

Issue: Group II Written Notice with suspension (failure to follow instructions and failure to comply with established written policy); Hearing Date: 08/09/05; Decision Issued: 08/11/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8133



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8133

Hearing Date: August 9, 2005
Decision Issued: August 11, 2005

PROCEDURAL ISSUE

Grievant requested as part of his relief that he be transferred to another position. A hearing officer does not have authority to transfer employees.¹ Grievant also requested that a manager be removed from state employment. A hearing officer does not have authority to take adverse action against any employee.² 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
One witness for Grievant

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

² § 5.9(b)6. *Ibid.*

Assistant Right-of-Way Manager
Representative for Agency
One witness for Agency
One Observer 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 discriminate, harass, retaliate or otherwise treat grievant unfairly?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice issued for failure to follow supervisory instructions and failure to comply with established written policy.³ As part of the disciplinary action, grievant was suspended without pay for five days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴ The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant as a property management specialist for 15 years.⁵

For several years the agency has stressed the importance of every employee recording their time in a manner that accurately posts expenditures to the correct project number.⁶ Inaccurate reporting can result in incorrect billing to local government agencies for which VDOT performs work. Agency policy provides that "It is the responsibility of all employees to report their work hours accurately and in a timely manner. ... In addition to entering your time in FMSII promptly, you **must** keep a daily written record such as a diary, notes on a calendar, etc., showing what you worked on and for how long. Your supervisor may ask to see these records at any time. Failure to keep or produce such records upon request is a violation of this policy."⁷

Effective January 1, 2004, the agency created four new Cost Center codes to be used when crediting revenue from the sale of property. The instructional memorandum noted that employees using these Cost Center codes would have to be able to track and justify charges when needed.⁸ Two months after implementation of the new codes, the District Right-of-Way (ROW)

³ Agency Exhibit 2. Group II Written Notice, issued September 28, 2004.

⁴ Agency Exhibit 1. Grievance Form A, filed September 28, 2004.

⁵ Agency Exhibit 5. Grievant's Employee Work Profile Work Description.

⁶ Agency Exhibit 2. Memorandum from District Administrator to all employees, May 30, 2001.

⁷ Agency Exhibit 2. Policy 30430.01, *Policy for Entering Project/Time Information into FMSII*, September 15, 2003.

⁸ Agency Exhibit 2. Memorandum, December 19, 2003.

Manager⁹ expressed concern to his Assistant Manager about the amount of time being charged to Cost Centers.¹⁰ He directed her to monitor the amount of time being charged by employees making property management charges. As a result, grievant's supervisor instructed him to justify each and every charge made to Cost Centers. The memorandum stated, in pertinent part, "Please do not charge your time to Cost Centers, if you are not working on them, and only charge to them the actual hours that you are working."¹¹

By July 2004, the Assistant ROW Manager felt that the 10 employees who charged Cost Center codes were sufficiently acclimated to their use and she decided to review the time charged by each employee. For the period of June 25 through July 9, 2004, she reviewed Property Management Status Reports,¹² RUMS Management System Reports,¹³ Time Sheet reports,¹⁴ and departmental Sign-out Sheets.¹⁵ From this information, she compiled a form that summarized hours charged by each employee and her conclusions about the review.¹⁶ On August 11, 2004, the Assistant Manager met individually with each of the 10 employees to discuss the results of her review.¹⁷ Six of the employees had no problems and their reviews were deemed satisfactory. The assistant manager had questions about the results for four employees, including grievant. She asked each of the four to provide within 24 hours their daily diaries to substantiate the hours they were charging. Two of the employees did so and their data satisfactorily resolved the questions raised by the reviews.

Grievant and one other employee were unable to satisfactorily resolve the questions raised by the review. The other employee was removed from state employment because of the improprieties revealed by the review. Grievant failed to submit a diary of his daily work and instead submitted a memorandum to the Assistant Manager acknowledging that his sign-out sheets were inaccurate and promising that, in the future, he would make a more detailed record of his work.¹⁸ To give grievant the benefit of the doubt, the Assistant Manager decided to review an additional period of work to ascertain whether the first review was only an aberration. She then began a review of the period from June 1 through June 24, 2004. The second review produced similar results to the first. For the period reviewed from June 1 through July 9, grievant charged 192 hours to Cost Centers. However, because grievant had incomplete or no diary data, he was able to justify only 28.5 hours of work performed. The Assistant Manager met with grievant on September 2, 2004 to discuss the review results. When grievant was unable to justify his charges, the Assistant Manager told grievant, as she

⁹ Grievant Exhibit 1. Organization Chart, Right-of-Way and Utilities, October 25, 2004.

¹⁰ Agency Exhibit 5. E-mail from ROW Manager to Assistant Manager, March 18, 2004.

¹¹ Agency Exhibit 2. Memorandum from supervisor to grievant, April 5, 2004.

¹² Agency Exhibit 7.

¹³ Agency Exhibit 8.

¹⁴ Agency Exhibit 9.

¹⁵ Agency Exhibit 10.

¹⁶ Agency Exhibit 11.

¹⁷ Agency Exhibit 13. Meeting notes, August 11, 2004.

¹⁸ Agency Exhibit 12. Memorandum from grievant to Assistant ROW Manager, August 12, 2004.

had done in the meeting on August 11th, that his failure to document his daily work as instructed could result in disciplinary action up to and including discharge. She again gave grievant 24 hours to provide documentation to support his work charges.

