

Issue: Group II Written Notice with termination (due to accumulation (failure to follow supervisor's instructions); Hearing Date: 03/09/05; Decision Issued: 03/10/05; Agency; VCU; AHO: David J. Latham, Esq.; Case No. 8001



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8001

Hearing Date: March 9, 2005
Decision Issued: March 10, 2005

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Director of Student Commons
Advocate for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct such as to 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 retaliate against grievant?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice for failure to follow a supervisor's instructions.¹ Because of an accumulation of prior active disciplinary actions, grievant was removed from state employment effective October 13, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² Virginia Commonwealth University (Hereinafter referred to as "agency") has employed grievant for ten years. He was a housekeeping worker at the time of the disciplinary action.

Grievant has two prior active disciplinary actions – a Group II Written Notice for failing to follow a supervisor's instructions³ and, a Group III Written Notice for sleeping during work hours.⁴ In addition grievant has two prior inactive disciplinary actions – a Group II Written Notice for failing to follow supervisory instructions⁵ and, a Group I Written Notice for failing to perform assigned work.⁶

In January 2004, a new ceramic tile floor was installed in the lobby of the building where grievant worked. The tile was very light in color and of a new type that had different cleaning requirements than the old tile. Both the tile manufacturer and the company that installed the tile instructed the building services director to make sure that the floor was machine scrubbed daily using a self-propelled scrubber and a water and soap mixture. The soap solution is a liquid kept in a "wet room" housekeeping closet for which every housekeeper has a key. Grievant's supervisor instructed grievant to machine scrub the lobby floor every night.⁷ When the supervisor found in early April that grievant was failing to comply with this instruction, she again instructed him to machine scrub the floor.⁸ Grievant never complained to the supervisor that he did not have what he needed to clean the floor. The Associate Building Services Director never received any complaints from grievant or anyone else alleging that there was a shortage of cleaning liquid for the machine scrubber.

On June 29, 2004, a new night shift supervisor was assigned to work from 7:00 p.m. to 3:30 a.m., which overlapped half of the evening shift and half of the night shift. Grievant worked on the night shift from 11:30 p.m. to 7:30 a.m. During the month of July 2004, grievant assured the new supervisor that he was cleaning the floor properly even though the floor continued to accumulate a gray tinge from accumulated grime.⁹ On July 31, 2004, a representative of the installing tile contractor visited the site and noted that the tile floor was not being

¹ Agency Exhibit 1. Group II Written Notice, issued October 13, 2004.

² Agency Exhibit 1. Grievance Form A, filed November 5, 2004.

³ Agency Exhibit 5. Group II Written Notice, issued August 28, 2003.

⁴ Agency Exhibit 5. Group III Written Notice, issued June 5, 2002.

⁵ Agency Exhibit 5. Group II Written Notice, issued September 27, 2001.

⁶ Agency Exhibit 5. Group I Written Notice, issued October 11, 1994.

⁷ Agency Exhibit 2. Supervisory Inspection Report to grievant, February 4, 2004.

⁸ Agency Exhibit 2. Supervisory Inspection Reports to grievant, April 5 & 6, 2004.

⁹ Agency Exhibit 2. Memorandum from Associate Director, December 15, 2004.

cleaned properly. As a result, the Associate Director of Building Services issued a memorandum explaining the problem and directing that the floor be machine scrubbed each night.¹⁰ He posted the memorandum in the custodial employee lounge and gave a copy to grievant's supervisor, who talked with grievant about the instruction. The condition of the floor continued to deteriorate despite grievant's assertion to his supervisor that he was properly cleaning the floor each night. Grievant did not report a shortage of cleaning liquid to the supervisor.

Each housekeeping worker has a clipboard on which supervisors place notes to communicate instructions to the employee. On the evening of October 7, 2004, the night shift supervisor placed a note headed "Special Cleaning Assignment" on grievant's clipboard. Grievant read the note when he reported for work. The note instructed grievant to use a putty knife to scrape gum off certain parts of the lobby tile floor, and then to machine clean the floor before 3:00 a.m. on that shift.¹¹ Grievant did scrape gum off the floor but instead of machine cleaning it, he only hand-mopped the floor with a germicide.

The supervisor returned later and inspected the floor.¹² The floor looked just as grimy as it had several hours earlier, the machine scrubber had not been moved from the housekeeping closet, and the scrubber tank that contains water and cleaning solution was dry. The supervisor reported this to the associate director for building services who consulted with the Building Director. Grievant was found sleeping in the employee lounge later than morning, and the following morning he was found sleeping in the lobby lounge.¹³ In a due process meeting prior to issuance of the discipline, grievant apologized but failed to offer any explanation as to why he had not followed his supervisor's instructions to machine scrub the floor. After consultation with upper management and human resources, grievant was disciplined and removed from employment.

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

¹⁰ Agency Exhibit 2. Memorandum from Associate Director to supervisor, August 9, 2004.

¹¹ Agency Exhibit 4. Special Cleaning Assignment, October 7, 2004.

¹² Agency Exhibit 4. Supervisory Inspection Report, October 8, 2004.

¹³ Agency Exhibit 1. Letter from Associate Building Services Director to grievant, October 11, 2004.

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 his evidence first and must prove his claim by a preponderance of the evidence.¹⁴

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. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 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. Failure to follow a supervisor's instructions is a Group II offense.¹⁵

Grievant expressed concern about the admission into evidence of inactive disciplinary actions. While inactive disciplinary actions may not be utilized for accumulation purposes in determining whether removal from employment is appropriate, they are admissible as evidence to show a continuing pattern of same or similar conduct and to show that grievant has been warned about such behavior in the past.

