Issues: Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions and insubordination) and retaliation; Hearing Date: 01/04/06; Decision Issued: 01/06/06; Agency: VDH; AHO: David J. Latham, Esq.; Case No. 8230; Outcome: Agency upheld in full

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8230

Hearing Date: January 4, 2006
Decision Issued: January 6, 2006

APPEARANCES

Grievant
Attorney for Grievant
Employee Relations Manager
Advocate for Agency
Four witnesses for Agency

ISSUES

Did 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 retaliation a factor in the issuance of discipline?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice for failure to follow supervisory instructions regarding inappropriate and disruptive behavior,

and insubordination.[1] Due to an accumulation of active prior disciplinary actions, grievant was removed from state employment effective July 26, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[2] The agency has employed grievant for 19 years as an architect/engineer I.[3] Grievant has two prior active disciplinary actions – a Group I Written Notice for unsatisfactory work performance[4] and, a Group III Written Notice for sleeping during work hours.[5]

In January 2004, grievant was notified in writing that some of his behavior was considered disruptive.[6] Two months later, the Director again counseled grievant in writing about his negative attitude, publicly airing complaints about supervisors, and using inappropriate tone in remarks to supervisors.[7] In November 2004, grievant sent an e-mail to his supervisor that said, *inter alia,* "Apparently neither you or (sic) [Director] can comprehend even a very simple request. In light of your previous actions and your dishonesty …"[8] The supervisor responded to grievant advising him that the tone of the message was inappropriate. In the past, previous Directors had counseled grievant about the inappropriate tone of his memoranda and directed him to cease making such comments.

On March 22, 2005, grievant wrote to the Deputy Commissioner making a number of allegations impugning the honesty and qualifications of his supervisor. The Deputy Commissioner investigated the allegations and responded in a detailed letter explaining that many of the decisions grievant attributed to grievant's supervisor had, in fact, been made by other management people.[9] The Deputy Commissioner advised grievant that grievant's continuing efforts to undermine his supervisor could result in disciplinary action.

On April 12, 2005, grievant and his supervisor participated in a meeting of deputy field directors (DFD) at which at least eight people were present. While the morning session was conducted without incident, grievant was openly critical of his supervisor during the afternoon session. Grievant asked his supervisor why the supervisor did not keep him informed. The supervisor responded that he does keep grievant informed, that their offices are next door to each other, and that they had weekly staff meetings. The supervisor then told grievant that this meeting was not the place to discuss this matter and that they would discuss it later.[10] Grievant then accused the supervisor of failing to act on a draft

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[1] Agency Exhibit 2. Group II Written Notice, issued July 26, 2005.
[2] Agency Exhibit 1. *Grievance Form A*, filed August 23, 2005.
[3] Grievant Exhibit 2. Grievant's Employee Work Profile, effective October 25, 2003.
[4] Agency Exhibit 8. Group I Written Notice, issued August 26, 2004.
[5] Agency Exhibit 7. Group III Written Notice, issued August 26, 2004.
[6] Agency Exhibit 9. Memorandum from Director to grievant, January 8, 2004.
[7] Agency Exhibit 9. Memorandum from Director to grievant, March 5, 2004.
[8] Agency Exhibit 11. E-mail from grievant to supervisor, November 30, 2004.
[9] Agency Exhibit 9. Memorandum from Deputy Commissioner to grievant, April 19, 2005.
[10] Agency Exhibit 5. Memorandum from a deputy field director to Director, April 28, 2005.

memorandum on emergency wells. The supervisor responded that neither he nor the Director had the memorandum. When grievant implied that the Director was lying, the supervisor asked grievant if he was calling the Director a liar; grievant responded that he was. Grievant then accused his supervisor of preventing him from taking training. The supervisor told grievant that the DFD meeting was not the place for a discussion of grievant's individual training.[11] After that meeting, grievant never came to his supervisor to discuss any of the criticisms he had directed at the supervisor.

In July 2005, grievant sent an e-mail to the Director referring to him as a "jerk."[12] As a result of this e-mail, the Director determined that grievant's continuing behavior as evidenced in part by his conduct during the April 12th meeting was disruptive, detrimental to office morale, and undermined agency effectiveness. Grievant was given a due process notification that discipline was being considered and that he had the opportunity to provide a response.[13] On the morning of July 26, 2005, grievant had a conversation with his supervisor in which he called the supervisor a liar and told him to leave grievant's office.[14] Subsequently, grievant was given a Group II Written Notice and removed from state employment. The Director delayed the issuance of discipline following the April meeting because he was aware that grievant had applied for positions outside the agency and the Director did not want to jeopardize grievant's chances of obtaining other employment.

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:

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[11] Agency Exhibit 6. Supervisor's documentation of April 12, 2005 meeting.
[12] Agency Exhibit 4. E-mail from grievant to supervisor, July 6, 2005.
[13] Agency Exhibit 2. Memorandum from Director to grievant, July 12, 2005.
[14] Agency Exhibit 2. Memorandum from supervisor to file, July 26, 2005. [The memorandum is actually dated July 26, 2004 but the substance of the memorandum makes it clear that the date of 2004 was in error].

> 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, such as an allegation of retaliation, the grievant must present his evidence first and prove his 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 (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. 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 follow supervisory instructions and insubordination are two examples of Group II offenses.

