Issue: Group III Written Notice with termination (willfully or negligently damaging or defacing state records); Hearing Date: 05/02/06; Decision Issued: 05/18/06; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8313; Outcome: Agency upheld in full

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8313

Hearing Date: May 2, 2006
Decision Issued: May 18, 2006

PROCEDURAL ISSUE

Grievant requested as part of her relief that the agency pay for a training course and a certification license. Grievant also asked that, if reinstated, the security team escort her back to work. A hearing officer does not have authority to require the agency to pay for either training or a license, or to direct a security team's activity.[1] 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
Attorney for Grievant
Three witnesses for Grievant
Employee Relations Manager

[1] § 5.9(b)1, 7 & 8. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Two Attorneys for Agency
Five 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 grievance from a Group III Written Notice for willfully or negligently damaging or defacing state records.[2] As part of the disciplinary action, grievant was removed from state employment effective January 27, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[3] The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") has employed grievant for seven years as a human resources analyst.[4]

In 2001, grievant attended on different dates three training classes covering: Employment Law/Personnel Recruitment and Selection, Americans with Disabilities Act, and Fundamentals of EEO Law.[5] One of grievant's functions is recruiting applicants and overseeing the interview and selection process. She is required to provide advice to hiring managers and others who participate in the selection process. She is also required to train and inform interview panels on the correct completion of interview paperwork.[6] Interview panelists are given a prepared set of questions that are asked of all candidates. The panelists are to record applicant responses and their reactions to those responses. According to the agency, the interview notes should contain only information and observations obtained during the interview. Any outside knowledge a panelist may have of an applicant should not be included in the interview notes. Following interviews, the panel recommends their choices to the hiring manager and the hiring manager, in turn, makes his recommendations to human resources. The human resources analyst is then expected to check job references of the recommended applicants. The agency prefers that interview notes be recorded in ink and that nothing be erased.[7] If a change is needed, the

[2] Agency Exhibit 1. Group III Written Notice, issued January 27, 2006.
[3] Agency Exhibit 2. *Grievance Form A*, filed February 14, 2006.
[4] Agency Exhibit 4. Grievant's Employee Work Profile Work Description, January 6, 2003.
[5] Agency Exhibit 6. Training transcript.
[6] Agency Exhibit 4. *Ibid.*
[7] This is not stated in policy and the panelists were not so instructed by anyone.

preferred method of correction is to draw a line through the portion to be deleted and have the writer initial and date the deletion.[8]

During the fall of 2003, the agency recruited applicants for two classified carpenter positions in the Plant and Physical Services (PPS) Department. Following the standard screening process, 13 applicants were interviewed. An interview panel of two people recommended six applicants for hiring. Each of the two panelists had previously been on an interview panel several years earlier; however, they had never been trained as to the responsibilities of a panelist. They made their recommendations to the hiring manager, who reviewed the interview notes, made photocopies of the notes, and then turned them over to grievant.[9] Grievant and her immediate supervisor, the employment manager, reviewed the notes. The employment manager instructed grievant to assist the panel to clarify their comments; he did not seek to have a new panel convened. Among those not recommended for hiring was a wage employee who was then employed in PPS. When the employee learned that he had not been selected, he complained to grievant that he had not been treated fairly.[10] Despite explanations provided by both grievant and the employment manager, the employee remained dissatisfied and in April 2004 filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that he had been discriminated against on the basis of his age (70).[11]

In late 2004, the EEOC requested the agency to provide a "position statement" regarding the employee's complaint.[12] The EEOC did not request the agency to submit the interview panelists' notes with the position statement. The Employee Relations (ER) Manager requested a human resources generalist to develop the position statement. The generalist prepared the position statement concluding that the applicant was not selected for the position because he did not meet the KSAs (knowledge, skills and abilities) required by the position. When the generalist questioned grievant about the erasures, grievant said that the two panelists were new and erased the comments of their own volition. Grievant did not tell her that she had directed them to erase the comments. The ER Manager reviewed the position statement, approved it, and forwarded it to the EEOC.

In January 2005, the EEOC contacted the agency and requested the interview panelists' notes. When the ER Manager located the original notes from the two panelists, she immediately noticed that the interviews had been recorded in pencil and that there were obvious erasures in the summary section of the

[8] This is not stated in policy and the panelists were not so instructed by anyone.
[9] Agency Exhibits 7 & 9. Photocopies of the interview notes as originally written by the panelists.
[10] Grievant Exhibit 1. Employment Manager's background information summary, November 19, 2003.
[11] Grievant Exhibit 7. Charge of Discrimination filed by applicant, April 6, 2004.
[12] A "position statement" is EEOC terminology for the agency's official written response to an employee's complaint.

forms.[13] She asked the generalist to question grievant about the erasures; grievant stated that the two panelists were new to the process, did not know what to write, and just erased something on their own. In March 2005, grievant typed a statement which she asked both panelists to sign.[14] Both signed the statement certifying, *inter alia*, that this was the first time they had administratively documented the responses of applicants. This statement contradicted their testimony at the hearing that they had previously served on interview panels.

On January 19, 2006, the ER Manager learned from the hiring manager that he had made copies of the interview notes prior to sending them to grievant. After obtaining his copies, the reason for the erasures became apparent to the ER Manager. The summary comment made by one panelist showed that he had knowledge of the applicant's physical abilities from his employment as a wage employee. The second panelist's summary comment referred to the first panelist's knowledge of the applicant. The ER Manager then interviewed the panelists, both of whom stated that grievant had summoned them to her office soon after the interviews, told them that their summary comments were improper, handed them pencils, and told them to erase their comments on the interview notes. They relied on grievant's knowledge of human resource procedures and complied with her request. While they were meeting with grievant, the employment manager entered the office, reviewed the erased forms, and approved them.

