

Issues: Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions and perform assigned work), and harassment;
Hearing Date: 10/23/06; Decision Issued: 10/25/06; Agency: NSU; AHO:
David J. Latham, Esq.; Case No. 8442; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8442

Hearing Date: October 23, 2006
Decision Issued: October 25, 2006

PROCEDURAL ISSUE

Grievant requested as relief that she receive compensation for being terminated. A hearing officer does not have authority to award monetary damages.¹ During the hearing grievant attempted to verbally amend her grievance by requesting a transfer and reinstatement. Once a grievance is initiated, additional claims may not be added.²

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Office Manager
Attorney for Agency

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

² § 2.4. *Id.*

Three 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? Was the grievant harassed?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice issued for failure to follow supervisory instructions and perform assigned work.³ 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.⁴ Norfolk State University (Hereinafter referred to as "agency") employed grievant for four years. She was a transcript coordinator at the time of the disciplinary action.⁵ Grievant has two prior active disciplinary actions – a Group I Written Notice for unsatisfactory job performance,⁶ and a Group II Written Notice for leaving the work site without permission during work hours.⁷

Grievant was assigned as the transcript coordinator in June 2005. She was responsible for producing, maintaining and distributing transcripts requested by customers – primarily former students.⁸ Upon receiving requests, grievant entered relevant data into the computer, determined eligibility, printed the transcripts, and mailed them to requestors. The goal for mailing requests was three to five days from receipt. The number of requests for transcripts varies during the year with the heaviest volume of 50-70 requests per day occurring during the graduation months of May and December. However, during the rest of the year the volume is considerably less; during January 2006, the volume averaged about 30-35 requests per day.

The person who previously processed transcript requests trained grievant in all aspects of her responsibilities.⁹ Grievant acknowledged that she learned the job within a few months, and that her predecessor was always available and helpful in answering any questions grievant had. Grievant's predecessor was able to process all transcript requests she received on the day of receipt. In September 2005, grievant was counseled in writing because numerous

³ Agency Exhibit 1. Group II Written Notice, issued May 22, 2006.

⁴ Agency Exhibit 2. Grievance Form A, filed June 16, 2006.

⁵ Agency Exhibit 5. Employee Work Profile Work Description, October 24, 2005.

⁶ Grievant Exhibit 1. Group II Written Notice, issued July 10, 2003.

⁷ Agency Exhibit 1. Group II Written Notice, issued July, 2003.

⁸ Agency Exhibit 5. Employee Work Profile Work Description, October 24, 2005

⁹ Agency Exhibit 8. Description of the training given to grievant in June and August 2005.

complaints had been received regarding delayed processing of transcript requests.¹⁰ Grievant continued to take more than five days to process some transcript requests. At times she got so far behind in processing requests that other employees were asked to help grievant catch up with her work. Grievant's predecessor in the position was asked to help grievant once or twice per month. There were a steady number of complaints from requestors about delayed processing of their requests.

After another complaint in late February 2006, the Registrar directed grievant to bring her all unprocessed transcripts. There were 15-20 requests that were more than seven days old; one request was more than a month old and another was five months old. The Registrar directed grievant to telephone the requestors to apologize for the delay in processing and to explain why their requests had not been processed.¹¹ Grievant did not comply with the supervisory instruction. The Registrar assigned other employees to promptly fulfill the old requests. Following this, the Registrar issued a Notice of Improvement Needed to grievant directing her to, among other things, improve her attitude toward customers, process requests timely, be more organized, follow supervisory instructions, and keep her voice mailbox clear.¹² At one point in March, other employees complained that they did not want to help grievant because every time they did, grievant just fell behind again and did not make any apparent effort to stay current in her work. The following day, a complaint was received from the Better Business Bureau about a customer who had made three requests, paid his fee, and still not received his transcript.¹³ The supervisor asked grievant about this request but she had no excuse for not processing it on a timely basis.

