

Issue: Group III Written Notice with termination (endangering the lives of others, failure to report to work as scheduled, failure to follow supervisory instructions, falsification of records, failure to perform assigned work, and disruptive behavior);
Hearing Date: 07/26/06; Decision Issued: 07/31/06; Agency: Va. Community College System; AHO: David J. Latham, Esq.; Case No. 8385



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8385

Hearing Date: July 26, 2006
Decision Issued: July 31, 2006

PROCEDURAL ISSUES

Grievant requested as part of his relief that he receive reimbursement of travel expenses. However, prior to qualification of the grievance, grievant withdrew his request for travel expenses because the agency had reimbursed him for such expense.¹ Grievant also requested reimbursement for unpaid overtime hours worked. A hearing officer does not have authority to revise compensation.² 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 did not participate in the pre-hearing conference despite multiple messages being left on his answering machine by the Division of Hearings. The Notice of Hearing mailed to grievant instructed him to call the hearing officer to receive instructions about the hearing process; grievant never called the hearing

¹ E-mail from grievant to Human Resource Manager, May 8, 2006.

² § 5.9(b)4. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

officer. The Notice of Hearing included instructions on submission of documents and a witness list. Prior to the hearing, grievant did not submit to the hearing officer or the agency representative either any written evidence or a witness list. Grievant did not appear for the hearing. Prior to the hearing, grievant did not call the hearing officer either to request a postponement or to explain why he did not attend the hearing. The hearing was conducted as scheduled and testimony was taken from the witnesses who appeared on the agency's behalf.

APPEARANCES

Vice-President of Student Success
Four witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was grievant afforded due process? Did the agency discriminate or retaliate against grievant? Did the agency misapply or inconsistently apply policy?

FINDINGS OF FACT

Grievant filed a timely grievance challenging a Group III Written Notice for endangering the lives of other employees and other citizens, failure to report to work as scheduled without proper notice, failure to follow supervisory instructions, falsification of records, failure to perform assigned work, and disruptive behavior.³ As part of the disciplinary action, grievant was removed from state employment effective March 27, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.⁴

The Virginia Community College System (hereinafter referred to as "agency") has employed grievant as student activities coordinator for two years. Grievant has one prior active disciplinary action – a Group II Written Notice for failure to report to work as scheduled.

On March 20, 2006, grievant and two female employees drove approximately 65 miles to another town on college business. They left the college at about 11 a.m. traveling for most of the trip on an Interstate highway on which the posted speed limit is 65 miles per hour (mph). Grievant drove a state-

³ Agency Exhibit 2. Group III Written Notice, issued March 27, 2006.

⁴ Agency Exhibit 1. Grievance Form A, filed April 23, 2006.

owned sedan and for a significant part of the trip was driving at 80-85 mph. Both female employees, one in the back seat and the other in the front passenger seat, were able to clearly see the speedometer. One of the passengers repeatedly asked grievant to slow down. For a while, he slowed to 70-75 mph and then again started driving at 80-85 mph. When they entered the destination town, grievant frequently slammed on the brakes at traffic lights so that the tires screeched. Upon arrival, one of the passengers asked grievant for the car keys so that she could drive on the remainder of the trip. Grievant put the keys in his pocket and walked away.

After conducting their business, grievant drove them to lunch. One passenger again asked grievant for the car keys and again grievant refused to relinquish them. During that drive, grievant repeated his previous behavior of slamming on the brakes at traffic lights and, accelerating quickly away from stops (commonly known as peeling out or burning rubber). When one passenger told grievant he was abusing the car, he responded, "It's OK, it's just a state car." At one traffic light, grievant repeatedly honked the horn several times to get the attention of another driver stopped in the adjoining traffic lane. He then opened the vehicle's windows and turned the radio as loud as possible, again to attract the attention of the other driver. The employee in the back seat was so embarrassed that she lay down on the back seat to avoid being seen. Whenever the passengers asked grievant to stop his dangerous driving and embarrassing behavior, grievant just laughed and repeated his actions at the next opportunity.

On the drive back to the college, grievant again drove at 80-85 mph on the Interstate highway. At one point he asked the passengers if they had ever gone 100 mph. Both said no and then emphatically said, "And we don't want to." Grievant then accelerated to over 100 mph for about a mile or two. He slowed to 80 mph and then said, "Let's see if it will go 105 mph." He then accelerated to over 105 mph for about two miles. Both passengers were terrified and yelled at grievant to stop. Grievant then slowed to about 75-80 mph for the rest of the trip. When they returned to the college, one passenger thought she was going to get sick and went to the restroom.

In addition to his primary job of student activities coordinator, grievant had been head coach of the men's soccer team prior to August 2005. However, grievant's supervisor concluded that grievant was spending too much time on soccer and not enough time on his full-time job of activities coordinator. After grievant was relieved of his soccer coaching duties, grievant began to avoid any coordinating functions related to soccer coaching. Grievant's supervisor had specifically directed grievant to attend a meeting with the soccer coaching staff on March 22, 2006.⁵ Grievant did not want to attend the meeting and decided to manipulate his calendar manager. He inserted into his calendar appointments of other employees to make it appear that grievant's day was full of appointments.⁶

⁵ Agency Exhibit 8. E-mail from supervisor to grievant and others, March 21, 2006.

⁶ Agency Exhibit 7. Grievant's calendar manager, March 22, 2006.

The calendar manager is relied upon by the department's administrative assistant. Grievant's manipulation and falsification of the calendar manager resulted in disruption when the administrative assistant had to make corrections the following day.

On the following day, March 22, 2006, grievant failed to come to the meeting; he instead called and left a voicemail message for his supervisor claiming that he was sick. The meeting was rescheduled for March 23, 2006; on that date grievant did not come to work and did not contact his supervisor.

