Issues: Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions), and retaliation; Hearing Date: 09/07/06; Decision Issued: 09/11/06; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8408; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 09/26/06; Reconsideration Decision issued 10/03/06; Outcome: Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8408

Hearing Date: September 7, 2006
Decision Issued: September 11, 2006

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Weigh Station Manager
Advocate for Agency
Observer 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? Did the agency retaliate against grievant?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice issued for failure to follow supervisory instructions.[1] Due to an accumulation of active disciplinary actions, grievant was removed from state employment. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Virginia Department of Motor Vehicles (DMV) (Hereinafter referred to as "agency") has employed grievant for eight years.[3] She was an engineering technician at the time of the disciplinary action.[4] Grievant has two prior active disciplinary actions – a Group II Written Notice for failure to follow supervisory instructions by not timely completing a medical form and, for failure to comply with a directive prohibiting the use of mobile telephones during work hours;[5] and a Group I Written Notice for unsatisfactory performance and disruptive behavior.[6]

Grievant worked as a weight technician at a motor carrier service center (truck weigh station). DMV weigh stations are used by two agencies – DMV and the Virginia State Police (VSP). DMV employees weigh trucks and collect revenue from truck drivers. When trucks are found to be overweight, oversize, or otherwise out of compliance with motor vehicle laws, enforcement is handled by commercial vehicle enforcement officers (CVEO) of the VSP. Both agencies have employees working in the weigh stations. There are two telephone lines in the weigh station at which grievant worked; one is a dedicated line assigned to DMV and the other is a dedicated line for VSP. On the ground floor, the front room telephone is the VSP telephone line intended to be used only by CVEOs; in the back room, the telephone can pick up both the DMV and VSP lines. On the upper floor there are two separate phones, one for DMV and one for VSP.[7]

In 2004, grievant's supervisor had noticed that when employees called in to report an unscheduled absence (illness, accident, etc.), they often called on the VSP telephone line. The employee would tell the CVEO who answered that they were going to be absent and ask the CVEO to give the message to the DMV station manager. Sometimes, a CVEO would forget to give messages to the DMV manager. Because the DMV manager has no supervisory authority over VSP employees, he was unable to discipline the CVEOs. Accordingly, the DMV manager instructed his employees, including grievant, to make certain that they talked with him or a DMV employee when calling in an unscheduled absence. He specifically asked them to call the DMV phone line – not the VSP phone line. He gave this instruction in a meeting with employees and documented it in the meeting notes.[8] In early 2005, the manager gave all employees another written

[1] Agency Exhibit 1. Group II Written Notice, issued March 31, 2006.
[2] Agency Exhibit 2. Grievance Form A, filed April 27, 2006.
[3] She had previously been employed with another state agency for about seven years.
[4] Agency Exhibit 5. Employee Work Profile Work Description, October 25, 2005.
[5] Agency Exhibit 6. Group II Written Notice, issued June 29, 2005.
[6] Agency Exhibit 6. Group I Written Notice, issued August 16, 2005.
[7] Agency Exhibit 4. Diagram of building layout, telephone locations, and line assignments.
[8] Agency Exhibit 3. Meeting Notes, August 19, 2004.

reminder that CVEOs do not have authority to approve time off for DMV employees.[9] Despite these instructions, grievant continued to sometimes call in on the VSP telephone line. The manager documented two of the instances in October 2005.[10] Grievant called in on the VSP line during January and February to report absences and left messages for her manager with one of the CVEOs.

In October 2005, grievant broke her leg and tore a ligament at work. She was subsequently determined to be eligible for workers' compensation and received treatments and physical therapy into the first part of 2006. On February 23, 2006, grievant called in during the morning to advise the manager of a change in her physical therapy appointment from the 23rd to the 24th. She called in on the VSP line and left the message for the manager with a VSP employee. She arrived for work at her scheduled time of 3:00 p.m. and promptly advised the manager about the appointment change. As a result of grievant calling in on the VSP telephone line, the manager gave grievant a written counseling memorandum unambiguously directing her to call in only on the DMV line.[11]

On the morning of March 8, 2006, grievant experienced leg pain and was seen by her physician at the hospital. While there, grievant allowed her husband to call the weigh station with her mobile telephone; the number he called was the VSP line, not the DMV line. On March 9, 2006, grievant again called the weigh station on the VSP line. When a CVEO answered, she asked him for the DMV number. She then called in on that number and spoke with the manager to report that she would be absent.

Grievant avers that she had both the DMV and VSP telephone numbers programmed into her mobile telephone. The telephone responded to voice commands such that when grievant said "Call work," the telephone dialed the last work number she had used. The telephone was not produced at the hearing because it had been accidentally destroyed during the summer.

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).

