

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions and perform assigned work); Hearing Date: 09/20/06; Decision Issued: 09/27/06; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8421; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8421

Hearing Date: September 20, 2006
Decision Issued: September 27, 2006

PROCEDURAL ISSUE

Grievant participated in the telephone pre-hearing conference and was given verbal as well as written instructions regarding the submission of documentary evidence and a witness list. Grievant did not submit either any documents or a witness list.

APPEARANCES

Grievant
Food Service Operations Manager
Attorney 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?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice for failure to follow supervisor's instructions and failure to perform assigned work.¹ As part of the disciplinary action, grievant was removed from state employment effective July 18, 2006 due to an accumulation of active disciplinary actions. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.²

The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant for 15 years; she was an administrative office specialist at the time of removal.³ Grievant has an active prior Group II Written Notice for failure to report to work as scheduled without proper prior notice to supervision.⁴

Clients at the facility where grievant is employed have varying degrees of mental retardation and some have physical handicaps. Meals are prepared for each client based on their individual physical conditions, special dietary restrictions, and ability to feed themselves. Since 1995, grievant has been working with a DOS-based computer system that produces meal tickets for clients at the facility. The meal tickets list the specific foods, size of portions, patient likes and dislikes, and physician-ordered restrictions for each client.⁵ These tickets are placed on the client's food tray and are to be checked by staff to assure that the food served matches the ticket specifications. The DOS-based program became old, developed problems, and the manufacturer no longer provides technical support for the program.

In late 2004, the software company that developed the computer system sold the agency a newer, Windows-based program to replace the DOS program. Grievant was tasked with inputting the necessary information to implement the Windows program so that the DOS version could be phased out. Initially, grievant worked with both versions because the agency had to continue using DOS until the Windows version is fully implemented. By the spring of 2005, grievant had not implemented the new version. Two employees of another agency facility were temporarily assigned to grievant's facility to train and assist her in the program's implementation. The two employees alternated weeks at

¹ Agency Exhibit 1. Group II Written Notice, issued July 13, 2006.

² Agency Exhibit 17. *Grievance Form A*, filed July 25, 2006.

³ Agency Exhibit 12. Grievant's Employee Work Profile (EWP), 2005.

⁴ Agency Exhibit 3. Group II Written Notice, November 9, 2004.

⁵ Agency Exhibit 15. Example of correctly completed meal ticket from a different agency facility, September 12, 2006.

the facility. One or the other was at grievant's facility from March to May 2005. The two employees frequently sat one-on-one with grievant to explain and guide her through the implementation process. During this time period, they assigned maintenance of the DOS version to another employee in order to allow grievant to devote full time to implementation of the Windows version. They gave grievant written task lists to help her organize the implementation but saw virtually no progress from grievant.

Grievant was on leave from June to August 2005. When she returned from leave, the food service operations manager stressed to grievant that because of the delay, it was important that the new Windows version be implemented as soon as practicable. He gave grievant a revised work description and performance plan which reflected that 90 percent of her time was to be devoted to implementing the new Windows version of the meal ticket program.⁶ During their discussion on August 17, 2005, the manager asked grievant if she could have the Windows version fully implemented by January 1, 2006; grievant responded that she could. During the next several months, grievant made limited progress by inputting patient names and food consistency information. However, by January 1st, grievant was nowhere near completion of the project. She knew she had missed the deadline and recognized that she had fallen behind.

When grievant felt that a client's meal ticket was ready for use, she was supposed to print out a copy and give it to the dietician and the nutritionist who would review it to assure compliance with the client's diet restrictions and preferences. In early May, the manager told grievant to concentrate on one limited group of clients in order to expedite her work. In mid-May 2006, the central office expressed concern to the manager that the system was still not operational. The manager notified grievant of the pressure from central office and told her to print tickets for one limited group of clients for review by the dietician and the nutritionist.⁷ When the tickets were printed, review showed that they were noncompliant and had numerous errors. As a result, the manager issued a Notice of Improvement Needed/Substandard Performance to grievant in early June.⁸ In addition to detailing grievant's failure to comply with his earlier instructions, grievant was cited for sleeping at her desk. Coworkers had observed grievant sleeping at her desk and, had also seen her just staring at her computer screen with no activity for prolonged periods of time.

Grievant knew that the agency had paid the CBORD company to provide technical assistance if problems occurred. Occasionally, grievant did call

⁶ Agency Exhibit 12. *EWP Work Description & Performance Plan*, 2005. [NOTE: The EWP refers to implementation of the "CBORD" system. CBORD is the software company that provided both the DOS and Windows version of the computer meal ticket system. Agency employees referred to the new Windows version as the CBORD program.]

⁷ Agency Exhibit 11. E-mail from manager to grievant, May 31, 2006.