During the week of March 20-23, 2006, when grievant was at work, he loudly played music on the computer in his cubicle disturbing others in the area. At random times, he made loud comments about condoms and other inappropriate subjects from his cubicle to no one in particular; this behavior also disturbed coworkers in the area. On one occasion, he turned the music volume up on his computer, locked the computer, and left to attend a meeting.

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, such as claims of discrimination, retaliation,

or misapplication of policy, the grievant must present his evidence first and prove his claim by a preponderance of the evidence.⁷

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 Policy No. 1.60 effective September 16, 1993. 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. Section V.B of Policy No. 1.60 provides that Group III offenses include acts and behavior that are the most severe and of such a serious nature that a first occurrence normally should warrant removal from employment.⁸ The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.⁹

Due Process

Grievant asserts that the agency did not afford him due process before he was removed from employment. The *Standards of Conduct* requires that before an employee is removed from employment for disciplinary reasons, the employee must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.¹⁰ (Usually employees are given a minimum of one day to respond but can be given up to one week or more depending upon the complexity of the charges). The agency failed to give grievant the required advance notice or a reasonable opportunity to respond.

The agency contends that it removed grievant without the requisite due process because it relied on Section VII.E.4 of the *Standards of Conduct*, which allows for removal *from the work area* when certain conditions exist. However, Section VII.E.4. must be read in its entirety. When an employee is removed from the *work area*, the agency must comply with subsections 4.b. and 4.c. These subsections provide that the employee is to be placed on "Pre-Disciplinary Action Leave" and then afforded the due process requirements cited in Section VII.E.2. before taking disciplinary action.

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

⁸ Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

⁹ *Id.* Section V.A.

¹⁰ *Id.* Section VII.E.2.

Although the agency did not comply with the policy's pre-disciplinary due process requirements, grievant has subsequently received full due process because he was given an evidentiary hearing before an independent hearing officer at which all due process rights were available to grievant.

Offenses

The agency has demonstrated, by a preponderance of evidence, that grievant committed multiple offenses. Driving a state vehicle at speeds in excess of 105 mph is an unauthorized use of state property – a Group II offense. Driving a state vehicle in an abusive manner (speeding, slamming on brakes, peeling out) is a misuse of state property – a Group II offense. Endangering the lives of two passengers (and potentially other citizens) by reckless driving¹¹ is a Group III offense. Manipulating the calendar managers of other employees is falsification of official state records – a Group III offense. Failing to report for work as scheduled without proper notice to a supervisor is a Group II offense. Failing to comply with supervisory instructions is a Group II offense. Playing loud music and making loud inappropriate statements in the workplace that disturbs coworkers is disruptive behavior – a Group I offense. The sum total of grievant's offenses is more than sufficient to warrant removal from state employment.

Discrimination

To sustain a claim of discrimination, grievant must show that: (i) he is a member of a protected group; (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's protected status.¹² Grievant asserts that he is homosexual thereby affording him protected status due to his sexual orientation. Grievant suffered an adverse job action (removal from employment) and thereby satisfies the second prong of this test. However, grievant has not presented any evidence that he was performing at a satisfactory level. Assuming that grievant was otherwise performing his job satisfactorily, grievant has not presented any evidence to create an inference that his removal from employment was based on his protected status. Grievant's speculation that his sexual orientation played a role in his removal does not constitute evidence. Accordingly, grievant has not proven that the agency discriminated against him. Moreover, the agency has presented legitimate, non-discriminatory reasons for grievant's removal from employment.

Grievant also asserts that he was disabled due to depression, anxiety and ADHD.¹³ However, grievant never submitted any medical documentation to the agency to support his assertion, even after his supervisor had invited grievant to

¹¹ Va. Code § 46.2-862 provides that a person shall be guilty of reckless driving who drives a motor vehicle in excess of eighty miles per hour.

¹² Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

¹³ Agency Exhibit1. Second resolution step meeting notes, May 9, 2006.

do so on at least two occasions. Grievant never made a formal request to the agency for any accommodations related to the alleged disability.

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.¹⁴ 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. 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. Grievant asserts that his protected activity was speaking out in regard to alleged gross mismanagement by his supervisor. However, grievant failed to present any testimony or evidence setting forth how he spoke out and whether it comports with the limitations on free speech. Assuming for the sake of argument that grievant's complaints were in compliance with policy and law, grievant must show a nexus between his speaking out and his removal from employment. Grievant has not established any such connection between the two events. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for removing grievant from state employment. For the reasons stated previously, grievant has not shown that the agency's reasons for terminating his employment were pretextual in nature.

Misapplication or inconsistent application of policy

Grievant's allegation of misapplication of policy involved reimbursement for travel expenses. As noted at the beginning of this decision, grievant withdrew this issue from his grievance after the agency completed reimbursement of the travel expenses. Grievant's allegation of inconsistent policy application involved his claim for overtime work. However, grievant presented no testimony or evidence on this issue and has, therefore, failed to bear the burden of proof.

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

¹⁴ EDR *Grievance Procedure Manual*, p.24

case, grievant has been employed for two years which is not considered long service. He has generally performed his work satisfactorily. However, there are aggravating circumstances. Grievant's conduct was sufficiently egregious, in disregard of human life, and abusive of state equipment as to overcome any possible mitigation. In addition, grievant has a prior active Group II Written Notice for failing to report to work as scheduled. Accordingly, the aggravating circumstances outweigh the mitigating circumstances. Therefore, the discipline in this case is within the limits of reasonableness.¹⁵

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and grievant's removal from employment effective March 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

¹⁵ 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.'"

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.¹⁶ 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.¹⁷ 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

¹⁶ 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).

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