Issue: Group I Written Notice (inappropriate and counterproductive behavior); Hearing Date: 07/27/05; Decision Issued: 07/28/05; Agency: DMAS; AHO: David J. Latham, Esq.; Case No. 8123

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8123

Hearing Date: July 27, 2005
Decision Issued: July 28, 2005

APPEARANCES

Grievant
Attorney for Grievant
Appeals Division Director
Advocate for Agency
Three 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? Was the disciplinary action retaliatory?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group I Written Notice issued for inappropriate and counterproductive behavior.[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 Medical Assistance Services (Hereinafter referred to as "agency") has employed grievant as a health care compliance specialist for 14 years.[3] Grievant has no prior disciplinary actions and has been rated "Contributor" for the past three years.

Grievant conducts research on new appeals presented to the agency. She reviews appeal request statements to determine the validity, timeliness and issue of the appeal. She analyzes, prepares and organizes pertinent background information on new appeals. Her work may sometimes require contact with local Department of Social Services offices to obtain information about cases.[4] Grievant does not have any supervisory responsibilities.

On Friday, February 11, 2005, grievant overheard a discussion between two coworkers located in cubicles across the hall (an open passage dividing two rows of cubicles). The discussion was loud and long and centered on the failure of a particular eligibility worker in a local Department of Family Services (DFS) office to submit required reports on a timely basis. One of the coworkers stated that, if the report was not submitted by the following Monday, she was going to call the eligibility worker's supervisor. After overhearing this conversation, grievant took it upon herself to call the eligibility worker. Grievant used her personal mobile telephone and made the call from an empty conference room so that no one would know she was making the call. Grievant told the eligibility worker that if the report was not received that day, the worker's supervisor would be called. She asked the worker to keep their conversation confidential.

Because of the peculiar nature of grievant's call, the eligibility worker related the conversation to her supervisor on her next day at work (Tuesday, February 15, 2005). The DFS supervisor promptly called grievant's supervisor the same day and related details of grievant's conversation with the eligibility worker. The DFS supervisor said that grievant had told the eligibility worker that she was going to be in trouble but that grievant was "looking into it and would protect her."[5] She further stated that the eligibility worker felt grievant was portraying herself as being at a high level of authority and, that the worker should beware of one of grievant's coworkers and grievant's supervisor. Grievant's

[1] Agency Exhibit 1. Group I Written Notice, issued March 9, 2005.
[2] Agency Exhibit 6. Grievance Form A, filed April 8, 2005.
[3] Agency Exhibit 5. Employee Work Profile, October 25, 2004.
[4] Agency Exhibit 5. *Ibid.*
[5] Agency Exhibit 3. Human Resource Director's notes from conversation with DSS supervisor, February 16, 2005.

supervisor then spoke with the agency's Human Resource Director and asked that she investigate the matter.[6]

The Human Resource Director contacted the DFS supervisor for a full accounting of what had occurred.[7] The Director then spoke with grievant about her telephone call to the DFS eligibility worker and gave her an opportunity to explain what happened. She then gave grievant an opportunity to provide a written description of the telephone conversation. Grievant responded to the Director on February 28, 2005.[8] The Human Resource Director and Appeals Division Director conferred about grievant's telephone call to the local DFS worker and decided that the most appropriate corrective action was a Group I Written Notice.

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.

---

[6] Grievant and her supervisor had communication difficulties. In January 2005, grievant requested her supervisor to agree to mediation. The supervisor had demurred, in part because he was scheduled to leave the agency in March 2005. Accordingly, the supervisor never agreed to mediation and the communication impasse was ongoing at the time of this incident. [Mediation is a *voluntary* process in which both parties must agree to employ the services of a mediator. See § 1.2, *Grievance Procedure Manual*, August 30, 2004.]

[7] Agency Exhibit 3. Human Resource Director's notes, February 15 & 16, 2005.

[8] Agency Exhibit 4. Grievant's response to Human Resource Director, February 28, 2005.

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]

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 of Policy No. 1.60 provides that Group I offenses are the least severe.[10] Inadequate or unsatisfactory work performance is a Group I offense. The offenses listed in the *Standards of Conduct* are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the *Standards of Conduct*.[11]

The *Standards* provide that management may take various actions to address employment problems such as unacceptable performance and/or behavior. Corrective action may range from an informal action such as counseling to formal disciplinary action.[12] There is no requirement that counseling precede formal disciplinary action; the appropriate level of corrective action is determined by management based on the nature of the unacceptable performance or behavior.

The agency has shown, by a preponderance of evidence, and grievant has admitted, that she secretly called a local DFS eligibility worker, made inappropriate statements to her, and attempted to keep the call from being disclosed. Grievant has not provided any legitimate business reason for calling the DFS worker. While grievant sometimes has a need to call a local DFS office, there was no need for grievant to be calling the DFS worker about the matter that was already being addressed by her coworkers. Grievant does not have any supervisory responsibilities. If she believed that this represented a supervisory problem, grievant should have told her supervisor who could then contact the eligibility worker's supervisor, if he deemed it appropriate.

In her grievance, grievant objected to the fact that her supervisor did not discuss the incident with her prior to referring the matter to the Human Resource

---

[9] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

[10] Agency Exhibit 9. Section V.B, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[11] Agency Exhibit 9. Section V.A, *Ibid.*

[12] Agency Exhibit 9. Section II.A, *Ibid.*

Director. There is no requirement that a supervisor discuss incidents with employees prior to discussing them with other appropriate management personnel. Moreover, the supervisor explained that, in view of the ongoing communication difficulty between he and grievant, he decided to contact the Human Resource Manager in order to have a neutral party conduct the investigation. Under the circumstances, the supervisor's decision was a reasonable management decision.

Grievant argues that the agency based the discipline on hearsay. In administrative proceedings, hearsay is admissible evidence. If the evidentiary weight of hearsay evidence is preponderant, it may even overcome grievant's sworn denial. However, in this case, the agency has averred that it based its decision to discipline not on the hearsay evidence, but on grievant's own admissions about her actions. Grievant admitted to making the call, to being secretive about the call, to making inappropriate statements to the eligibility worker, and to attempting to avoid disclosure of the call to others. Thus, it was grievant's admissions that resulted in the disciplinary action – not the hearsay evidence.

Retaliation

Grievant asserts that the disciplinary action was retaliatory because she had requested mediation. 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.[13] 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. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law.

While grievant suffered an adverse employment action (the disciplinary action at issue herein), she has not shown that she engaged in any protected activity, as that term is defined above. Even if one could conclude that her request for mediation is a protected activity, grievant has not shown any nexus between her request and the disciplinary action in this case. Moreover, the agency has demonstrated, by a preponderance of evidence, that it had a non-retaliatory business reason to issue the disciplinary action. Further, testimony at the hearing established that grievant's supervisor had rated her "Extraordinary Contributor" on some aspects of her performance in his most recent evaluation. Such high ratings are inconsistent with an allegation that the supervisor's disciplinary action was retaliatory.

[13] § 9, EDR *Grievance Procedure Manual*, August 30, 2004.

The agency considered mitigating circumstances such as grievant's past satisfactory performance and the absence of any prior disciplinary actions. However, based on the seriousness of the incident, it was determined that counseling would be an insufficient measure to emphasize the inappropriateness of grievant's behavior. It is concluded that grievant's behavior was equivalent to unsatisfactory work performance and therefore constitutes a Group I offense.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on March 9, 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.[14] 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.[15]

[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

[14] 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).

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