

Issue: Group I Written Notice with suspension and mandatory anger management counseling (disruptive behavior), and Retaliation; Hearing Date: 03/28/06; Decision Issued: 03/30/06; Agency: DGS; AHO: David J. Latham, Esq.; Case No. 8294; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8294

Hearing Date: March 28, 2006
Decision Issued: March 30, 2006

PROCEDURAL ISSUE

Following issuance of a disciplinary action on December 6, 2005, grievant timely grieved the Written Notice. However, in his written grievance, grievant also sought to grieve two earlier disciplinary actions issued in September 2003 and September 2005, and a Notice of Improvement Needed/Substandard Performance issued in September 2005. The Grievance Procedure provides that written grievances must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute.¹ This 30-day requirement may be extended only if the parties agree and, to be enforceable, such an agreement must be in writing. In the instant case, the parties did not agree to extend the 30-day requirement. Accordingly, the disciplinary actions issued on September 24, 2003 and September 12, 2005, and the Notice of Improvement Needed/Substandard Performance issued on September 12, 2005 have become final and are no longer grievable.² Therefore, this decision will address only the Written Notice issued on December 6, 2005.

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

² However, past disciplinary and corrective actions are admissible as evidence if they demonstrate a pattern of same or similar conduct and/or to document an accumulation of active disciplinary actions.

APPEARANCES

Grievant
Attorney for Grievant
Human Resources Director
Representative 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? Did the agency retaliate against grievant?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group I Written Notice for disruptive behavior.³ As part of the disciplinary action, grievant was suspended without pay for five work days and directed to take mandatory anger management counseling. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.⁴ The agency has employed grievant for 12 years as a scientist manager.⁵ Grievant has two prior active disciplinary actions – a Group II Written Notice for failure to follow supervisory instructions issued September 17, 2003, and a Group I Written Notice for disruptive behavior issued September 12, 2005.⁶ Grievant did not timely grieve either disciplinary action.

During the past six years, grievant had been counseled about documented instances of hostile, threatening, or aggressive behavior involving two customers and seven agency employees.⁷ In each instance grievant denied the behavior. In conjunction with the Group I Written Notice issued in September 2005, grievant was given a Notice of Improvement Needed/Substandard Performance⁸ and formal written counseling. The disciplinary action was precipitated by two documented complaints in which grievant had acted in a hostile or threatening

³ Agency Exhibit 18. Group I Written Notice, issued December 6, 2005.

⁴ Agency Exhibit 1. *Grievance Form A*, January 5, 2006.

⁵ Agency Exhibit 8. Grievant's Employee Work Profile, effective December 1, 2004.

⁶ Agency Exhibit 4. Group I Written Notice, issued September 12, 2005.

⁷ Agency Exhibit 6. Counseling memorandum, September 12, 2005.

⁸ Agency Exhibit 5. Notice of Improvement Needed/Substandard Performance, September 12, 2005.

manner toward a customer and, in a separate incident, towards an employee. The agency strongly recommended that grievant obtain professional anger management counseling; grievant did not follow the recommendation.

The Commonwealth's policy prohibiting workplace violence defines this offense to include any verbal abuse including harassment such as shouting.⁹ The policy specifically prohibits engaging in behavior that creates a reasonable fear of injury to another person or subjects a person to extreme emotional distress. Violation of this policy can result in disciplinary action up to and including termination of employment.

One of grievant's responsibilities is to initiate orders for supplies and equipment used in laboratory testing procedures.¹⁰ This is done by completing a requisition in the computer system. The form is then forwarded to the purchasing unit where a contract officer reviews the requisition to assure compliance with applicable regulations and procedures. Usually, most of grievant's requisitions are reviewed by one contract officer. That contract officer has worked with the agency for 31 years; she has known and worked with grievant for the 12 years he has been employed with the agency. During that entire time, grievant and the contract officer have had a good working relationship, have been on good terms with each other, and have never had any fractious encounters.

On November 9, 2005, grievant prepared four requisitions in varying dollar amounts for equipment and supplies to be purchased from the same vendor; the total dollar amount of the requisitions was \$8,380.¹¹ When the contract officer reviewed the requisitions on November 10, 2005,¹² she realized that the combined total of the four requisitions exceeded an established \$5,000 limit for orders to the same vendor. She went to grievant's office and pointed out that the simultaneous submission of multiple orders to the same vendor in amounts that exceeded the \$5,000 limit constituted the prohibited practice of "order splitting." Grievant became irate and told the contract officer she didn't know her job and that he had been ordering supplies in this manner all along. Grievant began yelling at the contract officer stating that she was just trying to make things hard for him. The contract officer denied that and suggested to grievant an alternate method of ordering the supplies that would be within regulations. Grievant yelled that what she was proposing was illegal. The contract officer explained why her

⁹ Agency Exhibit 21. Department of Human Resource Management (DHRM) Policy 1.80, Workplace Violence, effective May 1, 2002.

¹⁰ Agency Exhibit 8. Grievant's Employee Work Profile Work Description, December 1, 2004.

¹¹ Agency Exhibit 1. Requisition numbers PR1142883, PR1142614, PR1142827, & PR1142939.

