

Issue: Group I Written Notice (failure to follow supervisory instructions, perform assigned work, or comply with established policy); Hearing Date: 07/13/06; Decision Issued: 07/18/06; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8349; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8349

Hearing Date: July 13, 2006
Decision Issued: July 18, 2006

PROCEDURAL ISSUE

This hearing was docketed for June 2, 2006.¹ On that morning, the agency's key witness learned that her mother was critically ill and family members recommended she travel to see her mother. The mother lives out of state several hours drive away. Under the circumstances, the parties agreed to a postponement of the hearing. The first date on which all participants were again available was July 13, 2006.

APPEARANCES

Grievant
Representative for Grievant
Four witnesses for Grievant
District Manager
Representative for Agency

¹ § 5.1, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004, requires that a grievance hearing must be held and a written decision issued within 35 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

Two witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group I Written Notice issued for failure to follow supervisory instructions, perform assigned work, and comply with established written policy.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The Virginia Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant for 27 years. She is currently a customer service center (CSC) manager.

As a result of instances of illegal selling of drivers' licenses in recent years, the agency has increased its efforts to prevent such illegal activity. The agency has particularly stressed to CSC managers the need to comply with policies designed to prevent fraudulent activity. This topic has been discussed in at least three conference calls between the district manager and CSC managers⁴ and in at least seven meetings with the CSC managers⁵ between December 2003 and November 2005. In July 2005, grievant's supervisor advised grievant that her performance was substandard because she was not following accountability and inventory procedures,⁶ due to grievant being counseled in writing regarding missing decals.⁷

To ensure consistency, accuracy and validity of all drivers' license processing, the work of tellers is checked by audit tellers pursuant to a written policy. In 2003, the district manager told grievant that each manager/assistant manager "... need to assure that the surrendered license is attached to the application when it goes to audit. The audit clerk needs to verify that the surrendered license is turned in."⁸ The audit tellers are required to assure that surrendered drivers' licenses are attached to applications, that required information is on the application, that a paid stamp is on the application, and that

² Agency Exhibit A. Group I Written Notice, issued January 10, 2006.

³ Agency Exhibit A. Grievance Form A, filed February 10, 2006.

⁴ Agency Exhibits 1, 4, & 10.

⁵ Agency Exhibits 2, 3, 5, 6, 7, 8, & 9.

⁶ Agency Exhibit B. Interim Evaluation Form, July 5, 2005.

⁷ Agency Exhibit C. Memorandum from district manager to grievant, April 19, 2005.

⁸ Agency Exhibit 12. E-mail from district manager to managers, July 3, 2003.

a four-digit log number is recorded.⁹ CSC managers are required to spot check the work of audit tellers to assure that audit tellers comply with policy.

The district manager had directed all managers, including grievant to spot check audit tellers' work. She did not define for managers what she meant by "spot check." She did not tell them how often to spot check, how many applications should be spot-checked, or suggest a percentage of work to be checked. Each manager was allowed to decide how often they reviewed applications and how many applications they would spot check. Grievant spot checked applications about twice per month. However, grievant trusted her audit clerks to do things correctly because they had been doing the audits for years and grievant "took their word" that things were being done right.¹⁰ Grievant also acknowledged that she didn't "get serious" [about the spot checking] until after another manager had been arrested.¹¹

In July 2005, the manager of another office in grievant's district was arrested for selling drivers' licenses. This resulted in the immediate heightening of awareness of the potential for fraud. Grievant began to take a closer look at the issuance of drivers' licenses in her office and discovered what appeared to be a problem. She promptly notified her district manager who notified the agency's investigative section and an investigation was initiated. The investigation initially revealed that one audit clerk had illegally sold driver's licenses to two persons.¹² Later it was determined that 50 licenses had been sold illegally. Subsequently, that audit clerk was arrested and has been convicted of selling licenses illegally. The district manager notified grievant in December 2005 that although grievant had uncovered the illegal activity, she had done so too late and should have uncovered the activity during the audit process. After giving grievant an opportunity to respond, the district manager disciplined grievant with a Group I Written Notice.

The agency acknowledges that grievant could not have detected all the fraudulent activity but should have detected it sooner if she was spot checking frequently and thoroughly. Similar discrepancies have occurred in other offices. As a result, one person is currently in prison and another has been removed from state employment.

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

⁹ Agency Exhibit G. *Customer Service Center Operations Manual* Number CSCOM-803, Audit Processing, August 22, 1987.

¹⁰ Agency Exhibit A. Second resolution step response to grievant. Grievant's verbal statement to the Operations Director. March 26, 2006.

¹¹ *Id.*

¹² There are about 25 tellers in grievant's office; their work is reviewed by 2-3 audit tellers.

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 employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹³

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 promulgated *Standards of Conduct* Policy No. 1.60. 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. Policy No. 1.60 provides that Group I offenses include acts and behavior that the least severe, while 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.¹⁴ Failure to follow supervisory instructions, failure to perform assigned work, and failure to comply with established written policy are examples of Group II offenses. Unsatisfactory work performance is a Group I offense.

The agency has demonstrated by a preponderance of evidence that there has been repeated emphasis placed on accountability and security. The district manager advised grievant in writing on multiple occasions that procedures must

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

¹⁴ Agency Exhibit D. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

be followed on every application and surrendered licenses must be attached to applications.

The evidence as to whether grievant actually spot-checked license applications is mixed. The district manager asserts that grievant admitted to her that she has never done a spot check of audits; grievant denies making such an admission. However, the Operations Director said in his second step resolution response that grievant provided "information that confirmed" she did perform spot checks. However, grievant acknowledged that she didn't get serious about it until July 2005 and that she "took the word" of her audit tellers that they were doing their work correctly. Viewing the evidence in the light most favorable to grievant, one must conclude that although she did some spot-checking, she did it very infrequently, did not do it thoroughly, and was too willing to take the audit tellers' word that they were doing things right. In view of the heightened emphasis on security, accountability, and especially on license applications, grievant's performance in this area was unsatisfactory. Accordingly, the agency has demonstrated that grievant's failures constituted a Group I offense.

Grievant stated in her grievance, and again at the hearing, that she believes she is being disciplined because of the offenses committed by the audit teller. If the teller had not illegally sold licenses, it is unlikely that grievant would have been disciplined. However, the agency did not discipline grievant for the audit teller's actions but rather for grievant's failure to conduct a more frequent and thorough spot check of the audit teller's work. Grievant had previously been counseled in writing for substandard performance in maintaining proper accountability. Spot-checking the audit tellers falls into the same general category of maintaining appropriate accountability and security.

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. The *Standards of Conduct* 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 state service and a satisfactory work performance record. Grievant's supervisor attests that grievant is a good manager, keeps employee morale high, and works hard. The offenses charged by the agency are Group II offenses. However, due to the mitigating circumstances just cited, the agency decided to reduce the discipline to a Group I Written Notice. After carefully reviewing the circumstances of this case, it is concluded that the agency appropriately applied the mitigation provision. Viewing the evidence in the light most favorable to grievant, her failure to conduct frequent and thorough spot checking is unsatisfactory work performance and therefore warrants a Group I Written Notice.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on January 10, 2006 is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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.¹⁵ 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.¹⁶ 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]

David J. Latham, Esq.
Hearing Officer

¹⁵ 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).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.