

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 05/03/06;
Decision Issued: 05/09/06; Agency: DMHMRSAS; AHO: David J. Latham,
Esq.; Case No. 8317; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8317

Hearing Date: May 3, 2006
Decision Issued: May 9, 2006

PROCEDURAL ISSUES

Grievant requested as part of her relief that the agency be directed to investigate another employee. A hearing officer does not have authority to order an investigation of another employee.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."

Grievant also requested that she be paid for three months differential pay. Differential pay is authorized by the Department of Human Resource Management to make salaries more competitive with the market. In the instant case, grievant received differential pay when she worked a night shift. After she was moved to day shift, she was no longer eligible for differential pay. Employees are assigned to shifts based on the work needs of the agency. When an employee is moved off the shift for which a differential can be earned, the employee is not entitled to differential pay, regardless of the reason for the move.

¹ § 5.9(b)6. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Therefore, a hearing officer does not have authority to direct the payment of differential pay under such circumstances.²

APPEARANCES

Grievant
Representative for Grievant
Four witnesses for Grievant
Director of Nursing
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 decision to issue discipline?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group I Written Notice for disruptive behavior.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 Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant for 14 years as a registered nurse.⁵ Grievant has received training in supervision (1994), leader/management workshop (1996), body language (1996), and communication skills (1998).⁶

During July and August 2005, grievant had altercations with some LPNs. In late July 2005, eight employees gave complaints about grievant to a human resources employee; the following month grievant was advised that the complaints were unfounded. On July 8th (date of grievant's memorandum) grievant allowed one LPN to go home which upset two LPNs who had to continue working.⁷ On July 28th, grievant verbally counseled one of the two aforementioned LPNs about not allowing a male care worker in the medication

² § 5.9(b)1 & 4. *Ibid.*

³ Agency Exhibit 1. Group I Written Notice, issued January 20, 2006.

⁴ Agency Exhibit 1. *Grievance Form A*, filed February 16, 2006.

⁵ Agency Exhibit 6. Grievant's Employee Work Profile, August 12, 2004.

⁶ Agency Exhibit 4. Grievant's training records.

⁷ Grievant Exhibit 2, pp. 1-4.

room.⁸ On August 9th, the same LPN and another LPN became upset because grievant told them to clock out before going to lunch.⁹ On August 13th, grievant told the same LPN she would have to do a nighttime orientation.¹⁰ On August 22nd, grievant wrote up the same LPN for pre-setting patient medication.¹¹ This LPN had been employed since March 2005; she resigned in September 2005.

In August 2005, the Director of Nursing (DON) counseled grievant, and documented in writing, that several nurses reported difficulty in communicating with grievant.¹² One LPN reported that grievant had been rude, loud, nasty, condescending, and unprofessional when discussing a patient medication issue.¹³ Another LPN (referred to in the preceding paragraph) resigned in September 2005 citing grievant's demeaning behavior as the reason for her resignation.¹⁴ She testified that grievant was nasty, sometimes ignored her, scolded her, and spoke with an angry demeanor and tone when responding to questions. A third LPN reported similar behavior by grievant.¹⁵ This LPN had known grievant for seven years and got along well with her in the past but she observed a marked change in grievant's behavior beginning in late 2004. The complaints reported that grievant was rude, abrupt, loud, and ignored people. During the counseling session, grievant's body language, tone of voice, and voice appeared to the DON to be angry, hostile and intimidating. In conjunction with this counseling, grievant was transferred from night shift to day shift for two months to better monitor her behavior. Grievant was also directed to take an interpersonal communications class in central office in October 2005.

On September 22, 2005, an LPN complained about grievant failing to help with patients, micromanaging their work, and frequently looking over their shoulders.¹⁶ On December 8, 2005, an LPN submitted a written complaint about grievant and requested a change of assignment because grievant had embarrassed her in front of other employees.¹⁷ On December 20, 2005, an LPN reported that grievant spoke to her in a demeaning and sarcastic manner regarding treatment of a patient.¹⁸ She felt that grievant harassed her and threatened to quit her job. Another LPN reported on December 21, 2005 that grievant was reluctant to share needed medical information but expected the LPN to already know the information. She also reported that grievant talked down to her and used a very rude tone.¹⁹ A third LPN submitted her resignation

⁸ Grievant Exhibit 2, pp. 5-6.

⁹ Grievant Exhibit 3, pp. 3-6.

¹⁰ Grievant Exhibit 3, pp. 13-16.

¹¹ Grievant Exhibit 3, pp. 7-11.

¹² Agency Exhibit 2. Memorandum from HSC to grievant, August 31, 2005.

¹³ Agency Exhibit 2, p. 20.

¹⁴ Agency Exhibit 2, pp. 15, 16.

¹⁵ Agency Exhibit 2, pp. 17-19.

¹⁶ Agency Exhibit 2, pp. 12-14.

¹⁷ Agency Exhibit 2, pp. 9, 10.

