Issue: Group II Written Notice with 10-day suspension (failure to perform assigned work and comply with supervisor's instructions); Hearing Date: 09/08/03; Decision Issued: 09/09/03; Agency: DMAS; AHO: David J. Latham, Esq.; Case No. 5790

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5790

Hearing Date: September 8, 2003
Decision Issued: September 9, 2003

PROCEDURAL ISSUE

At the end of the hearing, after grievant had been examined by her attorney and cross-examined by the agency's representative, the hearing officer questioned grievant. Grievant's attorney took exception to some of the hearing officer's questions and to the manner in which he questioned grievant. A somewhat pointed exchange ensued between grievant's attorney and the hearing officer. The hearing officer is concerned that grievant should feel that she received a full and fair hearing, as well as a balanced and just decision. Accordingly, the hearing officer has given consideration to the possibility of recusing himself from this matter.

After due deliberation, the hearing officer concludes that recusal is neither necessary nor appropriate in this case. First, the hearing had been virtually completed when the difference of opinion surfaced. Second, and most significantly, the hearing officer is satisfied that the evidence in this case would

result in the same decision by any other adjudicator. It will therefore serve no useful purpose to have this matter relitigated.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Supervisor
Customer Services Manager

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 timely filed a grievance from a Group II Written Notice issued for failure to perform assigned work and comply with a supervisor's instructions.[1] As part of the disciplinary action, she was suspended without pay for 10 days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Department of Medical Assistance Services (DMAS) (Hereinafter referred to as "agency") has employed grievant for 17 years, two years of which were as a wage employee and 15 of which have been as a classified employee. She is currently a program support technician in the customer service unit. The primary core responsibility of grievant's position is to "Receive and process written and **phone** inquiries from providers, recipients and other DMAS units."[3] (Emphasis added)

The customer service unit handles all aspects of customer services. One group of employees known as call center representatives responds to telephone inquiries on the agency "Helpline" from both providers (hospitals, physicians and

[1] Exhibit 2. Written Notice, issued June 17, 2003. The Written Notice was prepared on June 17, 2003 but was actually issued to grievant on June 18, 2003.
[2] Exhibit 1. Grievance Form A, filed June 27, 2003.
[3] Exhibit 1. Grievant's Performance Plan, October 25, 2002. NOTE: Position descriptions were eliminated in 2000 with the implementation of Compensation Reform; they were replaced by Employee Work Profiles, one component of which is the Work Description and Performance Plan.

suppliers) and recipients. Another group, including grievant, responds to written inquiries from both providers and recipients. Another group provides training to employees and customers. Each Wednesday for at least the past two years, trainers have conducted a two-hour training session for all employees of the customer service department. The purpose in having all customer service employees attend these meetings was to cross-train employees so that they could assist each other in times of need. Grievant has attended all of the training sessions, except for those occasions when she was absent from work.

The agency implemented a new claim processing system in the late spring of 2003. During startup of the new system, anxiety levels in the agency were elevated because it was anticipated that there might be start-up problems. Because such problems did in fact occur, the customer service Helpline experienced a 50 percent increase in incoming telephone calls beginning on June 16, 2003. Those regularly assigned to answer Helpline calls provide technical assistance to agency customers regarding agency policies, procedures, program eligibility, and billing/payment processes. In response to the Helpline volume increase, agency management made a decision to temporarily augment the regular staff with other employees who have some knowledge of these areas. The customer service manager, in consultation with his superiors, determined that the training staff and customer support personnel who respond to written inquiries from customers would be best able to assist on the Helpline.

The customer service manager directed grievant's supervisor to temporarily place grievant on the telephone Helpline. The supervisor spoke with grievant on the morning of June 17, 2003 and explained the need for assistance on the Helpline. Grievant said she had not been trained to work in that area. The supervisor told grievant that she should do the best she could and gave her the names of three people who could assist her with difficult questions. The supervisor also told her they would show her how to operate the ACD (automated call distribution) telephone system. Grievant then stated that working on the Helpline is not in her job description and that it was a different pay band.[4] The supervisor told her that if she was unable to answer a question, she should make notes and someone else would research the question. Grievant told the supervisor she did not want to work on the Helpline. The supervisor told grievant that she might have to take corrective action; grievant said, "Write me up."

Grievant and the supervisor then met with the customer service manager who gave grievant the same explanation as the supervisor. When grievant expressed concern about callers with complex questions, the manager told her to

[4] *See* Department of Human Resource Management Policy No. 3.05, *Compensation*, revised March 1, 2001 which states: "Temporary pay is a non-competitive management-initiated practice. It is paid at the discretion of the agency. The effective date for beginning temporary pay also is at the agency's discretion." The previous policy had provided that temporary pay begins after an employee had been performing the temporary function for six months. Most agencies have continued to use that guideline as their practice, although neither party entered into evidence the actual policy followed by DMAS.

"Just do the best you can." Grievant again raised her concern about the call center employees being in a different pay band; the manager reassured her that she would only be assisting with calls for a temporary period.[5] Grievant told the manager that she would be willing only to take messages. He told grievant that she would have to attempt to answer those inquiries she was able to and seek help on those questions she could not answer. Grievant said, "No, I'm not willing to do that." The manager told grievant that if she refused to comply with instructions, she would receive a Notice of Improvement Needed; grievant said "OK." Grievant returned to her desk. The manager was concerned, perplexed, and upset that grievant had refused to follow the reasonable instructions of her supervisor. The manager directed the supervisor to give grievant a Notice of Improvement Needed/Substandard Performance.[6] The supervisor gave the Notice to grievant late in the morning of June 17, 2003. That afternoon, the manager met with his superior (division Director) and the agency's Deputy Director because both grievant and a coworker had refused to work in the call center. It was decided that grievant's refusal to comply with instructions was sufficiently serious to warrant disciplinary action. The Human Resource Director was consulted and she concurred that disciplinary action should be taken. When the agency Director concurred with the proposed action on June 18, 2003, the disciplinary action was prepared. Prior to issuance, grievant was given a final chance to work on the Helpline but she again refused.

