Issue: Group II Written Notice with termination (due to accumulation) (abuse of state time, failure to comply with supervisory instructions, and unsatisfactory work performance); Hearing Date: 12/09/03; Decision Issued: 12/11/03; Agency: Dept. of Health; AHO: David J. Latham, Esq.; Case No.: 445

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 445

Hearing Date: December 9, 2003
Decision Issued: December 11, 2003

PROCEDURAL ISSUE

Grievant requested as part of his relief that he be reinstated in a different unit of the agency. Hearing officers may provide certain types of relief including rescission of discipline, payment of back wages and benefits, and reinstatement.[1] However, hearing officers do not have authority to transfer employees within the agency.[2] Such a decision is an internal management decision 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
Human Resource Supervisor
Attorney for Agency

[1] § 5.9(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)2. *Ibid.*

Five witnesses for Agency
Observer for EDR

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? Did the agency use unfair labor practices, bias, favoritism, or double standards in its application of the disciplinary process?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for abuse of state time, failure to comply with supervisory instructions, and unsatisfactory work performance.[3] Because of an accumulation of multiple Group II disciplinary actions, grievant was removed from employment on September 11, 2003. 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 Health (Hereinafter referred to as "agency") has employed grievant as an Environmental Health Specialist for less than two years. Grievant received a Group II Written Notice for excessive personal use of an agency-owned cellular telephone.[5] He received another Group II Written Notice for failure to follow supervisory instructions regarding reimbursement of personal cellular telephone charges.[6] Grievant did not file grievances with regard to either of the two disciplinary actions issued in February 2003. Therefore, the two previous Group II Written Notices became final 30 days after issuance.[7]

Agency policy prohibits employees from engaging in any outside employment during their hours of Health Department employment.[8] Among other responsibilities, grievant inspects restaurants for compliance with health regulations. He generally works on his own in the field inspecting restaurants and discussing problems with restaurant owners. In July 2002 the environmental health manager advised grievant and his coworkers that personal calls on cellular telephones provided by the agency were unauthorized except for emergencies and occasional usage. Employees were specifically reminded that,

[3] Exhibit 6. Written Notice, issued September 11, 2003.
[4] Exhibit 3. Grievance Form A, filed October 10, 2003.
[5] Exhibit 16. Group II Written Notice, issued February 6, 2003.
[6] Exhibit 12. Group II Written Notice, issued February 25, 2003.
[7] § 2.2 EDR *Grievance Procedure Manual* provides that a "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."
[8] Exhibit 31. Agency Human Resources Policy 1.60, *Outside Employment*, February 2001.

"The State does not pay you to conduct personal business while at work."[9] Grievant's supervisor counseled him not to discuss personal business at work when he gave grievant his annual performance evaluation in October 2002.[10] In June 2003, the environmental health manager gave grievant an oral warning not to make calls relating to his personal business on the agency cellular telephone. In July 2003, the manager found grievant talking with another employee about his outside business venture and showing him the business web site on a state-owned computer. The manager verbally counseled grievant and instructed him not to discuss his outside business while on agency time.[11]

On September 4, 2003, the owner of a restaurant was in the office to discuss concerns regarding her restaurant. Normally, such discussions would last from 10-15 minutes. Grievant's supervisor observed that grievant was still talking with the owner after half an hour and began paying more attention to the discussion.[12] While the supervisor could not hear the details of what was being said, he noticed that grievant began speaking to the restaurant owner in more hushed tones and it appeared that he was not conducting state business. He walked past the grievant and restaurant owner and noted that grievant attempted to cover up drawings he had been making and showing to the restaurant owner[13]. After grievant had been talking with the owner for approximately one hour, the supervisor approached grievant and asked if he had finished discussing state business. Grievant responded affirmatively. The supervisor picked up the drawings grievant had been making, and asked grievant to come to his office. Grievant acknowledged that he had been discussing an outside business venture and attempting to recruit the restaurant owner to participate in the business.[14] If the restaurant owner had agreed to participate in the business, grievant would have been able to earn income from her participation.

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

[9] Exhibit 14. Memorandum from environmental health manager to environmental health specialists, July 17, 2002.
[10] Exhibit 10. Supervisor's written documentation of verbal counseling, June 25, 2003.
[11] Exhibit 10. Supervisor's written documentation of verbal counseling, July 8, 2003.
[12] Grievant met with the restaurant owner in an area near the supervisor's open office door.
[13] Exhibits 8 & 9. Drawings made by grievant and shown to restaurant owner on September 4, 2003.
[14] Grievant is a member of Quixtar – an e-commerce company affiliated with Amway that allows members to purchase goods at reduced prices. Quixtar also encourages members to solicit new members and promises income based on the purchases made by the new members – effectively a variation of a pyramid scheme.

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 allegations of unfair labor practices, bias, favoritism or double standards, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[15]

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 failure to follow supervisory instructions is a Group II offense.[16]

There are three primary reasons that grievant's actions must be disciplined. First, grievant abused state time by discussing his personal outside business while on state time. Undisputed testimony established that all environmental health specialists have a heavy workload and are currently backlogged in their work. It is therefore essential that grievant devote all of the hours he is at work to accomplishing departmental objectives. When grievant spends inordinate amounts of time talking with restaurant owners or coworkers about his personal outside business, he is unproductive and is wasting time that he should spend on inspections and other responsibilities. When he speaks with

[15] § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.
[16] Exhibit 34. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

coworkers about his personal business, he wastes not only his own time but also the time of coworkers.