¹² There was significant confusion about the date of this incident. The contract officer maintained that the incident occurred on November 8, 2005. Others to whom she reported the incident erroneously reported the date as November 16, 2005. Grievant is certain that the date was November 10, 2005. There is no special significance as to the exact date the incident occurred. However, the best evidence is the requisitions which include a computer-added date of preparation of late afternoon on November 9, 2005. Therefore, it is concluded that the encounter between grievant and the contract officer occurred on the morning of November 10, 2005.

alternative was legal. Grievant then told the contract officer he wanted to think about it and told her to leave.¹³

The contract officer was very upset about the manner in which grievant had reacted so angrily and confrontationally and “dismissed” her. She immediately went to the laboratory’s business manager because he is the liaison between the laboratory and the procurement services division in which the contract officer is employed.¹⁴ When the contract officer related the incident to the business manager, she was coherent but quite upset, on the verge of tears, and said she felt almost as if she had been physically threatened. The business manager had never seen the contract officer so upset during his six years of employment. He then escorted her to see grievant’s immediate supervisor, an assistant director. After listening to the contract officer, the assistant director escorted her to speak with the laboratory’s deputy director. When she related the incident again, the contract officer was still very emotional about how grievant had treated her.

After the contract officer returned to her office, grievant came to her office and apologized stating that he was sorry, that he had anger management problems, and that it would not happen again.¹⁵

Discipline was issued following appropriate discussion and consultation with Human Resources professionals.

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).

¹³ Agency Exhibit 11. Memorandum from contract officer to deputy laboratory director, November 21, 2005.

¹⁴ Agency Exhibit 12. E-mail from business manager to deputy laboratory director, November 21, 2005.

¹⁵ The contract officer maintains that grievant apologized to her three times on November 10, 2005. When confronted about this by the Deputy Director on November 21, 2005, grievant did not deny that he apologized multiple times (see Agency Exhibit 13). However, during the hearing, grievant averred that he only apologized once.

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 a claim of retaliation, the grievant must present his evidence first and prove his 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* 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 of Policy No. 1.60 provides that Group I offenses include acts and behavior that are the least severe.¹⁷ Disruptive behavior is an example of a Group I offense.

The agency has borne the burden of proof to demonstrate by a preponderance of evidence that grievant's behavior on November 10, 2005 was disruptive. While grievant denies any inappropriate behavior, the agency's evidence outweighs his denial. First, the contract officer testified credibly about grievant's anger and demeanor during the conversation. Her testimony under oath was consistent with her written account of the incident written within days afterward. The business manager, grievant's supervisor, and the deputy laboratory director all corroborated the contract officer's account of the incident as it was described to them on the day of the incident. They also confirmed that the contract officer was genuinely upset about grievant's behavior. Their written statements are likewise consistent with their testimony at the hearing. Further, grievant's behavior was consistent with the type of behavior for which he has been counseled and disciplined for six years. When grievant was disciplined in

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

¹⁷ Agency Exhibit 20. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

September 2005, the agency felt that his behavioral problem was so serious that it strongly recommended anger management counseling.

Grievant argues that the contract officer was coerced into making a written statement. The contract officer readily acknowledged that she was initially reluctant to make a written statement because she considers grievant to be a "good guy" and she did not want him to get in trouble. The deputy laboratory director also acknowledged that he had encouraged the contract officer to document the incident because of grievant's past behavioral problems. The deputy director was concerned that this incident was a continuation of an unsolved problem of six years standing and wanted to resolve the problem. Just two months earlier, the agency had *strongly* recommended to grievant that he receive anger management counseling. Grievant failed to accept that recommendation. Under these circumstances it was entirely reasonable for the director to obtain documentation from the contract officer. Moreover, as a responsible manager, it was incumbent on the deputy director to take decisive action. Had he not done so, he might be subject to corrective action for not fulfilling his own management responsibilities.

Retaliation

In his written grievance, grievant alleged that the disciplinary action was retaliatory. 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) 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 asserts that he has been outspoken about safety issues in the past and that the discipline is retaliation for his outspokenness. While grievant has not shown that he reported any violations of law to authorities, the agency did not dispute his assertion of outspokenness on safety issues. Accordingly, for purposes of this analysis, it is presumed that grievant's complaints about safety issues were a protected activity. A disciplinary action with suspension constitutes an adverse employment action. Therefore, grievant has met the first two prongs of the test cited above. However, other than speculation, grievant has not shown any connection between the two events. He has offered no testimony or evidence that would link his outspokenness about safety to the disciplinary action. Moreover, the agency has carried the burden of proof to

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

show that the disciplinary action was issued for a non-retaliatory reason, viz., disruptive behavior.

Mitigation

The normal disciplinary action for a Group I offense is the issuance of a Written Notice. Upon the accumulation of three active Written Notices, the employee normally should be suspended without pay for no more than five workdays. 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 satisfactory work performance. In this case, grievant has long service. However, there are aggravating circumstances that outweigh this mitigating circumstance. Grievant had been repeatedly counseled and then disciplined for the same or similar behavior. He had been strongly encouraged to obtain anger management counseling but had failed to do so. Based on the totality of the evidence, the hearing officer concludes that the agency properly applied the mitigation provision.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice, five-day suspension, and mandatory anger management counseling are hereby UPHeld.

Grievant has failed to bear 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.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]

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.