The human resources director has an open-door policy. Employees may speak with human resources about any issue, including proposed disciplinary actions. Grievant did not attempt to speak with anyone in human resources prior to issuance of discipline. No one told grievant she could not go to human resources. The agency has not used security personnel to escort suspended employees from the premises; when an employee is suspended, they leave the premises without incident.

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).

[5] Employees assisted the Helpline for several days and then returned to their regular jobs.
[6] Exhibit 2. Notice of Improvement Needed/Substandard Performance, June 17, 2003.

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.[7]

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. Section V.B.2 of the Standards of Conduct policy 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]." One example of a Group II offense is failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.[8]

This case involves an issue of failing to follow a supervisor's instruction. Grievant's supervisor, and then her manager, both explained to grievant the need for her temporary assistance answering telephone inquiries on the agency's Helpline. When grievant expressed concern about not being fully qualified, the manager reassured her that she would only have to "Do the best you can." Grievant refused to comply with her supervisor's instruction. She was given a second chance and again refused to comply. The failure to comply with a supervisory instruction is a Group II offense.

When one agrees to work for an employer, whether in the private or public sector, one agrees to certain conditions of work. One of the most elemental conditions of employment is the duty and obligation to comply with supervisory instructions. Of course, one is not obligated to comply with instructions that are

---

[7] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.

[8] Exhibit 3. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

illegal, immoral or unreasonable. In this case, it is undisputed that grievant was being asked to perform a task that was both legal and moral. However, she disputes the reasonableness of the instruction.

Grievant works in the customer service unit directly adjacent to the employees who answer inquiries on the Helpline. She has attended training meetings with Helpline employees for several years and has therefore been exposed to the training they receive. More significantly, grievant's job description requires her to perform the same general type of work required of the Helpline employees – she responds to inquiries from providers and recipients. The primary difference is that grievant responds to written inquiries while the Helpline employees respond to telephonic inquiries. Moreover, grievant's core responsibility specifies that she receives and processes telephone inquiries from providers and recipients.[9] Accordingly, it is entirely logical that management would consider grievant to be among those most able to temporarily assist in answering telephonic inquiries. Therefore, management's request that grievant and others in the customer service unit assist on the Helpline was reasonable.

The Manager's request that grievant temporarily help other employees in the call center was not only reasonable but also a commonplace occurrence in the workplace. When supervisors are absent from work, they usually delegate a subordinate to handle matters in their absence. The subordinate is not expected to be able to answer every question that comes in for the supervisor; rather, they are expected to answer the questions they can, and take notes so the supervisor can respond upon his return. In other words, the subordinate does the best she can during the supervisor's absence; grievant was asked to do the same thing.

The Customer Service Manager did not expect grievant to be as proficient as experienced Helpline specialists. The emphasis was on staffing the unit with enough employees to handle the temporarily heavy influx of telephone calls. He knew that grievant would not be able to answer all questions from callers. She was expected to take notes on questions she could not immediately answer and return calls later after the question had been researched – just as she does in her regular job answering written inquiries.

Grievant had told the manager that she wanted to discuss the matter with the human resources department. She contends that he told her he would call the Human Resource (HR) Director and get back to her, although he does not recall that. In any case, grievant was not told that she could not go to human

[9] Grievant contends that she works mostly with recipients, while calls on the Helpline are primarily from providers. However, under cross-examination, grievant acknowledged that she has the knowledge and ability to perform at least some of the functions performed by call center representatives. However, this is a red herring because management made the decision that grievant was better qualified to assist than any other available employees. Clearly, management is in the best position to assess its own employees and to determine which ones will best be able to accomplish the agency mission. Once that decision was made, grievant's duty and responsibility was to comply with the instruction.

resources. Grievant has, on her own, gone to human resources before on other issues and knew that the HR Director has an open-door policy. However, even if grievant felt that she could not go to human resources until after the manager got back to her, this is a moot issue. The HR Director has since heard the grievant's side of the issue and still concurs that discipline was warranted. Thus, even if grievant had talked with the HR Director prior to the issuance of discipline, there is no evidence to suggest that the outcome would have been any different.

Grievant complains that she received no special training to work on the Helpline. However, the preponderance of evidence established that the only special training grievant would have required would be familiarization with operation of the ACD telephone system. The undisputed testimony is that this would have taken only a few minutes to accomplish. Grievant's weekly training with the Helpline staff and her regular work in responding to written inquiries of providers and recipients were more than ample training to provide partial temporary assistance in the Helpline area. While she could not answer all questions, she could answer some of them. Any amount of questions that she answered would have helped reduce the workload.

Grievant testified that a "major concern" was that she didn't know how long she would be working in the call center. However, she never asked either the supervisor or the manager how long they anticipated the temporary assignment would last.

The agency has shown, by a preponderance of evidence, that grievant refused to follow the reasonable instruction of a supervisor and thereby committed a Group II offense. However, the grievant has long service with the agency and had a good performance record prior to this disciplinary action. While the offense requires a Group II Written Notice, the imposition of a full ten-day suspension for a first offense does not appear warranted by the circumstances.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice for failure to follow a supervisor's instructions issued on June 18, 2003 is hereby UPHELD. The suspension is REDUCED to five workdays. The agency shall reimburse the grievant for five days of suspension.

The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.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.

3. If you believe that 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.

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.[10] 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.[11]

[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

[10] 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).

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