Issue: Group II Written Notice with termination (due to accumulation) (failure to comply with established written policy); Hearing Date: 07/18/05; Decision Issued: 07/19/05; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8113; **Administrative Review: HO Reconsideration Request received 08/03/05; Reconsideration Decision issued 08/04/05; Outcome: No newly discovered evidence or incorrect legal conclusion. Request denied.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8113

Hearing Date: July 18, 2005
Decision Issued: July 19, 2005

PROCEDURAL ISSUE

Grievant requested as part of her relief that she be transferred to a different section of the agency. A hearing officer does not have authority to transfer an employee.[1] Therefore, the hearing officer is without authority to direct this form of relief requested by grievant. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Human Resource Representative
Representative for Agency

[1] § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

Five witnesses for Agency

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? Was the agency's action retaliatory?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written notice for failure to comply with applicable established written policy.[2] As part of the disciplinary action, grievant was removed from state employment effective April 5, 2005 due to an accumulation of disciplinary actions.[3] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[4]

The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant as a program support technician for four years. Grievant has one active prior disciplinary action – a Group II Written Notice for inappropriately releasing customer calls.[5]

The agency operates a customer call center (CCC) which receives and responds to inquiries from the public. Grievant worked in the CCC as an agent responding to calls from the public. Supervisors of CCC agents employ a buddy system such that when one supervisor is unavailable, the supervisor who is their "buddy" will respond to calls transferred by agents. The CCC Director has directed in writing that CCC personnel are not to hang up on customers and not to release calls or otherwise disconnect calls from the automated telephonic waiting queue.[6] Prior to grievant's removal from employment, it had been the accepted practice that CCC agents were allowed some discretion in disconnecting a caller, after warning them, if the customer repeatedly uses vulgar or profane language, or is otherwise abusive.

The agency publishes internal guidelines and directives on its Intranet. Among the instructions, personnel are told that if they require technical

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[2] Agency Exhibit 4. Group II Written Notice, issued April 5, 2005.
[3] Agency Exhibit 7. Section VII.D.2.b.(1), Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.
[4] Agency Exhibit 4. *Grievance Form A*, filed April 27, 2005.
[5] Agency Exhibit 5. Group II Written Notice, issued November 7, 2002.
[6] Agency Exhibit 6. Memoranda from CCC Director, August 27, 2003 & December 31, 2003.

assistance with the call, they should contact the Technical Assistants (Techs).[7] Personnel are directed to transfer customer calls to Techs if the customer wants to lodge a complaint or seeks resolution of a problem but wishes someone with "higher authority" for assistance.[8] Disgruntled customers are permitted to speak with the agency head (Commissioner) if necessary.

Another Intranet document has instructions for transferring calls to Medical Review Services and states: "Only if you cannot provide the customer with the information he is seeking may you transfer the call."[9] Another agency document states: "CCC agents are only to transfer calls to the Medical Review Services Work Center should the customer desire to have more detailed information on medical documentation submitted by the physician/nurse practitioner or customer is requesting an extension on the official notice/order of suspension."[10]

Late on Friday, March 18, 2005, grievant handled a telephone call from a customer who had received an Official Notice/Suspension Order. The letter advised the customer that the agency had received information concerning his ability to drive a vehicle and that he would be required to take a road test or have his license suspended.[11] The customer wanted to know why he had to be tested. Grievant told him that he would have to make a written request for that information. The customer asked to speak with a supervisor; grievant took his name and said a supervisor would call him back.[12] The customer became angry because he could not speak with a supervisor immediately and asked for the name of the CCC Director; grievant refused to give him the name. The customer did not use vulgar or profane language but did threaten to sue the agency.

At one point, grievant believed the customer might be recording the call. She told him that she had not given permission to record and that if he did not stop, she would disconnect him. The agency does not have any policy regarding customers who record calls.[13] After ten minutes, grievant was unable to appease the customer and disconnected the call.[14] Grievant did not attempt to transfer the call to her supervisor, the buddy supervisor, the Techs, the CCC Director, or the Medical Review Services unit. In the past, grievant has transferred calls to supervisors, to the CCC Director, and to the Medical Review Services unit.

