

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions); Hearing Date: 01/30/06; Decision Issued: 01/31/06; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8244; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8244

Hearing Date: January 30, 2006
Decision Issued: January 31, 2006

PROCEDURAL ISSUE

In lieu of termination, grievant suggested as relief that she would be willing to accept a demotion. A hearing officer may only reinstate an employee to their former position or, if occupied, to an objectively similar position.¹ A hearing officer does not have authority either to promote or to demote employees.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." Alternatively, grievant suggested she be allowed to resign in lieu of termination. This also is a form of relief which a hearing officer has no authority to provide.³

The hearing officer advised grievant's attorney and the agency representative that the parties could settle the case by agreeing to either of the two alternatives suggested, if the parties mutually agreed to make such a settlement. The parties discussed these two alternatives but did not reach such a settlement and, therefore, this decision is being issued.

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

² § 5.9(b)3 & 4. *Ibid.*

³ § 5.9(b)8. *Ibid.*

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Employee Relations Manager
Advocate for Agency
Three 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?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice for failure to follow a supervisor's directive.⁴ Due to an accumulation of active prior disciplinary actions, grievant was removed from state employment effective October 7, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.⁵ The agency has employed grievant for five years as an administrative and program specialist.⁶ Grievant has three prior active disciplinary actions – a Group I Written Notice for profanity and unprofessional behavior in the workplace,⁷ a Group I Written Notice for improper call handling⁸ and, a Group II Written Notice for failing to follow a supervisor's instructions.⁹

Grievant was employed in the customer service center and responded to telephone inquiries statewide from the general public, branch offices, license agents, courts, attorneys, insurance companies and other parties. Her work description requires that she maintain a professional business-like demeanor, and speak clearly and audibly.¹⁰ Among the factors on which she is evaluated are professionalism and appropriate telephone etiquette. During the past year, during weekly or biweekly staff meetings, grievant's supervisor had emphasized

⁴ Agency Exhibit 14. Group II Written Notice, issued October 7, 2005.

⁵ Agency Exhibit 14. *Grievance Form A*, filed October 19, 2005.

⁶ Agency Exhibit 1. Grievant's Employee Work Profile, effective November 1, 2004.

⁷ Agency Exhibit 2. Group I Written Notice, issued May 17, 2004.

⁸ Agency Exhibit 3. Group I Written Notice, issued June 15, 2004.

⁹ Agency Exhibit 4. Group II Written Notice, issued July 20, 2004.

¹⁰ Agency Exhibit 1. Grievant's Employee Work Profile work description, November 1, 2004.

on three or four occasions that representatives should not eat while on the telephone with customers. Employees are permitted to eat at their work stations only at times they are not on the telephone. In January 2005, another supervisor who was temporarily in charge of grievant's area observed both visually and audibly that grievant was eating during telephone calls.¹¹ Most recently, grievant's supervisor counseled grievant about eating during calls after monitoring her in June 2005.¹²

In April 2003, grievant was counseled verbally and in writing regarding her failure to follow supervisory instructions.¹³ In June 2003, grievant was again counseled for the same problem.¹⁴ In February 2004, was counseled for failing to follow instructions.¹⁵ Then, beginning in May 2004, grievant was disciplined on three separate occasions for the reasons cited in the first paragraph of this section.

The agency employs up to 40 telephone customer service employees assigned to four teams, each with its own supervisor. The telephone system in the call center incorporates a call management system for routing calls to representatives, and for management oversight of employee performance.¹⁶ Each telephone has a number of push buttons that permit the system to record various performance parameters. Among these functions, the "After Call" function is used when the representative has completed a telephone call but has to perform work necessary to resolve a question that occurred during the call (reviewing microfilm, etc.). An "Auxiliary Work" button is used for lunch, breaks, restroom visits, training, and other special projects. The "Mute" function is "**solely** utilized when agents have a need to cough."¹⁷

The system generates management reports that record the exact time of each call, the buttons pushed by the representatives, the length of time in status, and other information.¹⁸ Another report summarizes the average time a customer waits on hold before being answered, number of abandoned calls, and other management information. Supervisors and management people are able to monitor these reports in real time on their computer monitors.

On the morning of September 28, 2005, grievant's supervisor conducted a staff meeting with her entire team including grievant. The supervisor informed her staff that a newly assigned workforce manager would be monitoring the system that day. She reminded employees that the after-call button was to be

¹¹ Agency Exhibit 9. Agent Monitor Profile, January 6, 2005.

¹² Agency Exhibit 8A. Agent Monitor Profile, June 9, 2005.

¹³ Agency Exhibit 5. Written Counseling memorandum, April 11, 2003.

¹⁴ Agency Exhibit 5A. Written Counseling memorandum, June 14, 2003.

¹⁵ Agency Exhibit 6. Written Counseling memorandum, February 19, 2004.

¹⁶ Agency Exhibit 10. Intranet description of telephone terms/features.

¹⁷ Agency Exhibit 10. *Ibid.*

¹⁸ Agency Exhibit 11. Agent trace by Location report.

used strictly for after-call work.¹⁹ She further reminded them that an employee leaving their workstation for a personal need (restroom) was to use the personal auxiliary button.