[9] Agency Exhibit 3. Memorandum from manager to employees, February 2, 2005.
[10] Agency Exhibit 3. Employee Performance Reporting, fall 2005.
[11] Agency Exhibit 3. E-mail from manager to grievant, February 24, 2006.

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 a claim of retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[12]

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 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.[13] Failure to follow supervisory instructions is a Group II offense.

The agency had good reason to specify that employees should call in only on the DMV telephone line. The VSP line was installed and intended only to conduct State Police business; it was improper for DMV employees to tie up that line when a dedicated telephone line was available for DMV employees. In addition, the manager had specifically advised employees that VSP officers are not obligated to, and sometimes do not, relay messages to him. Even though it had been an accepted practice in the past to call in on either telephone line, the manager had issued an instruction in 2004 that DMV employees should use the DMV line. If there was any question in grievant's mind prior to February 24, 2006, there should not have been after the manager issued his written counseling memorandum to her on that date. Upon receiving this unambiguous

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[12] § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

[13] Agency Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

instruction, grievant should have assured that she made all future calls to work using the DMV line. She could have accomplished this by making sure that only the DMV number was programmed into her mobile telephone. Grievant did not take this simple precaution and instead continued to call in on the VSP line.

There were some inconsistencies in grievant's evidence. First, grievant testified that both the DMV and VSP telephone numbers were programmed into her mobile telephone. However, she also testified that when she called in to the VSP line on March 9th, she asked the CVEO for the DMV telephone number. If grievant had the number programmed on her telephone, there would be no need to ask for the DMV number. Second, grievant first testified that she called in on March 9th using her mobile telephone; later, she revised her testimony asserting that she had called on her home telephone line.

Grievant argues that when she made calls on the VSP telephone line, the manager did not immediately counsel her while she was on the telephone. Based on the relatively small size of the scale house and the lack of private offices, it is obvious that other employees could have overheard the telephone conversations between grievant and the manager. Accordingly, it would have been inappropriate to counsel grievant on the telephone since counseling of employees by supervisors is a confidential personnel matter that should be addressed in private.

Grievant argues that the manager did not document in writing every occasion when grievant called in on the VSP line. While it is certainly the better practice to document such incidents, there is no requirement that a supervisor document every single instance of a failure to comply with policy. In this case, grievant did not dispute the manager's testimony that she had called in on the VSP line on occasions other than those that were documented. Grievant also suggests that the agency should not be allowed to discipline her for undocumented incidents. Certainly, the agency's case would be stronger if all such incidents had been documented. However, in this case, the preponderance of evidence establishes that grievant knew and understood the supervisory instructions, yet failed to comply with those instructions when it was within her ability and control to do so. Grievant asserts that she did not deliberately set out to be insubordinate. Accepting this assertion at face value, the fact remains that grievant did not comply with instructions when she knew that she should have - a Group II offense.

Retaliation

Grievant alleges that the agency retaliated against her because of absences incurred due to a workers' compensation claim filed as the result of an on-the-job accident in October 2005. 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] 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. Because grievant had a right to file a workers' compensation claim, and because she has been removed from employment, she meets the first two prongs of the test. However, in order to establish retaliation, grievant must show a nexus between her filing of the workers' compensation claim in 2005 and her removal in March 2006.

Grievant contends that the manager had increased his scrutiny of her work performance as retaliation. However, the manager offered unrebutted testimony that grievant's error rates were higher than those of her coworkers and that his increased attention to her work performance was necessary to address this problem. Grievant avers that she had complained that she found circumstantial evidence suggesting that someone may have been smoking in the scale house despite a written prohibition. The manager had prohibited smoking, however, he did not have jurisdiction over VSP employees. He did not ever observe anyone smoking inside the building and provided a rational explanation for grievant having found some half cigarettes near a door. Grievant argued that she was the only one ever disciplined; the manager offered unrebutted testimony that he has disciplined other employees as necessary. Grievant complained that she was the only person that the manager had asked to produce a physician's excuse. The manager testified that, following an agency audit, he was directed by his supervisor to begin asking all employees to produce physician excuses and that grievant had been the first person he had to ask for a note.

Grievant also believed that someone had entered her locker without permission;[15] she asserts that everyone had a key to her locker. When she complained to the manager about this he promptly posted a memorandum prohibiting employees from opening lockers other than the one assigned to them. The manager tested all keys and found that each key opened only one locker. Grievant also noticed that her last name was on a Court Case computer screen and believed someone was investigating her. It was usual for employees to use the Court Case system to check on truck drivers and/or trucking companies. Grievant's last name is common enough that there are drivers and at least one trucking company with the same name as grievant. In any case, the Court Case system is fully available to the public and anyone can access the site.