Grievant admitted that he knew he was supposed to machine scrub the floor on a nightly basis. However, he claims that he did not have the cleaning

¹⁴ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

¹⁵ Agency Exhibit 6. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

liquid to be used with the machine. In fact, a preponderance of testimony established that grievant did have a key to the wet closet in which the cleaning liquid was kept. Grievant referred several times to an acid wash solution and said he did not have access to it because it was in a locked closet to which he did not have a key. It is true that an acid wash solution is kept in a locked cabinet and that only the supervisor has a key to the cabinet. However, the acid wash solution is used only on rare occasions for an unusual spill or when the contractor does a major cleaning. The acid solution eats into the tile requiring the contractor to return and apply an expensive refinishing sealer to the tile. Accordingly, acid wash solution is not used for routine daily cleaning. Therefore, grievant had no need to use the acid solution but should instead have been using the soap solution for routine daily cleaning.

The fact is that grievant had not been machine scrubbing the floor. His previous supervisor had noted this in inspection reports during the spring of 2004. When the current supervisor spoke to grievant in July about using the machine, grievant told him that he was doing the floor each night *after* 3:30 a.m. When the supervisor directed grievant on October 7, 2004 to machine scrub the floor before 3:00 a.m. so that he could inspect it, grievant ignored the instruction.

Grievant claims that he asked his supervisor for the cleaning liquid for the machine scrubber but that the supervisor refused to give it to him. It is illogical that the supervisor would refuse to give him the cleaning liquid. However, for the sake of argument, even if grievant's supervisor had refused to give him liquid, the liquid was readily available to grievant because grievant had a key to the wet closet. Moreover, grievant never reported to the supervisor's boss (Associate Building Services Director) that he could not obtain the cleaning liquid.

Grievant contends that the decision to terminate his employment had been made prior to October 7, 2004. As evidence, grievant proffered an organizational chart dated October 7, 2004 in which his position is listed as vacant.¹⁶ However, grievant did not state where he had obtained this chart from. Grievant's witness contends that she saw the chart attached to her performance evaluation in early October. During the hearing, the hearing officer directed the agency to produce the witness's performance evaluation; there was no organization chart attached.¹⁷ Therefore, this witness's testimony is not credible.

The Commons Director testified that the organization chart is prepared either by him or by his secretary and that it is available to all employees on the agency's computer system. During the early fall of 2004, several new persons were employed and there were repeated changes to the organization chart during the fall semester. The Director further testified that the chart proffered by grievant was prepared in early November - after grievant had been removed from

¹⁶ Grievant Exhibit 3. Organization chart for Student Commons.

¹⁷ Organization charts are not supposed to be attached to performance evaluations; they are supposed to be a part of each employee's annual performance plan. A check was made and it was determined that the witness's performance plan does not include an organization chart.

employment. The date on the chart was either inadvertently not changed from the prior chart or, someone changed the date on the copy presented as evidence. Since anyone can access the chart, it is easy to change the date and print an altered copy.

Retaliation

Grievant alleged that the agency had retaliated against him in issuing this disciplinary action. 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.¹⁸ To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity;¹⁹ (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant failed to prosecute this allegation. He failed to offer any evidence to show that he had engaged in any protected activity prior to the issuance of this disciplinary action. Accordingly, since grievant failed to satisfy even the first prong of the test for retaliation, he has not proven that the agency retaliated against him.

Grievant also alleged that the agency was “stacking documentation” against him with a goal of terminating his employment. There is more to proving such a charge than merely making an allegation. While the grievant has accumulated a number of disciplinary actions, he has not shown that any of the prior disciplinary actions was unwarranted. The evidence did not show that he grieved the previous disciplinary actions and, therefore, it is presumed that he did not disagree with the offenses cited in those actions. In point of fact, the agency had previously *reduced* grievant’s last two disciplinary actions in order to help him stay in state employment. In 2002, the agency took into account grievant’s long years of service and only suspended him from work when it could have terminated his employment for the Group III offense. In 2003, grievant could have been automatically removed from employment based on the accumulation of two Group II offenses and a Group III offense. Again, the agency gave consideration to his length of service and did not discharge him. Thus, the facts reflect that the agency did all it could to retain grievant in his job when he committed the previous two offenses. However, at the time of the August 2003 discipline, grievant was warned in writing that such special consideration would not be given to him in the future.²⁰

Summary

¹⁸ EDR *Grievance Procedure Manual*, p.24

¹⁹ § 4.1(b)4, EDR *Grievance Procedure Manual* defines protected activity as: “participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incident of fraud, abuse, or gross mismanagement, or exercising any right protected by law.

²⁰ Agency Exhibit 2. Second Step Resolution response, November 5, 2004.

The agency has shown, by a preponderance of evidence that grievant has a long history of failing to follow supervisory instructions, and that he has been repeatedly warned through the disciplinary process. Grievant consistently failed to machine scrub the lobby tile floor from the time it was installed. He was counseled by means of inspection reports issued by a female supervisor during the spring of 2004. When a new supervisor took over during the summer, he also counseled grievant in July 2004 to machine scrub the floor each night; grievant failed to do so. Even after written instructions were issued in August 2004, grievant did not perform his responsibility. Instead he told his supervisor that he was cleaning the floor between 3:30 a.m. and 7:30 a.m. when the supervisor was off duty. Finally, after being instructed to machine scrub the floor prior to 3:00 a.m. on October 8, 2004, grievant again chose not follow his supervisor's instructions. This continuing failure constitutes insubordination – a Group II offense.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for failing to follow a supervisor's instructions and grievant's removal from employment effective October 13, 2004 are hereby UPHELD.

Grievant failed to present any evidence regarding alleged retaliation.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.²¹ 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.²²

[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

²¹ 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).

²² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.