

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions) and misapplication of policy; Hearing Date: 11/15/06; Decision Issued: 11/16/06; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 8340, 8444; Outcome: Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case Nos: 8340 & 8444

Hearing Date: November 15, 2006  
Decision Issued: November 16, 2006

**PROCEDURAL ISSUE**

Grievant requested as part of his relief that he be transferred to another unit or to another supervisor. A hearing officer does not have authority to transfer employees.<sup>1</sup> Grievant also requested that another employee be given training. A hearing officer does not have authority to direct an agency to train other employees.<sup>2</sup> 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 in his first grievance that a "cease and desist order" be issued. As this request is not explained, at the beginning of the hearing the hearing officer directed grievant to elaborate on this request during the hearing and explain precisely what he seeks. Grievant failed to provide any testimony or evidence to explain this request; therefore, the hearing officer is

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<sup>1</sup> § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>2</sup> § 5.9(b)7. *Id.*

unable to grant any relief for this request. Similarly, grievant provided no testimony or evidence relating to his request for “restoration of evaluation/bonus.”

### APPEARANCES

Grievant  
Representative for Grievant  
Five witnesses for Grievant  
Intake Supervisor  
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 misapply or unfairly apply policy?

### FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice for failing to follow supervisory instructions.<sup>3</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>4</sup> Grievant also grieved a community-based activity requirement in his Employee Work Profile (EWP) Work Description and, he alleged racial discrimination and/or harassment. Although this grievance was not timely, the agency allowed the grievance to proceed through the three resolution steps, and thereby waived the timeliness requirement.<sup>5</sup> The agency head declined to qualify this second grievance for a hearing and grievant appealed to the Department of Employment Dispute Resolution (EDR).<sup>6</sup> The EDR Director ruled that the portion of the grievance pertaining to the Work Description is qualified for hearing, that the claim of discrimination and/or harassment was untimely and, therefore, not qualified, and that the two grievances may be consolidated for a

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<sup>3</sup> Agency Exhibit 1. Group II Written Notice, issued January 26, 2006.

<sup>4</sup> Agency Exhibit 2. *Grievance Form A*, filed February 16, 2006.

<sup>5</sup> § 2.4.1, EDR Grievance Procedure Manual, effective August 30, 2004, requires that a written grievance 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.

<sup>6</sup> Agency Exhibit 9. *Grievance Form A*, filed March 16, 2006.

single hearing.<sup>7</sup> The Department of Juvenile Justice (hereinafter referred to as "agency") has employed grievant as a probation officer for a total of 32 years.

Agency policy is that criminal complaints should be processed and completed by probation officers within 30 calendar days. This policy is formalized in each probation officer's Work Description.<sup>8</sup> For the typical complaint, the probation officer is required to input information into the computer system, type a brief narrative description, prepare a detention order, have the officer sign the complaint, print out copies of all paperwork, and place them in the supervisor's intake tray for her review. Each of grievant's three previous supervisors (dating back to 1986) have spoken with grievant about his failure to process complaints on a timely basis. The supervisor from August 2002-2005 had given grievant a Notice of Improvement Needed/Substandard Performance on three different occasions because of his failure to timely process complaints.

On the morning of January 17, 2006, grievant's supervisor received a complaint from a detective regarding grievant's failure to timely process criminal complaints the officer had delivered to grievant on December 8, 2005.<sup>9</sup> The detective said that grievant had told him the preceding day that the petition was ready for his signature but it was still not ready when he arrived in the office on January 17<sup>th</sup>. The supervisor went to grievant's office and determined that grievant had not taken the appropriate action on the complaint.<sup>10</sup> She told him to process and complete the paperwork and put it in her intake tray not later than 5:00 p.m. that day.

Grievant knew which cases the supervisor was referring to because she viewed the complaint while she was in the office with grievant and because she mentioned the detective's name. Grievant avers that she referred to the accused by an incorrect last name; the supervisor denies this. In any case, grievant knew the case file and discovered the correct last name on the same day. She told grievant not to take any new case assignments that day to assure that he could complete the delinquent cases the same day. Nonetheless, grievant accepted new cases at 12:56 p.m. and at 4:15 p.m. that day, and failed to complete the delinquent cases.<sup>11</sup> Grievant did not tell his supervisor that day that he was too busy with new intake cases. Grievant was absent from work on January 18<sup>th</sup>,

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<sup>7</sup> EDR *Qualification, Compliance and Consolidation Ruling of Director*, Rulings 2006-1345 and 2007-1418, September 15, 2006.

<sup>8</sup> Agency Exhibit 10. Core Responsibility C, *Employee Work Profile (EWP) Work Description*, Revised January 7, 2006. [NOTE: This EWP was signed in January 2006 although some of the dates contained therein were erroneously written as 2005.]

<sup>9</sup> Agency Exhibit 4. Entry for 12:38 p.m., Intake Log Sheet, December 8, 2005.

<sup>10</sup> Agency Exhibit 5. Criminal Complaint.