On the following Monday, the customer called and spoke with a supervisor to relate what had occurred during his conversation with grievant. Afterwards,

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[7] Agency Exhibit 9. Telephone Procedures.
[8] Agency Exhibit 11. Contact Procedures.
[9] Agency Exhibit 2. Work Centers.
[10] Grievant Exhibit 8. Medical DLG 2001.
[11] Agency Exhibit 3. Letter to driver, March 16, 2005.
[12] Agency Exhibit 4. Letter to CCC Director, March 30, 2005.
[13] In Virginia, one party to a telephone conversation may tape record the conversation without advising or obtaining the permission of other parties to the conversation. Va. Code § 19.2-62.B.2.
[14] Agency Exhibit 3. E-mail from grievant to CCC Director, her supervisor, and the supervisor's paired or "buddy" supervisor, March 18, 2005.

the supervisor advised grievant that she could have transferred the call to the Medical Review Services unit; grievant said she was unaware of that and thought the customer would have to make a written request.[15]

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 grievant must present her evidence first and prove her claim by a preponderance of the evidence.[16]

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 (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* 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* 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

[15] Agency Exhibit 3. E-mail from supervisor to CCC Director, March 21, 2005.

[16] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

offenses normally should warrant removal from employment.[17] Failure to comply with applicable established written policy is one example of a Group II offense.

Although the agency contends that the grievant committed multiple errors during the telephone conversation (telling the customer he could not record the call, and that she could not tell him why he had to take a test), the only offense cited on the Written Notice (and in the due process letter[18]) is disconnecting the call. Even if grievant had been cited for her error in stating that the customer could not record the call, the appropriate corrective action for such a first occurrence of such an error of fact would be counseling. Similarly, grievant's error in telling the customer that he would have to submit a written request was an error in fact for which counseling would be an appropriate corrective action. The agency has given CCC agents multiple sets of instructions that are not totally consistent with one another. On one hand, the Medical DLG 2001 instruction states that agents are **only** to transfer calls to Medical Review Services in two limited circumstances, neither of which was applicable in this case. However, the Intranet Work Centers instruction states that calls can be transferred to Medical Review if the agent is unable to provide [any] information the customer is seeking. Because the agency's own instructions are inconsistent, it is not surprising that there could be confusion about specifically what calls may be transferred to Medical Services.[19]

Accordingly, the sole issue for adjudication is whether grievant should have disconnected the customer. It is undisputed that grievant could have transferred the customer's call to several other people who might have been able to answer his concern or direct him to the people who could respond to his inquiry. Grievant stated that her own supervisor prefers that agents take messages rather than transfer callers while they are irate. Several of grievant's coworkers corroborated this and the agency did not rebut it. However, grievant could have transferred the call to another supervisor, one of the Techs, or the CCC Director as the customer requested. Grievant has not offered a good reason for not transferring the call to one of these resources. Grievant has transferred calls to the CCC Director in the past.[20]

Grievant avers that others have disconnected or released customer calls and not been given a Group II Written Notice. She identified one such individual but the testimony established that the discipline in that case had been reduced to a Group I Written Notice because of a mitigating circumstance (the employee had 30 years of state service). As the agency learns of employees who disconnect calls, they are disciplined with Group II Written Notices.

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[17] Agency Exhibit 7. Section V.B, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

[18] Agency Exhibit 4. Letter from office manager to grievant, March 28, 2005.

[19] Even the Office Manager acknowledged in her testimony that the two documents are contradictory.

[20] Director's testimony, unrebutted by grievant.

Grievant relies on a licensure statute to support her contention that the customer would have to make a written request in order to obtain the information he was seeking. The statute states: "If the driver so requests in writing, the Department shall give the Department's reasons for the examination…"[21] Grievant's reliance on this statute is misplaced. While the statute mandates that the agency *must* give the information to a driver if he files a *written* request, it does not preclude the agency from exercising its discretion to provide the information in response to an oral request. Thus, in this case, the Medical Review Services unit could have responded (and subsequently did) to the customer's telephone inquiry when it determines that to be the best course of action.