Accordingly, grievant has not established any connection between her workers' compensation claim and the disciplinary action. One must offer more than a mere *belief* that an agency has retaliated. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for the disciplinary action. For the reasons stated previously, grievant has not shown

[14] EDR *Grievance Procedure Manual*, p.24

[15] Testimony established that the lockers are inexpensive and that the locking mechanism is easily defeated.

that the agency's reasons for the disciplinary action were pretextual in nature. Moreover, the manager offered unrebutted testimony that he had gone to bat for grievant when the workers' compensation physician released her to return to work full time. The manager noticed that grievant was limping and experiencing pain; he took it upon himself to call her physician and argue that grievant was not yet ready to return to work. This is not the action of a manager who wants to retaliate against an employee.

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 normal disciplinary action for a second active Group II Written Notice is removal from state employment. 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. The agency considered this factor as mitigating but felt that other circumstances outweighed this factor. A significant aggravating circumstance are the prior multiple active disciplinary actions. In addition, one of the disciplinary actions involved the same or similar conduct of failing to comply with supervisory instructions. After carefully reviewing the circumstances of this case, it is concluded that the agency appropriately applied the mitigation provision.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on March 31, 2006 and grievant's removal from employment due to accumulation of active disciplinary actions are hereby UPHELD.

Grievant has not shown that the disciplinary action was retaliatory.

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.[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]

[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.

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8408-R

Hearing Date: September 7, 2006
Decision Issued: September 11, 2006
Reconsideration Request Received: September 26, 2006
Response to Reconsideration: October 3, 2006

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[18]

OPINION

Grievant requests a reopening of the hearing to present additional evidence, however, the request fails to proffer what newly discovered evidence, if any, she wishes to present. The request also fails to demonstrate that any additional evidence could not, with due diligence, have been presented during the hearing. Accordingly, the request to reopen the hearing must be denied.

In the alternative, grievant requests a reconsideration of the decision. Grievant argues that the agency's decision to remove her from employment was pretextual. For the reason cited in the last paragraph of page 6 of the decision, it is concluded that the

[18] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

agency rebutted this argument. During his testimony, the manager testified passionately and persuasively that he had supported grievant when it appeared that her physician had released her to return to work even though grievant was still limping and experiencing pain.

Grievant suggests that insufficient consideration was given to the fact that the manager had to work overtime himself because of grievant's repeated absences. However, agency testimony established that other employees also incurred absences. The facility in which grievant worked consists of a manager and only four other DMV employees. The manager testified that he often had to work overtime when any employee is absent. In such a situation, it is an expected and regular occurrence that the manager has to fill in for absent employees. Other than speculation, there is no evidence that the disciplinary action was motivated by the fact that the manager had to work in grievant's place during her absence.

Grievant notes that she and other employees had used the VSP telephone line for some time and that only she was disciplined. However, the evidence established that regular usage of the VSP line to call in occurred prior to August 2004. In August 2004, the manager instructed employees to call in only on the DMV telephone line. After that time, only grievant and one other employee continued to call in on the VSP line. After the manager counseled the other employee, that employee ceased calling in on the VSP line. Grievant, however, continued to often call in on the VSP line.

Grievant makes an argument regarding the burden of proof in this case. The burdens of proof, as established in the Grievance Procedure Manual, were cited in the first full paragraph on page 4 of the Decision. With regard to the issue of retaliation, the burden of proof is squarely on the grievant. *If* grievant is able to establish a nexus that demonstrates retaliation, the burden of persuasion shifts to the agency to establish nonretaliatory reasons for the discipline. If the agency establishes nonretaliatory reasons, the burden of persuasion shifts back to grievant to demonstrate that the reasons are pretextual. Grievant correctly observes that retaliation cases often lack direct evidence of retaliation and therefore, even where pretext is not directly demonstrable, the adjudicator must consider the circumstantial evidence to determine whether retaliation occurred. In this case, the hearing officer carefully weighed all the evidence presented and found that the circumstantial evidence of retaliation was insufficient to constitute a preponderance.

Grievant believes that the testimony of a former employee was not given sufficient evidentiary weight. Although this testimony was not specifically mentioned in the decision, the hearing officer did carefully consider this evidence because of the fact that the employee is no longer employed. However, while a former employee *may* be more forthcoming in his testimony, there is also the possibility when the former employee dislikes the manager, the testimony may be skewed against the manager. In this instance, the former employee acknowledged under cross-examination that he did not like the manager. Accordingly, this admission must be considered in evaluating his negative testimony about the manager.

Grievant contends that the hearing officer did not consider whether the decision to terminate employment was partially based on undocumented counseling. In fact, the decision addressed this issue in the third paragraph on page 5.

In sum, grievant takes issue with certain Findings of Fact, and with the hearing officer's Opinion. The grievant's disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis either to reopen the hearing or to change the Decision issued on September 11, 2006.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[19]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

[19] 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).