

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions and use of obscene or abusive language); Hearing Date: 11/15/05; Decision Issued: 11/21/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8207; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8207

Hearing Date: November 15, 2005
Decision Issued: November 21, 2005

APPEARANCES

Grievant
Acting Facility Manager
Representative 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?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice issued for failure to follow supervisory instructions and for obscene or abusive language.¹ 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.² The Virginia Department of Transportation (Hereinafter referred to as “agency”) has employed grievant as a safety services patroller for 13 years. Grievant has one inactive disciplinary action for failure to follow a supervisor’s instructions and disruptive behavior when he made an obscene gesture with his middle finger at his supervisor.³

On April 15, 2005, grievant and a bridge tunnel patroller were in the emergency garage ready room. Grievant’s supervisor came to the ready room and the conversation turned to a visit made earlier that day to the area by the acting facility manager. Grievant recited a version of the visit he had heard from another employee. The supervisor told grievant that his version was incorrect and that grievant should not repeat it because that leads to incorrect rumors getting started. The conversation between grievant and his supervisor became heated with both raising their voices. Grievant told the supervisor to stop yelling. Grievant then put his fingers in his ears and told the supervisor to shut up and get out of the office. The supervisor told grievant that he was the supervisor and did not have to shut up or get out of the office. Grievant then telephoned the traffic control supervisor (the second level supervisor). While grievant was on the telephone he and his supervisor continued talking loudly to each other. The supervisor called grievant a “know-it-all.” During this conversation, grievant was holding the telephone with his left hand. With his right hand he extended the middle finger while looking directly at the supervisor in a gesture often referred to as “flipping the bird.”⁴

Although grievant later claimed that that the telephone had slipped from his left hand during the phone call, neither the supervisor nor the other employee in the room saw the telephone slip at any time. The traffic control supervisor, who was on the other end of the telephone conversation, did not detect a pause, an exclamation, or any other indication suggestive of the phone slipping out of grievant’s grasp.

The traffic control supervisor immediately thereafter came to the ready room and told both grievant and the supervisor to lower their voices. When the supervisor reported that grievant had given him “the finger,” grievant initially denied doing so. Later that evening, grievant told the traffic control supervisor

¹ Agency Exhibit 2. Group II Written Notice, issued May 5, 2005.

² Agency Exhibit 1. Grievance Form A, filed May 5, 2005.

³ Agency Exhibit 7. Group II Written Notice, issued February 27, 2001.

⁴ Agency Exhibit 8. E-mail from supervisor to traffic control supervisor, April 18, 2005. See also Agency Exhibit 5. Written statement of bridge tunnel patroller who witnessed the incident.

that he wanted to speak with his supervisor in order to apologize for having made the inappropriate gesture toward his supervisor.

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 employee must present his evidence first and must prove his claim by a preponderance of the evidence.⁵

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. Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in

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

nature, and are such that an accumulation of two Group II offenses normally should warrant removal from employment.⁶ Failure to follow supervisory instructions is an example of a Group II offense. Use of obscene or abusive language is a Group I offense.

The agency has demonstrated that grievant made an obscene gesture with his middle finger toward his supervisor. Grievant's action was witnessed by both the supervisor and another employee, both of whom testified credibly and directly about the incident. Moreover, grievant admitted to the traffic control supervisor that he had made the gesture and, he subsequently admitted to the acting facility manager that he had made a gesture (although he contended it was inadvertent rather than deliberate).

Grievant has given several inconsistent versions of the finger incident. At first, he denied altogether giving his supervisor the finger. Later the same day he admitted to the traffic control supervisor that he *had* given the finger. Subsequently, grievant wrote his description of the incident and claimed that he raised his right index finger as a gesture to ask the supervisor to be quiet while he was on the telephone.⁷ As he did so, the telephone in his left hand slipped and he tried to catch it with his right hand and that his actions could have been misinterpreted. Later, in a meeting with the acting facility manager, grievant said that when the phone slipped, he grabbed it with his *left* hand and the middle finger may have been inadvertently extended. At the hearing, grievant asserted that he raised his *right* hand, palm toward the supervisor, and that his middle finger was separated from the rest of the fingers because he had been counting the number of times he had told the supervisor to stop yelling. Grievant's multiple versions of the incident are inconsistent with each other. Even grievant's written version of the incident is inconsistent with the version he testified to at the hearing. Moreover, two credible witnesses have testified that grievant deliberately "gave the finger" to his supervisor. Accordingly, the agency has shown, by a preponderance of evidence that grievant did make an obscene gesture toward his supervisor.

Grievant asserts that he was justified in telling his supervisor to leave "his" office. Offices are provided to employees as places to conduct work; employees do not own or have proprietary rights to the office in which they work. A supervisor has the right to enter the office used by his employee. When, as in this case, the supervisor is conducting business, the supervisor has a right to stay in the employee's office. Employees cannot order their own supervisor to leave the office. Such conduct is flagrantly insubordinate and is equivalent in severity to the offense of failing to follow a supervisor's instructions. In this instance, grievant had been warned in a previous disciplinary action that "giving the finger" to a supervisor is an offense for which he can be disciplined. Making

⁶ Agency Exhibit 3. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁷ Agency Exhibit 2. Grievant's written description of the incident, undated.

the same obscene gesture to the same supervisor is a failure to follow supervisory instructions.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and five-day suspension issued on May 5, 2005 are 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.⁸ 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.⁹

[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

⁸ 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).

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.