Issue: Group III Written Notice with transfer and salary reduction (unprofessional/ inappropriate communication, disclosure of confidential information, attempting to influence the member of a selection board and, failure to follow the chain of command); Hearing Date: 05/26/04; Decision Issued: 05/27/04; Agency: DMA; AHO: David J. Latham, Esq.; Case No. 700

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 700

Hearing Date: May 26, 2004
Decision Issued: May 27, 2004

APPEARANCES

Grievant
Attorney for Grievant
Deputy Assistant Chief of Staff for Personnel
Attorney for Agency
Three 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?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued for unprofessional and inappropriate communication, disclosure of confidential information, attempting to influence the member of a selection board and, failure to follow the chain of command.[1] As part of the disciplinary action, grievant was transferred to a different role and position, and her salary was reduced by five percent. During the grievance resolution process, the second step respondent unilaterally and unconditionally reduced the disciplinary action to a Group I Written Notice and transfer; he restored grievant's salary to its former level. 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 Virginia Department of Military Affairs (Hereinafter referred to as "agency") has employed grievant for 23 years. Prior to the disciplinary action, grievant was an Educational Program Practitioner III (enrollment services specialist).[3] Grievant's primary responsibility for the past 16 years has been to coordinate the State Tuition Assistance Program (STAP). The purpose of STAP is to administer and award tuition assistance to members of the Virginia National Guard.[4] The agency has followed a policy of awarding tuition assistance when applications are approved. However, if a member fails to complete a course or receive a passing grade for the course, the agency is supposed to recoup the funds from the member. When the agency receives notice that a member has failed to complete a course or failed to receive a passing grade, grievant was supposed to prepare a letter to be sent to the member. The letter must be approved and signed by the Assistant Adjutant General. During the past three years, the agency's emphasis has been on recruitment and retention of Guard members due to the increased need for military staffing. As a result, recoupment of funds has been "placed on the back burner."[5] In fact, grievant acknowledged that she has not drafted a single refund request letter for the General's signature during the past three years.

In June 2003, grievant received notification from a university that eight Air Guard members had either failed to complete their course or had received a failing grade in their course. She asked the Assistant Adjutant General for advice on what to do about the report.[6] He told her that, as a matter of routine, the members' commanding officers should be notified. In July 2003, grievant sent an email directly to the commanding officer of the Air Guard unit to which the eight members are assigned. In her email, grievant characterized the failures and incompletes as a "disgrace," asserted that the members were "frauding (sic) the program," and stated that the matter was a "lack of integrity and ethics."[7]

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[1] Agency Exhibit 2. Written Notice, issued September 5, 2003.
[2] Agency Exhibit 1. Grievance Form A, filed September 29, 2003.
[3] Agency Exhibit 3. Grievant's Employee Work Profile work description, May 1, 2001.
[4] Agency Exhibit 4. VaARNG Regulation Number 621-1, 1 May 2000.
[5] Testimony of the Deputy Assistant Chief of Staff for Personnel.
[6] Grievant's direct supervisor (a major) was unavailable at the time.
[7] Agency Exhibit 2. Email from grievant to Air Guard commanding officer, July 8, 2003.

Grievant has known one of the eight students (Hereinafter referred to as student D) for several years. She knew that student D was among a group being considered for promotion to a command sergeant position and that the selection board was scheduled to meet on July 12, 2003. Grievant's cousin was also among the candidates being considered for the command sergeant position.[8] Grievant had learned the name of an Air Guard chief master sergeant (CMS) who was on the selection board. On July 10, 2003, grievant telephoned the CMS, identified herself, and told him she was concerned that student D had failed a course but had not reimbursed her tuition. Grievant told the CMS "I just thought you needed to know." She also requested that the CMS not reveal their conversation to anyone. The CMS promptly contacted the head of the selection board in order to recuse himself from being on the selection board.

As a result of grievant's email to the Air Guard commander and her telephone call to a member of a promotion selection board, the agency issued the disciplinary action at issue herein.

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 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.[9]

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[8] Grievant avers that she was unaware of her cousin's candidacy at the time of this incident.

[9] § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

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. The Standards provide that the offenses set forth therein are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. However, any offense that in the judgment of an agency head undermines the effectiveness of agency activities may be considered unacceptable and treated in a manner consistent with the policy.[10]

The offenses cited by the agency are not listed among the examples in the Standards of Conduct. However, as noted above any offense that meets the criteria outlined may be considered unacceptable. In this case, because the agency unilaterally reduced the level of the offenses from Group III to Group I, it is not necessary to determine whether the alleged offenses meet the definition of a Group III offense. Group I offenses are considered the least severe type of offense in the Standards of Conduct.

It is undisputed that grievant sent the offending email to an Air Guard commanding officer and contacted a member of a promotion selection board. The agency maintains that grievant's email was unprofessional because of allegations that Air Guard members were defrauding the program, and lacked integrity and ethics. The agency also charges that the email was unprofessional because grievant corresponded directly with a senior Air Guard commander; the agency's policy is that grievant should have drafted the communication and given it to her immediate supervisor. The communication would then have been reviewed, amended, forwarded up the chain of command, and sent to the Air Guard commander by someone of approximately equal military rank. There is insufficient evidence to prove that grievant *knew* that the correspondence should have first gone through a chain of command. However, grievant stated during the initial investigation that she regretted not going through the chain of command;[11] this strongly suggests (in combination with her 23 years of working in a military environment) that she knew, or reasonably should have known, of this requirement. In any case, the hearing officer concludes that the email was unprofessional because it included unproven allegations against the airmen.

