Issues: Group II Written Notice (failure to follow supervisor's instructions) and retaliation; Hearing Date: 02/21/06; Decision Issued: 02/24/06; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8260; Outcome: Agency upheld in full

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8260

Hearing Date: February 21, 2006
Decision Issued: February 24, 2006

PROCEDURAL ISSUES

Grievants C & M requested that their grievances be consolidated for a single hearing. The Director of the Department of Employment Dispute (EDR) Resolution consolidated the two grievances for hearing.[1] The merits of each grievance have been independently assessed and separate decisions are being issued for each case.

Grievant requested as part of her relief that she receive an apology. A hearing officer does not have authority to require issuance of an apology.[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 C
Grievant M
Attorney for Grievant

[1] EDR *Compliance Ruling of Director* Numbers 2006-1129 & 2006-1131, October 5, 2005.
[2] § 5.9(b)6 & 7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

One witness for Grievant
Human Resource Manager
Attorney for Agency
Nine 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? Did the agency retaliate against grievant?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written notice for failure to follow supervisor's instructions.[3] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[4] The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant for 29 years; she is a Program Administration Manager II, and manages a customer service center office.[5]

The Commonwealth's hiring process is detailed and provides that all persons hired for classified positions much be interviewed.[6] Interviews may be conducted by the hiring authority or by a person or panel of individuals designated by the hiring authority. The hiring authority is the person making the hiring decision. The agency has promulgated its own hiring policy that is similar to and consistent with the Commonwealth's policy.[7]

During the first part of 2005, the District Manager had become aware that the hiring process in some offices within her district appeared to be too subjective. Nepotism, favoritism, and pre-selection appeared to be factors in the hiring selections of some managers. Accordingly, the District Manager formulated an Interview and Selection Protocol for use by all offices within her district.[8] She first sent her proposed protocol to be reviewed by her supervisor (Field Operations Director) and by the Human Resources Director and others in the Human Resources Department. All involved reviewed and approved the protocol. On June 2, 2005, the District Manager sent the new protocol to grievant and other managers in her district. On June 21, 2005, she held a meeting with all managers in her district, verified that all had received the

[3] Agency Exhibit 41. Group II Written Notice, issued August 18, 2005.
[4] Agency Exhibit 41. *Grievance Form A*, filed September 6, 2005.
[5] Agency Exhibit 42. Employee Work Profile.
[6] Grievant Exhibit 29. DHRM Policy 2.10, *Hiring*, revised October 10, 2003.
[7] Grievant Exhibit 30. DMV *Employment Policies and Procedures*, revised May 1, 2004.
[8] Grievant Exhibit 31. DMV *Interview and Selection Protocol*, June 1, 2005.

protocol, and asked if anyone had any questions about the policy. Grievant did not ask any questions. Grievant was scheduled to conduct panel interviews for a position the following day, June 22, 2005.

The new protocol provides that candidates for classified positions must be interviewed by a three-person panel. The panel consists of the local office manager and two other members selected by the District Manager. The District office provides to the panel the interview questions and applications for those who pass the initial screening by human resources. Panel members must not discuss the applicants until after all interviews have been conducted and only if there is no agreement on who should be hired. Each panel member receives a score sheet to record scores for applicants following each interview.[9] After all applicants have been interviewed, scores are tallied and the names of the top three applicants are placed in rank order on each panel member's "Preliminary Applicant Ranking" sheet.[10] The selected applicant is to be chosen by the majority of panel members. "If there is no majority, or should the panel chair strongly disagree with the majority decision, the panel chair should contact the District Manager to discuss the proper method for making the selection. The panel chair must not coerce other panel members. Coercion includes, but is not limited to, remarks about the abilities of applicants, who the chair wants to hire, etc."[11]

For the scheduled panel interviews on June 22, 2005, the District Manager had selected two generalists (one male and one female) from two other offices to be on the panel with grievant, who served as the chair. Neither of these employees had previously served on an interview panel, and they had no knowledge of any of the applicants. They did not receive any instructions on the interview process until the morning of June 22, 2005. Several of the applicants to be interviewed had been working in wage positions in grievant's office and therefore she had extensive knowledge about them. When the panel convened and began to conduct interviews on June 22, 2005, grievant made comments about some applicants after the applicants left. She told the other two panelists that applicant A was dependable, but that applicant J had many unscheduled absences.

When all interviews had been completed and the score sheets tallied, the two panelists from other offices both agreed that applicant C was the highest scoring candidate. Grievant had scored applicant A highest. Although the majority selection was applicant C, grievant strongly disagreed with the majority decision. Grievant then placed a telephone call to the District Manager and requested to discuss with the other two panelists information she knew about the top three candidates. The District Manager told grievant not to discuss the applicants. Instead, she told grievant that she could total the individual numeric

[9] Agency Exhibit 45. Score sheets, June 22, 2005.
[10] Agency Exhibit 44. Preliminary Applicant Rankings of the three panelists, June 22, 2005.
[11] Grievant Exhibit 31. DMV *Interview and Selection Protocol*, June 1, 2005.

scores of all three panelists and then rank them based on the combined scores. Otherwise, the majority choice would have to be selected.

When the telephone call ended, grievant told the other two panelists that the District Manager had given her the option to combine all individual scores to determine a ranking. Grievant also said that the District Manager had told her she just wanted grievant to be happy with the final selection. Grievant then told the two panelists additional information about the top three candidates and in particular explained why she felt it would be inconvenient to move applicant C away from her current responsibilities. She also reiterated how dependable, and adaptable applicant A is. After this, the two panelists made new score sheets that resulted in grievant's favored applicant A receiving the highest score. Grievant and the District Manager exchanged a series of e-mails late in the afternoon of June 22, 2005.[12] In the last e-mail, grievant praised applicant A and averred that the other applicants have been counseled about performance deficiencies. The district manager has requested copies of the counseling letters but none have been found. Grievant did not proffer any counseling documents during this hearing.