The agency has shown that grievant failed to follow supervisory instructions to change his negative attitude, cease public criticism of his supervisors, and cease using inappropriate tone in his remarks to supervisors. The agency has also demonstrated that grievant's behavior during the April 12, 2005 meeting was disruptive and insubordinate. The documentation and testimony regarding the April 12th meeting provided by grievant's supervisor was corroborated by the memorandum and testimony of a deputy field director who had also been at the meeting. Another deputy field director read the memorandum of her fellow DFD and agreed with the description of what had occurred. Accordingly, the preponderance of evidence outweighs grievant's denial that his behavior was inappropriate and disruptive.

The agency has given grievant multiple opportunities to modify his behavior in the past. In early 2004, after twice counseling grievant, the Director

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[15] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[16] Agency Exhibit 3. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

hoped that grievant would respond in a positive manner. Similarly, when grievant was disciplined in August 2004, the agency could have removed him from state employment at that time but decided to retain him due to the length of his state service. Even the agency's Deputy Commissioner counseled grievant that his continued negative behavior could result in disciplinary action.

Grievant asserts that the DFD meetings were open and discussion was wide-ranging. Others agreed with that assessment but stated that the meetings were limited to technical and policy issues as they affect all or different areas of the state. One witness who has attended the meetings for 10 years characterized past meetings as light and cordial. However, the meeting on April 12th was unlike any he had ever attended because he had never witnessed anyone make personal attacks on another person. Another attendee at the April 12th meeting said he was uncomfortable during grievant's comments to his supervisor and that grievant's behavior had delayed the meeting from its regular agenda.

Grievant contends that the supervisory-subordinate relationship is suspended during the DFD meetings and that this, in effect, gives him license to criticize his supervisors and management. However, grievant offered no documentation or other evidence to support his contention. Absent any evidence of such a suspension of the supervisory-subordinate relationship, it is presumed that whenever employees are at work the relationship remains in effect. No matter how open and free-wheeling meetings about technical issues may be, the supervisory-subordinate relationship is always in effect.

Aside from the April 12th meeting, the evidence is preponderant in showing that grievant failed to comply with supervisory instructions to cease being negative and to improve the tone of his remarks to supervisors. On multiple occasions he referred to his supervisor and to the Director either as dishonest or as liars. A review of grievant's e-mails reflects negativity, cynicism, and remarks that are insubordinate. As the Director testified, grievant's e-mail calling the Director a "jerk" was simply the last straw in a continuing pattern of negative behavior. Grievant attempted to suggest that he only used the word "jerk" because he felt like he was being jerked around. However, grievant's statement made no mention of being jerked around; rather he stated unambiguously that the Director is a "jerk."

Grievant's insubordinate behavior was again apparent when he told the supervisor he was a liar and to get out of his office. As a state employee, the office grievant works in is not "his" office; it is the state's office. As the person responsible for supervising grievant and his work, the supervisor has a right to come into grievant's office at any time and to remain as long as necessary. Grievant's order to his supervisor to leave a state office in which he has business is plainly insubordinate. Such insubordination is a Group II offense because a repetition of such behavior warrants removal from state employment.

Viewing the evidence in the light most favorable to grievant, his behavior during the April 12th meeting was disruptive because it delayed the meeting, made people uncomfortable, and caused documentation of his behavior to be prepared that would not otherwise have been necessary. Grievant's disruptive behavior is therefore a Group I offense. However, even if this disciplinary action were to be reduced to a Group I Written Notice, grievant's accumulation of active disciplinary actions is more than enough to warrant removal from state employment.

Retaliation

In his written grievance, grievant alleged retaliation. 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.[17] 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.

Although grievant did not articulate the specific protected activity he purportedly participated in, it will be inferred for the sake of analysis that grievant's previous participation in the grievance process is the protected activity. Accordingly, it may be concluded that grievant did participate in a protected activity and thereby satisfies the first prong of the test. A disciplinary action constitutes an adverse employment action and thereby satisfies the test's second prong. However, grievant has failed to present any evidence that would demonstrate a nexus between his prior participation in the grievance process and the current discipline. There is more to proving retaliation than merely making the allegation.

Grievant made a similar allegation in his previous grievance but the hearing officer determined the allegation to be without substance. Grievant suggests that a leave request he made in late 2004 was not responded to by management and that this constitutes evidence of retaliation. Grievant offered no evidence to prove this allegation. Moreover, even if grievant could prove the allegation, he did not timely grieve this event.[18] In addition, this alleged

[17] EDR *Grievance Procedure Manual*, p.24.

[18] § 2.4, EDR *Grievance Procedure Manual,* provides that a grievance must be presented to management within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the grievance.

retaliation is unrelated to the reason for the current disciplinary action. Finally, the agency has demonstrated that the current disciplinary action was issued for a legitimate business reason that is neither pretextual nor retaliatory. Therefore, grievant has failed to prove that there was any retaliatory motive in the agency's decision to issue discipline.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and removal from state employment effective July 26, 2005 is hereby UPHELD.

Grievant has not shown that there was any retaliatory motive in the agency's decision to issue discipline.

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.[19] 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.[20]

[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

[19] 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).

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