¹⁸ Agency Exhibit 2, pp. 3-5.

¹⁹ Agency Exhibit 2, pp. 6, 7.

on December 25, 2005 because she could not “endure [grievant] any longer. She’s rude, belittling and down right not pleasant.”²⁰

During 2005, the unit in which grievant worked had a significantly higher employee turnover rate than the other three patient units. Four of the 13 nurses who resigned from grievant’s unit specifically cited grievant’s attitude and behavior toward them as a reason for resignation. Grievant offered the testimony of two recently retired nurses and one current employee who all state that they have not experienced any problems with grievant. She also proffered letters from other employees who also stated that they have not had problems with grievant.²¹

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:

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.²²

²⁰ Agency Exhibit 2, p.8.

²¹ Grievant Exhibit 5. Letters from other employees, past and present.

²² § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

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 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 are the least severe.²³ Disruptive behavior is one example of a Group I offense.

During the summer of 2005, it is clear that grievant had some difficulty with one LPN in particular and with two other LPNs to a lesser degree. Grievant wrote up the LPNs when she found them noncompliant with procedures. However, some of the LPNs were upset not only with grievant's enforcement of rules but also the manner in which grievant talked to them. Following the write-ups, the LPNs complained about grievant's abrasive manner of correcting them.

The preponderance of testimony establishes that grievant does not use foul language and does not yell. The Director of Nursing (DON) accurately summed up the problem (and the consensus opinion of witnesses) in concluding that it is not *what* grievant says, but *how* she says it. Grievant may well be correct in pointing out errors made by LPNs. However, grievant's comments come across to subordinates as hostile, rude, condescending, or demeaning.

As an experienced RN who has had training in communication skills and leadership, grievant knows, or reasonably should know, that correction of subordinates must be done in an appropriate manner. Specifically, correction should be done in private, should be constructive, and should be designed to educate in a positive, not negative, manner. Despite the interpersonal skills class grievant took in October, she continued to generate the same type of complaints in December that had occurred five months earlier. As a supervisor, grievant is expected to set a positive example for subordinates. The ongoing complaints are sufficient to demonstrate that she is not doing so. The LPNs' testimony is corroborated by two factors. First, the DON testified credibly that grievant was intimidating and behaved inappropriately during the counseling session. Second, one LPN who has known grievant for several years said she had gotten along well with grievant for many years but noticed a change in her behavior beginning in late 2004. This suggests some change in grievant's situation that is manifesting itself in inappropriate behavior in the workplace.

²³ Agency Exhibit 5. Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

On one occasion grievant found a joke taped to her mailbox at work.²⁴ Although this joke has been widely circulated on the Internet for months, grievant took the note seriously and since that time has a friend follow her car home from work. She also maintains cell phone contact with her home until she arrives because she feels that someone may be serious about killing her.²⁵

Grievant noted that she had been on leave on some of the dates cited on the written notice. However, the DON satisfactorily explained that the cited dates were either dates on which incidents occurred, or when the exact date was unknown, the date on which she received the written complaint from an employee.

It must be concluded that grievant's interpersonal communication with subordinates is unsatisfactory. Her behavior is likewise disruptive because it upsets subordinates resulting in their filing complaints about grievant. Thus, the productivity of subordinates, grievant, and management is adversely affected because of time expended to deal with such complaints. Given the previous counseling of grievant, it was reasonable and appropriate for the agency to issue the lowest level of disciplinary action – a Group I Written Notice.

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.²⁶ 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 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. Based on grievant's testimony and evidence, she did not engage in a protected activity. However, even if her complaints about some LPNs during the summer of 2005 could be construed to constitute a protected activity, grievant must show a nexus between her complaint and the adverse employment action (the Written Notice at issue herein). Grievant has not established any such connection between the two events. Moreover, even if such a nexus could be found, the agency has established a nonretaliatory reason for disciplining grievant. For the reasons stated previously, grievant has not shown that the agency's reason for discipline was pretextual in nature.

²⁴ Grievant Exhibit 8. The note states, "Lord, grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to hide the bodies of those people I had to kill, because they pushed me over the edge."

²⁵ Grievant was visibly emotionally distraught during her testimony about this issue.

²⁶ EDR *Grievance Procedure Manual*, p.24

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. 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 been employed for 14 years and, therefore, does have long state service. Her performance is otherwise satisfactory. The DON observed that grievant is a good nurse and otherwise performs her job well and provides quality care for clients. This is evidenced by her performance evaluation in which she is rated a Contributor. Counterbalancing these mitigating factors is the aggravating factor that grievant was counseled in writing less than six months earlier. In addition, she was transferred to another shift to observe her behavior, and was required to take an interpersonal communications class. Subsequent to this class, grievant's behavior toward some subordinates continued to be negative and counterproductive. 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 issued on January 20, 2006 is 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.²⁷ 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.²⁸ 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

David J. Latham, Esq.
Hearing Officer

²⁷ 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).

²⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.