Shortly after 11:00 a.m., the workforce manager called grievant's supervisor and asked why grievant had been in "after call" status for seven minutes (an unusual length of time). The supervisor checked grievant's workstation but she was not there. Grievant had not requested permission to leave her work station. The supervisor then encountered grievant returning from the break room carrying a bag of just-popped popcorn. In response to a query from the supervisor, grievant said she wasn't feeling well and needed something to eat. When asked why she used the after-call status for a personal need, grievant shrugged her shoulders. Subsequently, the supervisor monitored grievant's telephone calls and could hear her eating while talking with customers. Grievant went to lunch from 11:31 a.m. to 12:08 p.m. At 12:25 p.m., the supervisor encountered grievant walking toward the break room. Grievant said she was going to get a bag of chips. The supervisor said "No" but grievant continued walking to the break room and said, "But I'm in personal aux."

Grievant was given written due process notice the same day and placed on three days of administrative leave in order to prepare any response she might have. Despite being instructed to provide a response to her supervisor, grievant wrote a response instead to the Director of Assisted Services. In her response, grievant admitted to using the after-call function improperly.²⁰ She also took responsibility for not following policy after being instructed to do so in the meeting on the morning of September 28, 2005. Grievant also admitted to eating while assisting customers but asserted that she used the mute button whenever she was chewing. She acknowledged at the end of her letter that the action taken against her was due to her own inappropriate behavior.

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).

¹⁹ Agency Exhibit 12. Memorandum from supervisor to grievant, September 28, 2005.

²⁰ Agency Exhibit 13. Letter from grievant to Director of assisted services.

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.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 (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.²² Failure to follow supervisory instructions is an example of a Group II offense.

The agency has provided un rebutted evidence that grievant failed to follow her supervisor's directive. On the very morning of the offense, the supervisor had specifically directed grievant and her coworkers not to use the after-call status for anything except actually performing work related functions after a customer call. Despite this admonition, grievant placed herself in after-call status and then went to a break room to pop corn which she then took back to her workstation. Later, less than 20 minutes after returning from her lunch period, grievant again left her work station without supervisory permission to go the break room for a bag of chips. At the times of these two occurrences, customers had been waiting in queue (on hold) for 12 minutes and 15 minutes, respectively. Moreover, in her written response to the due process memorandum, grievant admitted that she had used after-call status improperly and acknowledged that

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

²² Agency Exhibit 1A. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

her behavior had been inappropriate. Therefore, a preponderance of evidence demonstrates that grievant committed the Group II offense of failing to follow her supervisor's instructions.

Grievant asserted that other employees ate during telephone calls and used the after-call status improperly. Two ex-employees who testified on grievant's behalf stated that they had eaten during telephone calls but only while the customer was talking and the mute button pressed. They also stated that they had used after-call status improperly for taking restroom breaks. Grievant's supervisor testified that she was not aware of anyone in her team either eating during calls or abusing after-call status. If she had learned of such problems she would have addressed them in the same manner as grievant's case.

Grievant maintained that, for a portion of the time she was in after-call status, she was actually reviewing microfilm in connection with a prior customer call. Since the agency did not rebut this testimony it is assumed to be true. Nonetheless, grievant also admitted that for the remaining time she walked to the break room, waited for popcorn to pop, and then returned to her work station (estimated to require a total of at least four minutes). This constituted an improper use of after-call status.

In weighing the appropriate level of discipline for an offense, one must consider both mitigating and aggravating circumstances. While grievant does not have long state service, her work performance was otherwise satisfactory and she was well liked by coworkers, supervision, and some customers.²³ However, these mitigating circumstances are outweighed by several aggravating circumstances. First, grievant had developed a pattern of not following supervisory instructions in the past. This pattern was documented in various counseling sessions in 2003 and 2004, and in three formal disciplinary actions later in 2004. In addition, a few years ago employees had been repeatedly warned not to park in the lot reserved for customers. Despite these supervisory and management instructions, grievant received 13 parking citations for parking in the customer lot.

Second, grievant had repeatedly been counseled not to eat while engaged in a customer telephone call but continued to do so on September 28th. This reflects a lack of proper telephone etiquette, as is required in grievant's job description. It also suggests a lack of concern for customers, as does grievant's leaving her workstation to get food just before and after lunch when customers had been holding on the phone for up to 15 minutes.

Finally, and most significantly, grievant had been specifically warned on the morning of September 28th to use after-call status *only* for actual after call work. Notwithstanding this unambiguous directive, grievant chose to violate the

²³ Grievant Exhibit 1. GEM Awards 2001-2004.

instruction and policy. This demonstrates a willful and knowing decision to ignore a supervisor's instructions.

Grievant suggested, through questions posed to agency witnesses, that her offense should only be considered unsatisfactory work performance – a Group I offense. For reasons already discussed, the evidence supports a conclusion that her offense was the Group II offense of failing to follow the supervisor's direct instruction. However, even if grievant's offense could be deemed only a Group I offense, this fourth active disciplinary action would nonetheless still result in removal from state employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and removal from state employment effective October 7, 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.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]

S/David J. Latham

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.