treated grievant professionally but have, in effect, dealt with her at arm's length. It is understandable that grievant finds this form of isolation to be disconcerting and unwelcome. It is not necessary that coworkers like each other or engage in social chitchat with each other. It is only necessary that coworkers

²¹ *Cramer v. Intelidata Technologies Corp.*, 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

treat each other respectfully as they perform their daily responsibilities. Moreover, grievant has not shown that the two coworkers are shunning her based on the fact that she is female or on the basis of any other protected classification. Rather, they have individually determined that they do not desire to have any social interaction with grievant because of either personality differences or personal preference. Further, grievant has not shown that the two coworkers' silent treatment is so severe as to constitute an abusive work environment. Accordingly, grievant has not demonstrated that she is subject to a hostile work environment.

Retaliation

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.²² To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Based on grievant's testimony and evidence, her basis to claim participation in a protected activity was her filing of a grievance in 2002, and her subsequent complaint to a member of the House of Delegates. She also speculates that she made remarks to the station manager that might have embarrassed him in the presence of other employees. In order to establish retaliation, grievant must show a nexus between either or both of these events and the disciplinary action issued in the instant case. Grievant has not established any such connection between the events and the discipline. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for issuing the discipline, i.e., an error made after repeated counseling about excessive errors, and grievant's failure to notify others about the error.

Appropriate level of discipline

The agency issued a Group II Written Notice on the basis that grievant had failed to follow established procedures. Typically, Group II offenses involve actions that are clearly deliberate and are knowingly contrary to established policy. Moreover, by definition, a Group II offense is considered so severe that a repetition of the same offense would result in termination of employment. In this case, there is no evidence that grievant made the error deliberately, or that her failure to take appropriate corrective action was willful and deliberate. The error was inadvertent. Her failure to notify either her manager or the next shift was unsatisfactory and grievant should have known better. However, in evaluating the totality of the circumstances, the imposition of a Group II penalty appears disproportionate to the offense. As the previous counseling has not had the desired effect, the next logical progression is a Group I Written Notice for unsatisfactory job performance.

²² EDR *Grievance Procedure Manual*, p.24

DECISION

The decision of the agency is hereby modified.

The Group II Written Notice issued on July 14, 2003 is REDUCED to a Group I Written Notice for unsatisfactory work performance. 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 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.²³ 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.²⁴

[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

²³ 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).

²⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.