The agency's second charge is that grievant abused her position by disclosing information protected by state and federal privacy laws. Even though grievant did not follow the appropriate chain of command when she gave student grade information to

[10] Agency Exhibit 6. DHRM Policy 1.60 Section V.A, *Standards of Conduct*, September 16, 1993

[11] Agency Exhibit 1. Memorandum from Deputy Chief of Staff for Personnel to second-step respondent, October 27, 2003.

the Air Guard commanding officer, he undoubtedly had a legitimate right to have the information. Therefore, the disclosure of information to the commanding officer was not in violation of privacy laws since he was entitled to such information in the normal course of his duties.[12] However, grievant's disclosure of student grade information to the CMS was unauthorized, unwarranted, and constituted a disclosure prohibited by privacy laws. Even in the absence of privacy laws, this disclosure is highly improper and outside the scope of grievant's duties.

The agency's third charge is that grievant attempted to influence a member of a promotion selection board. It is undisputed that grievant made such an attempt. The agency claims that grievant was attempting to discredit student D and thereby prevent her from being selected. Grievant asserts that she was attempting to *help* student D because she hoped that the CMS could persuade student D to repay the tuition and thereby clear her record. The selection board was scheduled to meet only two days after grievant's call to the CMS. It is difficult to imagine how student D could have cleared up the tuition reimbursement in such a short time. Moreover, grievant never contacted student D directly to inform her of the need to repay tuition. If grievant was as good a friend of student D as she claims, it would have been logical for grievant to contact student D *before* notifying a member of the selection board. Finally, grievant's assertion that student D is a good friend is flatly contradicted by her email to the Air Guard commander in which she accuses student D (and others) of defrauding the program and having a lack of integrity and ethics. The inconsistency of grievant's answers and positions in this case taint her credibility.

In any case, grievant knew that her discussion with the CMS was improper because she asked him not to reveal it to anyone. Nonetheless, the hearing officer finds it unnecessary to decide whether grievant was attempting to discredit or to help student D. Even if grievant was attempting to help student D, providing such information to a member of the selection board was an *attempt to influence*. Whether she attempted to influence positively or negatively is irrelevant; the fact is that <u>any</u> attempt to influence is improper.

Accordingly, the agency has provided a preponderance of evidence to show that: 1) grievant's email communication was unprofessional; 2) grievant improperly disclosed protected information to an unauthorized person; and, 3) grievant attempted to influence a member of a promotion selection board. Grievant has not offered sufficient evidence to mitigate these offenses. These are serious offenses that amply justify the imposition of a Group I Written Notice.

[12] The second-step respondent noted that the agency has not fully complied with a provision of the state Privacy Act requiring it to establish rules of conduct and inform employees about the detailed rules and procedures of the Act. However, the evidence in this hearing was sufficient to establish that, notwithstanding the agency's omission, grievant is sufficiently familiar with the privacy laws to know that her conduct violated the law. Her email to the Air Guard commanding officer cites the privacy act and otherwise clearly infers that grievant has a good general knowledge of the law.

Transfer to a different job position

The agency issued a Group III Written Notice, transferred grievant to a new role and position, and reduced her salary by five percent. During the grievance resolution process, the second step respondent unilaterally and unconditionally reduced the disciplinary action to a Group I Written Notice and restored grievant's salary to its former level.[13] However, the agency did not rescind the transfer that was part of the original disciplinary action.

The Standards of Conduct policy provides that the normal disciplinary action for a Group I offense is the issuance of a Written Notice. When a Group III disciplinary action is taken, an agency may remove an employee from employment or, if mitigating circumstances exist, it may demote or transfer the employee. However, demotion or transfer is not an option when the discipline imposed is either a Group I or Group II Written Notice.[14] Once the agency reduced the disciplinary action to a Group I Written Notice, it is limited to the issuance of a written notice only. If grievant's transfer is allowed to stand, it would have the effect of allowing an agency to transfer or demote any employee who committed a Group I offense merely by first issuing a Group III notice, and then reducing it to a Group I notice. This is clearly contrary to the progressive disciplinary plan mandated in Section VII.D of Policy 1.60. Therefore, the agency's reduction of the disciplinary action to a Group I Written Notice automatically rescinded *both* the salary reduction *and* the transfer. Grievant must be reinstated to the position of STAP coordinator.

However, grievant stated that although she desires to have her former position, she is also content in her new position in the Finance unit. If grievant elects to waive rescission of the transfer in order to remain in the Finance unit, that is an option that she and the agency may conclude is best for all concerned.[15]

DECISION

The decision of the agency is modified.

The Group I Written Notice issued on September 5, 2003 is hereby UPHELD.

The agency is directed to RESCIND grievant's transfer and to reinstate her to her former position, unless grievant elects to waive the reinstatement.

APPEAL RIGHTS

[13] It was stipulated during the hearing that grievant's pay was fully restored to its former level and that she received back pay that covered the period of reduced salary. Therefore, grievant has been made whole with regard to the salary issue.

[14] *See* Exhibit 6, Section VII.D. There are exceptions to the general rule when an employee has prior active disciplinary actions. In this case, grievant does not have any prior active disciplinary actions.

[15] Given grievant's offenses, and the lack of credibility demonstrated by her testimony, it is understandable that the agency may not be able to rely on her future ability to maintain the confidentiality of student grade information.

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.[16] 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.[17]

[16] 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).

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

[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