Grievant's abuse of state time in this case is consistent with his established pattern of abusing both state time and resources in the past. Grievant had been repeatedly counseled and disciplined for abusing his cellular telephone privilege by making excessive personal telephone calls, and he had been counseled not to discuss his personal business on state time.

Second, grievant had been repeatedly counseled by both his supervisor and the environmental health manager to cease using the agency telephone for personal business and to cease discussing his business venture while on state time. Grievant's continued violations of these directions constituted a failure to follow supervisory instructions.

Finally, grievant's discussions of his personal business with restaurant owners were potentially damaging to the agency's credibility and reputation with the public. State law prohibits state employees from soliciting anything of value for services performed within the scope of official duties.[17] Restaurant owners know that grievant, as a health inspector, can recommend closure of their establishments. When grievant discusses inspection findings with a restaurant owner, and then solicits the owner's participation in grievant's business venture, the owner could conclude that grievant is subtly coercing the owner to participate in order to assure that the restaurant would receive a passing inspection report. It is irrelevant that this may not be grievant's intent. What is relevant is that grievant has created a situation whereby restaurant owners may feel inappropriate pressure to participate in a business they would otherwise choose not to be involved in. This could lead to the agency being charged with improprieties or preferential treatment.

As noted earlier, grievant spends the majority of his working time in the field visiting restaurants without any supervision. Despite previous warnings, grievant attempted to solicit a restaurant owner and wasted most of an hour while sitting just outside his supervisor's office. If grievant had the chutzpah to solicit in the agency's office, it is not unreasonable to assume that he might have spent even more time soliciting restaurant owners when he visited their establishments. The agency can not afford to have restaurant owners feel that they are being pressured by health department inspectors to participate in business ventures in order to obtain passing inspection reports. This would result in a negative public image of the agency and adversely affect its ability to effectively perform its mission.

[17] Va. Code § 2.2-3103 defines prohibited conduct stating, " No officer or employee of a state or local government or advisory agency shall: 1. Solicit or accept money or other thing of value for services performed with the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency or which he is an officer or employee."

Accordingly, the agency has demonstrated by a preponderance of evidence that grievant abused state time by using state time for personal business, failed to follow supervisory instructions, and was thereby performing his work unsatisfactorily. The burden of persuasion now shifts to grievant to demonstrate mitigating circumstances, if any.

Grievant alleges that the agency's decision to discipline reflects unfair labor practices, bias, favoritism, and double standards. However, he did not offer any witnesses or documentary evidence to support his allegations. Allegations are like a salesman's pitch – interesting to listen to but useless without the facts to back up the promise. Grievant claims that potential witnesses he talked with were afraid to testify because of possible retaliation concerns.[18] Grievant could have requested the hearing officer to issue Orders for the appearances of these witnesses but he failed to make such a request. His allegations focused on the fact that a coworker, who had been experiencing personal problems outside of work, fell significantly behind in his work. When he was absent for an extended time, his work was distributed among the other coworkers. Grievant argues that because that worker was not disciplined, grievant should not be disciplined. Grievant fails to recognize that his coworker's outside personal problems were not of his own making, while it was entirely within grievant's control to stop pursuing his personal business during working hours.

Grievant also contends that the verbal counseling he received did not constitute "direct orders." It is ironic that grievant should make such a contention given his military background. Grievant retired a few years ago after serving many years in military service. While the military services are predisposed to issuance of direct orders, it is also common knowledge that a mere hint mentioned by a superior military officer is almost universally taken by subordinates as tantamount to direct orders. In any case, when grievant's supervisor and manager unambiguously told him not to abuse the telephone privilege and to cease discussing his business venture at work, it was clearly counseling. Grievant understood that he was not to pursue his outside business on state hours but he chose not to comply with his supervisors' instructions.

As an example of what grievant feels was an unfair practice, he cites the fact that he did not receive a discretionary in-band salary adjustment after his one-year probationary period. In fact, grievant's supervisor had submitted a recommendation for just such a salary increase. However, the Human Resources department disapproved the increase because grievant was disciplined with the first Group II Written Notice before the salary increase could be implemented.[19]

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[18] § 1.5 of the EDR *Grievance Procedure Manual* provides that any employee may ask EDR to investigate allegations of retaliation as the result of the use of or participation in the grievance procedure. EDR will investigate the complaint and advise the agency head of its findings.

[19] Exhibit 29. Memorandum from human resources to file, February 6, 2003.

Grievant could have been discharged when he received his second Group II Written Notice in February 2003. However, because grievant had just completed his one-year probationary period, the agency elected to give him another chance to learn from his mistakes. Unfortunately, it is clear that grievant did not apply the lessons he should have learned.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice issued on July 14, 2003 is hereby UPHELD. The termination of grievant's employment based on the accumulation of three active Group II Written Notices is hereby UPHELD.

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.[20] 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.[21]

[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

[20] 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).

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