On March 30, 2006, the president of the University received a complaint from a student who had requested her transcript several weeks earlier but had not had a response. At the end of March, grievant's supervisor gave her an interim evaluation¹⁴ citing as substandard the same areas mentioned in the February Notice of Improvement Needed. Grievant failed to demonstrate improvement following the interim evaluation. On April 5th, it was discovered that grievant had not opened her e-mail, which contained requests for transcripts, since March 6, 2006.¹⁵

Grievant was pleasant when talking with some people in the office. However, supervisors observed that grievant was sometimes unprofessional in dealing with customers. Specifically, she sometimes revealed frustration on the

¹⁰ Agency Exhibit 5. Counseling memorandum from supervisor to grievant, September 16, 2005.

¹¹ Agency Exhibit 8. Memorandum from Registrar to grievant's supervisor, March 1, 2006.

¹² Agency Exhibit 5. *Notice of Improvement Needed/Substandard Performance*, February 28, 2006.

¹³ Agency Exhibit 1. Letter from Better Business Bureau, March 2, 2006.

¹⁴ Agency Exhibit 5. *Interim Evaluation Form*, March 31, 2006.

¹⁵ Agency Exhibit 8. Screen of grievant's Outlook Inbox reflecting 124 unopened e-mail messages.

telephone, sometimes had a less than pleasant tone, and was sometimes hostile to customers.

The Human Relations Office was consulted prior to the decision to discipline and remove grievant from 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 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 a claim of harassment, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁶

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

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

should warrant removal from employment.¹⁷ Failure to follow supervisory instructions and failure to perform assigned work are two examples of a Group II offense.

The agency has demonstrated that grievant failed to comply with supervisory instructions on March 1, 2006 when she was told to call customers to apologize for and explain why she had not processed their requests in a timely manner. The agency has also shown that grievant failed to follow other supervisory instructions to improve her attitude with customers and to process transcript requests on a timely basis.

Grievant asserts that she had a personality conflict with her previous supervisor (who had supervised grievant until early 2005). The supervisor maintains that she attempted to help grievant on numerous occasions but grievant always had a reason for not doing what the supervisor asked her to do. In 2003 when grievant was disciplined, the supervisor called grievant's mother and attempted to enlist her help in convincing grievant to follow instructions. Grievant's mother acknowledged that grievant is hardheaded and wants to do things her way. This former supervisor denied harassing grievant, calling her names, and making any negative comments. The supervisor avers that grievant had warranted additional discipline but the supervisor tried to help grievant keep her job. The former supervisor was not involved in the decision to discipline grievant in May 2006.

Grievant contends that the agency terminated her employment because she has diabetes. Grievant had openly discussed her diabetes with others in the office. Some of the other employees also have diabetes and therefore, this was a common topic of discussion. However, each agency witness credibly denied that grievant's diabetes was ever considered in the decision to remove her from employment. Other than her contention, grievant failed to offer any evidence or corroborative testimony to support this charge.

Hostile work environment harassment

Grievant asserts that a former supervisor harassed her. To establish a claim for harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on a protected classification; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. The grievant has not presented evidence, other than allegation, that there was any unwelcome conduct. The former supervisor who grievant accused of harassing her credibly denied each allegation raised by grievant. Grievant failed to offer any corroborating witnesses or other evidence that would show that harassment occurred. During her employment, grievant never complained to a supervisor or anyone else that she was being harassed. Grievant also failed to identify any

¹⁷ Agency Exhibit 9. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

protected classification as the basis for her allegation. As grievant has failed to prove the first two prongs of the test, it is unnecessary to consider the remaining two prongs.

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 does not have long state service. A significant aggravating circumstance is the multiple prior active disciplinary actions. 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 May 22, 2006 and grievant's removal from employment due to accumulation of active disciplinary actions are hereby UPHELD.

Grievant has not borne the burden of proof to demonstrate harassment.

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.¹⁸ 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.¹⁹ 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

¹⁸ 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).

¹⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.