<sup>11</sup> Agency Exhibit 7. Intake Log Sheets, January 17-19, 2006.

was at work on January 19<sup>th</sup>, and finally completed the assignment on January 20<sup>th</sup>.<sup>12</sup>

Grievant has fulfilled the requirement to annually participate in a minimum of two community service activities as required by his EWP Work Description.<sup>13</sup> When grievant discussed this requirement with his supervisor, she told him that he should tell her in advance what activities he was going to participate in, that he could use flex time off on other days within the cycle so that overtime was not incurred, that he could use a state vehicle if necessary for travel, and that he could submit a travel voucher for mileage reimbursement if an agency vehicle was unavailable. Grievant did not appeal his EWP Work Description either before signing it or within 30 days after signing it. During the resolution steps of the grievance, grievant stated that he was not asking for reimbursement either for time or for mileage. Grievant has never submitted a travel voucher for mileage reimbursement. During this hearing, grievant stated that he is not seeking any monetary reimbursement either for time or for mileage.

#### 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.

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<sup>12</sup> Agency Exhibit 6. Intake Narrative and associated documents.

<sup>13</sup> Agency Exhibit 10. Special Assignment G, *Employee Work Profile (EWP) Work Description*, Revised January 7, 2006.

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 misapplication or unfair application of policy, grievant must present his evidence first and prove his claim by a preponderance of the evidence.<sup>14</sup>

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 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 state employment. Failure to follow supervisory instructions is an example of a Group II offense.<sup>15</sup>

#### Case No. 8340

In this case, the agency has demonstrated, and grievant did not rebut, that he failed to comply with the supervisor's January 17<sup>th</sup> instruction to complete a delinquent complaint by the end of that workday. Grievant argues that he was unable to complete the task because he received new cases that day. However, grievant had 30 days to work on each of the new cases. There was no reason for him to work on new cases when his supervisor had specifically directed him to make the delinquent case his first priority. Grievant has failed to provide any reasonable explanation for his failure to complete the case on January 17<sup>th</sup>. Under these circumstances, the agency has borne the burden of proof to show that grievant failed to comply with a reasonable supervisory instruction.

Grievant argues that his discipline was too harsh. If this had been the first instance of untimely work, grievant's argument might have merit. However, the preponderance of evidence established that three prior supervisors have observed the same unsatisfactory performance and that one of those supervisors had issued three Notices of Improvement Needed/Substandard Performance to grievant because of untimely work. Given a long history of similar unsatisfactory conduct by grievant, the agency has demonstrated that previous counseling had not had the desired effect of changing grievant's behavior. In such a situation, it

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<sup>14</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>15</sup> Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

is appropriate for the agency to move from counseling to disciplinary action in order to assure that the employee understands the seriousness of the matter.

#### Case No. 8444

Grievant's primary complaint in the second grievance is that he feels that probation officers' Work Descriptions should not include a requirement to perform community-based activities. The evidence demonstrates that this requirement is a part of the work descriptions of all 20 probation and intake officers. While grievant may have a philosophical disagreement with the agency regarding the necessity for this requirement, it is nonetheless a condition of his employment. When EWP Work Descriptions are signed annually, employees are given an opportunity to read the description and discuss any disagreements with their supervisor before signing. In addition, grievant had the opportunity to appeal the Work Description for a period of 30 days after he signed the document; grievant did not file an appeal.

A hearing officer cannot determine whether a community-based activity requirement is a reasonable and necessary part of grievant's job description. Grievant's supervisor and other agency management employees are in the best position to make such decisions. Those individuals have made the decision that such a requirement is in the best interest of the agency. As long as the responsibilities assigned to an employee are not illegal or immoral, there is no basis to overturn the agency's decision. In the final analysis, once an employee has voiced disagreement with his work description, the employee must choose either to comply with the work description or seek other employment. This is no different from a laborer who is hired to dig ditches but complains that he doesn't want to get his hands dirty; the laborer can either choose to dig and get dirty, or he can seek another line of work.

Grievant referred in his grievance to his evaluation. However, grievant did not proffer a copy of his evaluation or discuss his evaluation during the hearing. It appears from questioning that grievant intended to refer to his Work Description – not his evaluation – in the grievance. Therefore, grievant's evaluation is not addressed in this decision. Grievant reaffirmed during the hearing that he is not seeking any reimbursement either for time worked or for mileage reimbursement that may have been incurred as a result of his community-based activities.

#### 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

satisfactory work performance. Grievant has 32 years of state service and has a generally satisfactory performance record. Grievant complains that he was not told why he was suspended for five days (as opposed to some other number of days). There is no requirement that an agency must provide its rationale for the number of days of suspension associated with a disciplinary action. In this case, the agency could have suspended grievant for up to 10 days, issued a Written Notice with no suspension or, selected some other number of days. The agency listed as one mitigating factor, the fact that grievant did not have a printer on January 17<sup>th</sup>. Although not cited by the agency, grievant's long length of state service would also normally constitute a mitigating circumstance. However, the agency also cited three aggravating circumstances on the Written Notice. In addition, the fact that grievant has been repeatedly counseled verbally and in writing (Notices of Improvement Needed constitute written counseling) over several years is a significant aggravating circumstance. Under these circumstances, the agency's decision to issue a Group II Written Notice with five days suspension is within the limits of reasonableness.

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and five-day suspension issued on January 26, 2006 are hereby UPHELD.

Grievant has not shown that the agency misapplied or unfairly applied any policy by requiring him to participate in community-based activities. He has also failed to demonstrate that he was not properly compensated for his participation in such activities.

### 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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

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<sup>16</sup> 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).

<sup>17</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.