The following day, June 23, 2005, the female panelist came to the district office and spoke to the District Manager. The panelist was upset because she "felt that the right person had been cheated out of the job." The district manager asked the panelist to put in writing what had occurred. The panelist did so and submitted it to the District Manager the next day.[13] The District Manager then telephoned the male panelist and asked for his assessment of the interview panel process. He essentially verified much of what the female panelist said and concluded that it appeared to him that grievant was determined to get who *she* wanted. At the request of the District Manager, he also wrote a statement about the previous day's interview process.[14] After her conversations with both panel members, the District Manager documented the events of both June 22 & 23, 2005 in a memorandum.[15]

During lunch on June 22, 2005, after all but one applicant had interviewed, the two panelists went to lunch together and agreed that so far, applicant C appeared to be the strongest applicant. Neither grievant nor anyone else had instructed them not to discuss candidates until after all scores had been tallied.

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

[12] Agency Exhibit 48. E-mail string, June 22, 2005.
[13] Agency Exhibit 50. Written statement of female panelist, received June 24, 2005.
[14] Agency Exhibit 49. Written statement of male panelist, June 23, 2005.
[15] Agency Exhibit 43. District Manager's memorandum, June 23, 2005.

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, such as allegations of retaliation, the grievant must present her evidence first and prove her claim by a preponderance of the evidence.[16]

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 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 the Commonwealth of Virginia's DHRM *Standards of Conduct* Policy 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.[17] Failure to follow a supervisor's instructions is a Group II offense.

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[16] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[17] Agency Exhibit 26. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

The agency has shown, by a preponderance of evidence, that grievant failed to follow the instructions of her supervisor. Despite written instructions not to discuss the applicants until after the selection process was completed, grievant made comments to the other panelists about applicants after each applicant left the interview room. Despite a verbal instruction from the District Manager not to discuss applicants before the selection was made, grievant praised her favored candidate so much that the two inexperienced, lower-ranking panelists felt coerced into changing their scores to give grievant the result she wanted. The testimony and contemporaneous written statements of both panelists are consistent with each other and outweigh grievant's denial of undue influence on the selection process.

Grievant asserts that only the local office manager is the "hiring authority." However, she has provided no policy or other basis to support this assertion. State policy provides that the hiring authority is the person who makes the hiring decision. In the instant case, the District Manager has determined, with approval from her superiors and Human Resources, that she will have final authority on hiring employees in her district and therefore, she is the de facto hiring authority.

Grievant suggests that she should only be counseled. The agency concluded that coercion of an interview panel is a sufficiently serious offense that it cannot be glossed over with counseling. It is clear in this case that grievant's refusal to comply not only with written instructions but with the unambiguous instructions of her supervisor constitute a willful disregard of policy and instructions – a Group II offense.

Grievant argues that she was not given training on the new protocol. In fact, grievant had the new protocol in her hands for nearly three weeks before the panel interview and therefore had ample time to read it and to ask questions if she had any. The entire protocol is only five pages including sample score sheet and can easily be read and digested in 5-10 minutes. Moreover, on the day before the panel interview, grievant was given a specific opportunity to raise questions about the protocol with the District Manager during the monthly managers' meeting.

Retaliation

In her written grievance, grievant alleged that the disciplinary action was retaliatory because she had taken "actions to prevent or stop criminal activity." 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.[18] 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

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

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 offered absolutely no evidence to show that she took any actions to prevent or stop criminal activity, or that she in any other way exercised her First Amendment rights so as to constitute participation in a protected activity. Since grievant is unable to demonstrate that she engaged in any protected activity, she has not satisfied the first prong of the test. It is therefore unnecessary to consider the other two prongs. Grievant failed to present any evidence - other than unsupported allegation - that retaliation was a factor in the decision to take corrective action. Therefore, grievant has not borne the burden of proving her allegation of retaliation.

Grievant also offered as part of her closing argument a brief asserting that the agency violated grievant's statutory right to freedom of speech. She cites three Supreme Court cases in support of her argument. First, these cases hold that statements by public officials on matters of public concern must be accorded First Amendment protection. In the instant case, grievant's complaints meet this criterion. The *Pickering* case cited by grievant holds that, absent proof of false statements knowingly or recklessly made, the exercise of the right to speak on issues of public importance may not furnish the basis for dismissal from public employment.[19] Unlike *Pickering*, however, the evidence in the instant case supports a conclusion that grievant did not make any such complaint. Second, grievant also asserts that the cited cases stand for the proposition that free speech is protected so long as it does not materially interfere with the efficient operation of agency functions. Since the agency did not argue any such interference, this issue is moot.

Third, grievant suggests that the cited cases hold that free speech is restricted if it can be demonstrated that the adverse employment action was motivated in part in response to the exercise of free speech rights. Grievant asserts that the timing of the disciplinary action is indicative of such a retaliatory motive. This argument is unpersuasive. The discipline was issued less than two months after commission of the offense; this is within the normal range of time for issuance of discipline in cases similar to the instant case.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice, or a Written Notice and up to 10 days suspension. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise

[19] *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968).

satisfactory work performance. In this case, grievant has both long service and an otherwise satisfactory performance record. The agency considered these factors to be sufficiently mitigating that it did not impose a suspension. Based on the totality of the evidence, it is concluded that the agency properly applied the mitigation provision.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice is hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

Grievant has not borne the burden of proof to demonstrate retaliation.

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.[20] 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.[21]

[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

[20] 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).

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