

Issue: Group II Written Notice (failure to follow supervisory instructions);
Hearing Date: 05/23/05; Decision Issued: 05/27/05; Agency: VDOT; AHO:
David J. Latham, Esq.; Case No. 8054



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8054

Hearing Date: May 23, 2005
Decision Issued: May 27, 2005

APPEARANCES

Grievant
One witness for Grievant
Division Administrator
Representative 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?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for failure to follow supervisory instructions.¹ 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 Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant for five years. He is a Policy and Planning Specialist.³ Grievant has one active prior disciplinary action - a Group I Written Notice for disruptive behavior.⁴

Prior to August 2004, grievant worked in the agency's human resources department. In August 2004, he began work in the agency's Knowledge Management & Technology Transfer Office as a policy and planning specialist. The objective of his position is "to promote the sharing and transfer of critical knowledge, technology, best practices, and innovation between VDOT business units and among diverse groups of VDOT and local government employees to achieve VDOT business process improvements and enhance succession planning."⁵ A primary responsibility of his position is to conduct interviews of key experienced employees who are planning to retire or leave the agency. Interviews are expected to focus on "tacit" knowledge, which the agency defines as knowledge that evolves from experience and resides with the holder.⁶ The interview is not intended to discuss knowledge that is already documented, rather it should focus on knowledge the interviewee has acquired through experience but has not documented in any tangible form.⁷

From grievant's first month in the agency, his supervisor found it necessary to counsel him on the role of the Knowledge Management (KM) Office, i.e., "to listen to what others have to say and not judge or argue."⁸ The supervisor counseled grievant on at least four occasions about the need to listen more and speak less.⁹ In November 2004, grievant's supervisor conducted a performance evaluation and concluded that grievant's interview skills were below the performance level required in knowledge management work.¹⁰ By December, the supervisor concluded that grievant was still not meeting expectations and, therefore, she revised grievant's Employee Work Profile

¹ Agency Exhibit 21. Group II Written Notice, issued January 20, 2005.

² Agency Exhibit 1. Grievance Form A, filed January 28, 2005.

³ Agency Exhibit 3. Grievant's Employee Work Profile (EWP), August 16, 2004.

⁴ Agency Exhibit 22. Group I Written Notice, issued April 29, 2004.

⁵ Agency Exhibit 3. *Ibid.*

⁶ Agency Exhibit 4. Knowledge Management in General, (undated).

⁷ See Agency Exhibit 6 for a list of target questions that form the framework for knowledge management interviews.

⁸ Agency Exhibit 7. Supervisor's notes, August 11, 2004.

⁹ Agency Exhibit 7. *Ibid.*, August 24 & 26, 2004, and September 23 & 30, 2004.

¹⁰ Agency Exhibit 7. Supervisor's notes, November 8, 2004. See also Agency Exhibit 9. Performance Review, November 2004.

(EWP) Work Description to include more detailed measures for his core responsibilities.¹¹

In early December 2004, grievant submitted to his supervisor a summary of an interview he had conducted; the supervisor returned the summary with specific comments appended.¹² She directed grievant to redo the summary and offered a critique of where improvement was needed. Specific criticisms of the interview included: grievant putting words in the mouth of the interviewee, adding his own opinions to the interview questions, making assumptions, and being judgmental. After grievant responded to his supervisor, she found that it did not comply with her instruction. She compared the interview transcript with grievant's summary and found that grievant had added information to the summary that was not contained in the actual interview.¹³ She again directed him to redo the summary. Grievant again did not follow his supervisor's instruction but instead sent her a response arguing that he was not including his own opinions.¹⁴ The supervisor responded to grievant and again explained to him that his interview had covered technical knowledge that already existed in explicit form. She again directed him to redo the summary focusing on tacit knowledge and, if he included his own opinion or analysis to specifically identify it as such in the summary document.

The supervisor concluded that grievant had the ability to follow her instructions, understood those instructions, and had the requisite knowledge to perform according to instructions. Grievant had read extensively about the subject matter prior to his interviews and acquired a considerable amount of technical knowledge. However, despite the repeated verbal and written directions of his supervisor to focus on tacit knowledge, grievant failed to follow her instructions. The supervisor concluded that disciplinary action was necessary to get his attention. When she issued the disciplinary action in January 2005, she was not aware that grievant had been disciplined by his previous supervisor early in 2004 for a different offense. Eventually, after five different iterations, grievant provided a summary that met expectations.

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

¹¹ Agency Exhibit 7. Supervisor's notes, December 9, 2004. See also Agency Exhibit 10. EWP Work Description, effective November 1, 2004.

¹² Agency Exhibit 12. E-mail from supervisor to grievant, December 12, 2004.

¹³ Agency Exhibit 15. E-mail from supervisor to grievant, December 21, 2004.

¹⁴ Agency Exhibit 16. E-mail from grievant to supervisor, December 21, 2004.

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.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. 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 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.¹⁶ Failure to comply with established written policy and, failure to comply with established written policy are two examples of Group II offenses.

It is apparent from grievant's education, background, and experience that he is a capable, knowledgeable human resources professional. He approaches his job with diligence, extensive preparation, and dedication. However, it is also clear from the evidence in this case, that the knowledge management arena

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

¹⁶ Agency Exhibit 3. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

requires different approaches and, in particular, different interview techniques from those that might be appropriate in the typical human resources setting.

The agency has shown, by a preponderance of evidence, that grievant experienced difficulty in recognizing those differences as he began functioning in his new role in the fall of 2004. Despite repeated counseling and written instructions from his supervisor, grievant persisted on focusing on technical information that his supervisor told him was not to be the focus of interviews. Although grievant denies that he was attempting to display his own knowledge of the subject matter in both the interview process and the written summary, an outsider reading this case has the opposite impression. Certainly, grievant's supervisor felt that grievant interjected too much of his own knowledge and opinions into the summary document. Rather than accepting the supervisor's constructive criticism, grievant attempted to justify his initial submission by focusing on the technical subject matter, and by attempting to rationalize why he delved into certain areas.

Grievant argues that citation in the Written Notice of one element from his EWP Work Description Core Responsibility measures is contrary to policy. However, grievant has not cited any specific agency or state policy that prohibits citing such a measure in a written disciplinary action. Disciplinary actions may include any explanation which is reasonably necessary to describe the nature of the offense. In this case, it was not inappropriate for the supervisor to cite the specific measure since it identified with specificity that portion of grievant's responsibilities with which he was not in compliance.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on January 20, 2005 is hereby UPHELD.

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.¹⁷ 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.¹⁸

[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

¹⁷ 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).

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.