The following day, grievant submitted a memorandum of what he did on four days but he did not submit a daily diary or state that he had one. About one month after the Assistant Manager first requested grievant's daily diary, grievant submitted several handwritten sheets that he characterized as a "journal." Grievant said he had kept these sheets at home rather than in his office at work. The Assistant Manager summarized the information grievant provided along with her assessment of the data as compared to agency records.¹⁹ The results substantiate the Assistant Manager's conclusion that the majority of grievant's charged time is undocumented.

The Assistant Manager consulted with Human Resources and decided that the most appropriate level of discipline was a Group II Written Notice with five-day suspension.

Grievant filed a grievance on July 28, 2004, alleging that the ROW Manager had discriminated, harassed, and retaliated against him because the grievant had not been granted permission to take a training course that he requested.²⁰ Because grievant made the same complaints in the instant grievance, the agency's District Civil Rights Manager thoroughly investigated grievant's allegations. He found that the Assistant ROW Manager's review was properly and fairly conducted, and that there was no evidence of any discrimination, harassment, or retaliation.

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:

¹⁹ Agency Exhibit 12. 3-page comparison of grievant's data vs. Asst. Manager's response.

²⁰ Grievant Exhibit 3. Grievance Form A, July 28, 2004.

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.²¹

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.²² Failure to follow supervisory instructions, and failure to comply with established written policy are two examples of Group II offenses.

The agency has shown, by a preponderance of evidence, that grievant failed to follow supervisory instructions and failed to comply with established written policy. The policy requiring a daily written record (Policy 30430.01) is unambiguous as are the subsequent memoranda regarding Cost Center coding. When questioned about the time he charged to various cost centers, grievant was unable to produce documentation to support most of the time he charged. Even after several weeks, when grievant produced pages from what he characterized as a journal, the information he provided did not document or justify the time he charged. At this hearing, grievant failed to produce his journal as evidence and he has offered no other documentation to support or verify the time he claims to have spent on various projects. When asked to verbally state what he had done on various dates, grievant failed to provide any specifics and instead described some of his general responsibilities.

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

²² Agency Exhibit 3. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant's failure to properly and completely document his daily work activities has placed the agency in the awkward position of billing local governments for work that cannot be documented or justified. If the agency is unable to bill for such work, the revenue that the agency would otherwise have received will be lost.

Grievant takes issue with the Assistant Manager's review of his work, contending that only the agency's Internal Audit department may conduct an audit. The Internal Audit department reports to the Commissioner and, therefore, takes its instructions from the Commissioner.²³ However, while that department is charged with undertaking such audits as the Commissioner may direct, there is nothing in the Internal Audit Charter that precludes individual managers from reviewing the work of subordinates. In fact, part of the job of every manager is to supervise, monitor, and review the work of subordinates to assure that it is performed according to management instructions and according to established written policies. Accordingly, grievant's assertion that the Assistant ROW Manager's review was somehow extramanagerial is without foundation or merit.

Discrimination

Grievant alleges that he was discriminated against by the ROW Manager. To sustain a claim of discrimination, grievant must show that: (i) he is a member of a protected group; (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's protected classification.²⁴ Grievant has satisfied the first, second, and third prongs of this test because he is African-American, was disciplined, and was performing at a satisfactory level prior to the disciplinary action. However, grievant has not shown that the discipline was based on the fact that he is African-American. In fact, during the hearing grievant failed to proffer any evidence regarding his allegation of racial discrimination. Therefore, grievant has failed to prove that the agency discriminated against him.

Harassment

Grievant failed to offer any evidence to show that he has been subjected to harassment.

Retaliation

Grievant asserts that the ROW Manager retaliated against him because on July 28, 2004, grievant had filed a grievance against him.²⁵ Retaliation is defined as actions taken by management or condoned by management because

²³ Grievant Exhibit 8. Department Policy Memoranda Manual, 1999.

²⁴ *Cramer v. Intelidata Technologies Corp.*, 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

²⁵ Grievant Exhibit 3. Grievance Form A, filed July 28, 2004. [NOTE: The grievance of July 28, 2004 was resolved during the resolution steps, was not qualified for hearing, and has now been closed.]

an employee exercised a right protected by law or reported a violation of law to a proper authority.²⁶ To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he 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. Grievant has satisfied the first two prongs of the above test because he filed a prior grievance and thereafter was disciplined.

However, grievant has failed to demonstrate any connection between the two events. Moreover, the agency has demonstrated that it had a non-retaliatory reason to issue the discipline at issue herein. In addition, testimony established that the ROW Manager had been instrumental in preventing the agency from removing grievant from state employment when grievant previously had a problem in a different work unit. The Manager also decided in the instant case, that grievant could be salvaged and that he should receive only a Group II Written Notice rather than be discharged. Finally, the evidence demonstrates that the Assistant Manager had begun her review on July 15, 2004 – 13 days before grievant filed his grievance. Accordingly, grievant has not borne the

Grievant's argument that such a notice is to be provided at the time of the disciplinary action (the Written Notice) is without merit. Grievant was given far more advance notice (from August 11 to September 28) than most employees receive. He therefore had ample time to present whatever evidence he could. Grievant failed to offer any satisfactory evidence at any time prior to the disciplinary action being taken.

Grievant argues that the level of discipline was not justified because there is no evidence that grievant intentionally attempted to defraud the state. If there had been sufficient evidence of attempt to defraud, the agency would have been justified in issuing a Group III Written Notice and removing grievant from state employment. However, the agency concluded that grievant's failure to document his time as instructed constituted a knowing and willful failure to follow both verbal and written instructions. Such an offense meets the definition of a Group II offense because a second such offense would warrant removal from employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and five-day suspension issued on September 28, 2004 are hereby UPHELD.

Grievant has failed to show that the agency discriminated, harassed, retaliated, or treated him unfairly.

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.²⁸ 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.²⁹

[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

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).

²⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.