⁸ Agency Exhibit 10. *Notice of Improvement Needed/Substandard Performance*, June 7, 2006.

CBORD for technical assistance.⁹ By June 27, 2006, grievant was still not making any measurable progress in implementation. The manager gave her an email and attached memorandum pointing out that, at grievant's present rate of progress, it would take her 110 years to implement the Windows version.¹⁰ He advised grievant of the vital importance to implement the system by the end of July 2006 because of a new cook-chill system that was due to be installed at agency facilities in the near future. Two days later, the manager sent grievant another e-mail with attached memorandum stressing more emphatically the need to complete the implementation and setting forth specific interim deadlines to be met by grievant.¹¹ He specifically directed grievant to complete one day's master menu to be 95 percent error-free within the next five workdays. He also directed that corrections by the dietician and the nutritionist should be made within the five workdays so that she would have the completed, corrected tickets by July 11, 2006 – the fifth workday.

Grievant failed to complete the assignment as directed. She did not print out tickets for review by the dietician and nutritionist by July 11th. On the fifth workday, the manager directed grievant to print out the tickets she had completed.¹² Grievant printed out the tickets and gave them to the manager. Every ticket printed had multiple errors and several had not been completed (see Agency Exhibit 5). As a result of grievant's failure to perform her assigned work, the facility director advised grievant that he was considering discipline and possible removal from employment. He gave grievant five days paid administrative leave within which to provide a written response.¹³ After considering grievant's response, the facility director concluded that grievant should be disciplined with a Group II Written Notice for failing to follow her supervisor's instructions and failure to perform assigned work.¹⁴ Because of the accumulation of active disciplinary actions, grievant was removed from employment on July 18, 2006.

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

⁹ Agency Exhibit 9. E-mail from dietician to manager, June 19, 2006.

¹⁰ Agency Exhibit 8. Memorandum from manager to grievant, June 27, 2006. [NOTE: The date shown on the memorandum (8/16/06) was the date this exhibit was printed out. However, the manager testified, and grievant did not dispute, that she received a copy of this memorandum on June 27, 2006 when it was attached to the e-mail of the same date.]

¹¹ Agency Exhibit 7. Memorandum from manager to grievant, June 29, 2006.

¹² Agency Exhibit 6. E-mail from manager to grievant, July 11, 2006.

¹³ Agency Exhibit 18. Letter from facility director to grievant, July 13, 2006.

¹⁴ Agency Exhibit 4. Letter from facility director to grievant, July 18, 2006.

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.¹⁵

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 a second active Group II Written Notice normally should warrant removal from employment.¹⁶ Failure to follow a supervisor's instructions and failure to perform assigned work are two examples of a Group II offense. This policy is also contained in the agency's employee handbook.¹⁷

The agency has shown, by a preponderance of evidence, that it gave grievant ample opportunity to implement the Windows version of the CBORD meal ticket system. Grievant failed to complete the task by her agreed-upon deadline of January 1, 2006. She failed to meet other subsequent deadlines,

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

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

¹⁷ Agency Exhibit 16. Chapter 13, *DMHMRSAS Employee Handbook*.

including the final deadline of July 11, 2006. When she did turn in a partially incomplete batch of tickets after the final deadline, there were errors on virtually every ticket.

Grievant argued that some changes occurred in the system over time but she has not shown what these changes were, or that they were anything other than normal changes that occur from time to time in such systems. Moreover, she has not shown how such changes affected her ability to complete implementation when other facilities have been able to complete their implementation of the system. Grievant claims to have corresponded with other facilities regarding problems they encountered during implementation but she failed to provide any documentation or corroborative testimony during the hearing.

Grievant alleged in her written grievance that she was removed from employment while she was being treated for illness by a physician. However, grievant presented no documentary evidence or testimony to support this allegation. Grievant had been working full-time during June and July up to the day she was placed on administrative leave. During that time she had only taken 2.3 hours of sick leave on June 29, 2006.¹⁸ Therefore, grievant has not shown that her termination occurred during a period of illness.

Mitigation

The normal disciplinary action for a second Group II 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 case, grievant has long service. However, there are aggravating circumstances. Grievant has an active prior disciplinary action. In addition, the agency had given grievant extensive assistance in the spring of 1995, had removed her responsibility for maintenance of the DOS system so that she could concentrate full-time on the Windows implementation, had extended the deadlines for completion, and yet grievant still did not complete the task assigned to her. Accordingly, the aggravating circumstances outweigh the mitigating circumstances. Therefore, the discipline in this case is within the limits of reasonableness.¹⁹

DECISION

¹⁸ Agency Exhibit 19. Leave Inquiry Results for grievant.

¹⁹ 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.'"

The disciplinary action of the agency is affirmed.

The Group II Written Notice, and grievant's removal from employment effective July 18, 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 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.²⁰ 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.²¹ 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

²⁰ 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).

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.