The agency forwarded photocopies of the unerased interview notes to the EEOC. The EEOC then sued the agency.

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

[13] Agency Exhibits 8 & 10. Photocopies of the interview notes showing residue of the erasures on page three. [NOTE: The agency has care, custody and control of the original notes. The original notes were examined by the parties and the hearing officer during the hearing. The erasures were not thorough, contain pink eraser residue, and some of the erased words are still legible.]

[14] Grievant Exhibit 4. Statement signed by panelists, March 3, 2005.

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 grievant must present her evidence first and prove her 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 of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[16] Willfully or negligently damaging or defacing state records, and falsification of any records including reports are examples of a Group III offense.

Grievant denies that she "directed" the panelists to erase their comments. However, grievant acknowledged during the hearing that she "might have guided them" to make the erasures. The two panelists both testified that grievant had instructed them that their summary comments were inappropriate, should be removed, and then handed them pencils with erasers. While grievant may not have said, "I direct you to erase the comments," her words and actions in conjunction with her role as human resource recruiter were sufficient to constitute more than mere guidance. The two relatively inexperienced panelists relied on

[15] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.
[16] Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

grievant's human resource expertise, and understood from her statements that their comments would have to be removed from the interview notes.

It is undisputed that the panelists' comments were inappropriate and should not have been written on the interview forms. The comments suggest that the panelists *may* have based their decision not to recommend the applicant, at least in part, on the fact that his physical problems limited his ability to perform all functions of the carpenter's position. At the interview stage, this is an inappropriate basis upon which to make a recommendation; according to the agency, the recommendation should be made based solely on what occurred during the interview. Accordingly, grievant and the employment manager appropriately recognized that these comments were a problem. Thus, it was not improper to take some form of remedial action. The agency contends that grievant should not have directed (or guided) the panelists to erase comments. Rather, the preferred method is for the interviewer to draw a line through the comment and initial it. Of course, in this case, that method would not resolve the problem because it would still suggest that the interviewer had given *consideration* to the applicant's physical limitations. Since the interviewer should not even have considered this factor, leaving the comment intact was unacceptable. Thus, grievant suggested they erase the comments.

The agency further contends that the best course of action would have been to consider the interview process tainted and request the Human Resource (HR) Director to convene a new panel. While the agency may be correct in its *ex post facto* suggestion of the best course of action, the agency had ample opportunity to take that course of action in 2003 but failed to do so. Grievant's supervisor, the employment manager, reviewed the interview forms both before and after the erasures, yet still approved them. The employment manager could have requested the HR Director to convene a new interview panel. However, the employment manager did not do so, and he was not disciplined for his failure to act.

Accordingly, grievant's direction or guidance to the panelists was not a willful or negligent damaging or defacing of state records. Grievant took what she believed was a reasonable action that would remove inappropriate comments from the forms. Of course, the method that grievant used was not the best course of action. However, the evidence does not show that grievant was deliberately attempting to conceal anything. If she had been attempting to do so, there were certainly better ways of doing it. The erasures were sloppy, incomplete, and are immediately obvious. Had grievant been attempting to totally conceal the comments, she could, for example, have directed the panelists to rewrite their acceptable comments on new questionnaire forms.

The agency argues that grievant misrepresented facts to the EEOC. However, the generalist who prepared the position statement for the EEOC failed to question the erasures or take any action with regard to them before sending

the position statement forward. The generalist was not disciplined either for failing to properly investigate or for failing to report the erased forms.

The agency also cites grievant for knowingly allowing submission of the erased notes to the EEOC. However, the evidence is that grievant was unaware of any notes except the erased notes. At the time the position statement was prepared, no one in the agency was aware that the hiring manager had made a photocopy before submitting the notes to grievant. Since grievant was unaware that unerased copies existed, she cannot be faulted for allowing the only copies she was aware of to be submitted.

The agency also cites grievant for having impeded its investigation. The preponderance of evidence reflects that grievant did not disclose her role in the erasures. Both panelists testified clearly and credibly that they had made the erasures only after grievant had told them to do so. Their testimony outweighs grievant's denial of her direct role in directing them to make the erasures. When the investigation began, grievant's initial response to the Employee Relations Manager suggested that the panelists had made the erasures of their own volition. However, the fact is that the panelists erased the comments because of grievant's direction to do so. Thus, the agency is correct in asserting that grievant did not disclose what actually happened. Grievant's failure to be tell the ER Manager what she had done is of considerable concern because she knew that this matter was being investigated by a federal agency. Grievant's response was such as to absolve herself of any responsibility and make it appear that the two panelists had decided to make the erasures solely on their own. Under the circumstances, this offense is of such a serious nature that a first occurrence normally should warrant removal from employment.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for 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 both long service and an otherwise satisfactory performance record. However, in considering the severity of the offense, these factors are not sufficiently mitigating as to overcome the offense. It cannot be concluded that the discipline in this case exceeds the limits of reasonableness.[17]

DECISION

[17] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from employment effective January 27, 2006 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[18] 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.[19] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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

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David J. Latham, Esq.
Hearing Officer

[18] 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).

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