

Issue: Group II Written Notice with suspension (unauthorized use or misuse of State property); Hearing Date: 06/07/04; Decision Issued: 06/08/04; Agency: UVA; AHO: David J. Latham, Esq.; Case No. 717



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 717

Hearing Date: June 7, 2004
Decision Issued: June 8, 2004

APPEARANCES

Grievant
Representative for Grievant
Observer for Grievant
Office Manager
Attorney 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 grievance from a Group II Written Notice issued for unauthorized use or misuse of state property.¹ Grievant was suspended for one day as part of the disciplinary action. 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 University of Virginia (Hereinafter referred to as “agency”) has employed grievant for 26 years as an administrative assistant working in the athletic department.

The agency’s written policy provides that university property may not be used for personal purposes unrelated to the University’s mission or for commercial purposes.³ This prohibition extends to consumable materials and supplies. The policy further provides that university equipment may not be used by organizations that are not part of the University community unless the responsible unit head approves a user request form, and the use meets specified criteria.

Grievant’s brother is a vice president and branch manager of a mortgage company. As part of a marketing campaign for his company, grievant’s brother decided to mail a letter to 1,000 customers notifying them of the company’s current interest rates. He asked grievant whether she could perform a “mail merge” and affix his signature by computer in order to send the same letter text to 1,000 different customers; grievant said she could and agreed to perform the work for her brother. Before performing this work, grievant had mentioned what she would be doing to a coworker. The coworker was surprised and asked grievant about using so much toner to print 1,000 letters. Grievant told her it would not be a problem.⁴

On March 16, 2004, grievant returned to her office after work hours. She worked for about three and a quarter hours preparing the mail merge in the state-owned computer system and printing out 1,000 letters. Grievant used paper supplied by her brother but utilized the state computer system to perform the work and a state-owned printer to print out the letters. Grievant was paid by her brother for performing this work. Grievant did not obtain management approval to use state equipment and supplies to perform this work.

On the following morning, as the office manager (grievant’s immediate supervisor) entered the office kitchen, she happened to glance at a large janitor’s trash barrel just outside the kitchen door. The barrel was filled almost to the top with trash. Lying on top were several letters that were not printed on athletic

¹ Exhibit 1. Group II Written Notice issued March 22, 2004.

² Exhibit 1. Grievance Form A, filed April 7, 2004.

³ Exhibit 3. Agency policy XV.G.2, *Use of University Equipment*, November 2, 1995.

⁴ Exhibit 1. Email from grievant to Director of Athletics, April 12, 2004.

department letterhead.⁵ The office manager picked up the letters and recognized that they were from grievant's brother. She questioned grievant who acknowledged that she had utilized state-owned equipment to prepare 1,000 letters for her brother.

It is customary that some university coaches operate summer training camps for athletes. The coaches operate these camps as their own private businesses and pay a fee to the university for physical facilities used in the camp. Coaches sometimes mail correspondence or flyers advertising their camps. Each year, the Athletic Director sends a memorandum to all athletic department employees reminding them that the camps are independent enterprises, that the use of state property for personal gain violates state law, and that arrangements must be made if a coach wants to reimburse the department for the use of computers and printers. This type of reminder has been sent to all athletic department employees for at least 20 years. Grievant has received these annual reminders and knows the policy. On March 16, 2004, the office manager sent a reminder email to the four administrative assistants, including grievant. The email includes the text of the athletic director's most recent memorandum and adds "... a reminder that we are not allowed to use Athletic Department printers, copiers, etc. for anything that is not Athletic Department business."⁶

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

⁵ Exhibit 1. Letter from grievant's brother to mortgage company customer, March 16, 2004. The letters in the trash had minor problems and grievant had discarded them the preceding evening.

⁶ Exhibit 1. Email from office manager to administrative assistants, March 16, 2004.

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 retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.⁷

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 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.⁸ Examples of Group II offenses include unauthorized use or misuse of state property or records.

The essential facts in this case are undisputed. Grievant admits that she printed 1,000 letters using state-owned equipment and supplies without authorization. She also admits that she derived personal gain from the work because her brother paid her for the work. Accordingly, the agency has borne the burden of proof to show that grievant committed a Group II offense. Grievant argues only that the disciplinary action was too severe for the offense.

In her grievance attachment, grievant enumerates seven reasons she believes the disciplinary action was too punitive. First, she points out that she performed the work after normal work hours. While factually correct, this is not relevant because the offense cited is unauthorized use of equipment – not abuse of state time. Second, grievant asserts that she used her own supplies. While grievant used paper provided by her brother, the toner used to print the letters was purchased by the state. Third, grievant notes that she discussed the matter with a coworker ahead of time. While this is factually true, grievant failed to obtain approval from either her supervisor or any other manager. Fourth, grievant cites her length of service with the agency. The agency took length of service into account when it suspended grievant for only one day when it could have suspended her for up to ten days.

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

⁸ Exhibit 2. DHRM Policy 1.60 Section V.B.2.e, *Standards of Conduct*, September 16, 1993.

Fifth, grievant asserts that she believed that the written admonitions applied only to athletic camps. This assertion is not credible in view of the text stating that "*The use of state property or personnel for personal gain is in direct violation of state law. Unreimbursed use of computers, printers, photocopying, postage, phones, and supplies is prohibited.*"⁹ (Italics and underscoring added). Finally, in her sixth and seventh points, grievant expresses remorse, assures the agency that there will be no repetition of the offense, and suggests that written counseling would suffice as corrective action in this case. The agency took into account grievant's forthright admission of guilt and remorsefulness when it imposed only a one-day suspension. One of the purposes of disciplinary action is to impose a penalty that has a sufficient deterrent effect. The Standards of Conduct policy provides that grievant's offense is of a severity level that warrants a Group II Written Notice. The hearing officer has no authority to ignore the policy because of grievant's remorsefulness.

Grievant suggests that, in the past, some coaches have given her work assignments on state time that she felt were related to summer camps. If true, this would constitute a violation of the agency policy prohibiting the use of equipment and supplies for personal gain. However, if agency management was not made aware of such violations, it could not take the appropriate action. Grievant has a duty to check with the office manager before performing any questionable work. If grievant did not seek the office manager's approval before performing work that might be related to summer camps, the agency would not be aware of the policy violations. Such violations that escaped detection because of grievant's silence are not justification to reduce the discipline.

DECISION

The agency's disciplinary action is affirmed.

The Group II Written Notice issued on March 22, 2004 for unauthorized use of state property 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.

⁹ Exhibit 1. Email from office manager to grievant, March 16, 2004.

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.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]

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.

David J. Latham, Esq.
Hearing Officer