Retaliation

Grievant asserts that she was disciplined as retaliation because she had filed, and prevailed in, a grievance in 2004. 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.[22] To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant satisfies the first two prongs of this test because she had previously filed a grievance, and she has been disciplined and removed from employment. However, grievant has not demonstrated a nexus between these two events. There is more to proving a connection than merely arguing that one "feels" that retaliation is involved.[23] The current disciplinary action was issued because of a specific incident involving an irate customer whose telephone call grievant handled. Moreover, the agency has shown that the disciplinary action was evaluated by several upper management and human resource people before issuance. Grievant has not shown that these persons had reason to retaliate against her, or that any ever indicated that the discipline was being issued for retaliatory reasons.

Mitigation

Grievant has been employed for only four years and thus does not have long state service. Testimony established that her overall performance has been average or just below average. There are no other mitigating circumstances that would serve to reduce the level of discipline. Grievant has received multiple Notices of Improvement Needed/Substandard Performance for a persistent absence problem. Grievant's prior active disciplinary action was for releasing customer calls. As that offense is similar to the instant offense of disconnecting a

[21] Grievant Exhibit 11. Va. Code § 46.2-322.A.
[22] § 9, EDR *Grievance Procedure Manual*, Definitions.
[23] Agency Exhibit 4. Grievance Form A, filed April 27, 2005.

customer call, these two factors constitute aggravating circumstances that support the appropriateness of the disciplinary action.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and removal from employment are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

Grievant has not borne the burden of proof to demonstrate that the disciplinary action was retaliatory.

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.[24] 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.[25]

[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

[24] 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).

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8113

Hearing Date:	July 18, 2005
Decision Issued:	July 19, 2005
Reconsideration Request Received:	August 3, 2005
Response to Reconsideration:	August 4, 2005

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[26]

OPINION

Grievant requests reconsideration of the Decision and reduction in the level of discipline from a Group II to a Group I Written Notice. She argues that

[26] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

the agency provided no evidence that she reviewed written directives issued by the CCC Director. The agency's evidence established that the Director's e-mails issued in 2003 were sent to all call center employees (Agency Exhibit 6). Grievant did not deny receiving and reading the directives. In addition, the agency had published, in its Intranet guidance for all employees (Agency Exhibit 9), instructions that call center employees are to forward calls to Techs when the caller wants to speak with someone with "higher authority." In this case, the caller had requested to speak first with the supervisor, and then with the CCC Director. Despite these unambiguous requests by the caller, grievant refused to transfer the call to her supervisor, to the Director, or to the Techs.

Grievant argues that the telephone caller was "abusive" and that employees are permitted to disconnect abusive callers. She also notes that the agency has not provided a definition of the word abusive. When an agency does not specifically define a word, one must look to the common usage of the word. The dictionary defines "abusive" as "using harsh insulting language."[27] The caller did not use vulgar or profane language, or use any language that was harsh or insulting. While he threatened to sue the agency, such a threat did not insult grievant. Even if, as grievant avers, the caller threatened to sue her, he only expressed what is his legal right. That does not constitute an insult to grievant.

Grievant asserts that the caller became more abusive because he escalated his volume level as the conversation progressed. However, it is apparent that the caller became more upset only because grievant failed to comply with his repeated requests to speak with those in higher authority. Had grievant promptly transferred his call as requested, the caller would not have become so upset. The caller's requests were reasonable since grievant was unable to answer his questions. Thus, the caller was not abusive – he was upset and demanding but not abusive.

Grievant requests consideration of mitigating circumstances. She alleges that she lacked notice of how the agency interprets the word abusive. As noted above, absent a specific definition by the agency, an employee must use the commonly accepted definition of words in written instructions. Using that principle, the absence of an agency definition of one word is insufficient to constitute a mitigating circumstance. In any case, as discussed in the Decision, the aggravating circumstances in this case significantly outweigh any possible mitigating circumstances.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully

[27] *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.

considered grievant's arguments and concludes that there is no basis to change the Decision issued on July 19, 2005.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[28]

_____
David J. Latham, Esq.
Hearing Officer

[28] 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).