

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions); Hearing Date: 11/07/06; Decision Issued: 11/08/06; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 8443; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8443

Hearing Date: November 7, 2006
Decision Issued: November 8, 2006

APPEARANCES

Grievant
Program Manager
Advocate for Agency
One witness for Agency
Observer for EDR

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 II Written Notice issued for failure to follow supervisory instructions.¹ As part of the disciplinary action, grievant was suspended for three days. 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 Social Services (Hereinafter referred to as “agency”) has employed grievant for six years. He is a social worker.³

Grievant’s supervisor distributed to the entire Hotline staff, including grievant, his expectations of staff to help assure adequate coverage of the Hotline.⁴ Among the expectations is the directive that “All Hotline staff will contact the supervisor to request leave **PRIOR** to taking leave. A leave form is completed and submitted to the supervisor prior to taking leave and **shift changes.**”

Grievant’s responsibilities include accepting and referring reports of child/adult maltreatment to local social service agencies for investigation. In the 2004 annual performance evaluation of grievant, he was cited for failing to completely fill the OASIS computer screens, for failing to conduct proper searches on all referrals and, for being unwilling to take reports from some mandated reporters.⁵ During 2005, grievant was not at work for an extended period of time due to an administrative suspension pending investigation. In February 2006, grievant’s supervisor counseled him about unsatisfactory work performance. Among other things, grievant’s supervisor told him that he should not discourage or refuse callers who want to make referrals. He also told grievant not to assess the validity of reports but only take an accurate and thorough report, and then forward the report to the appropriate agency for disposition.⁶ Reports of maltreatment are required to be completed in the agency’s OASIS computer system. On occasion, messages can be taken in lieu of reports for administrative issues such as changes in on-call workers, medical consents, and foster parent calls.

Following the February counseling, the supervisor counseled grievant on several occasions in April, May, and June 2006 regarding continuing problems.⁷ On April 10th, the supervisor counseled grievant that he should not argue with localities who call in requesting that he file a report. On April 27th, the supervisor counseled grievant about a similar complaint from a locality that grievant had refused to take a report. On May 18th, the supervisor again counseled grievant about the necessity to take reports regardless of whether grievant believes the

¹ Agency Exhibit 1. Group II Written Notice, issued June 29, 2006.

² Agency Exhibit 1. Grievance Form A, filed July 26, 2006.

³ Agency Exhibit 4. Employee Work Profile Work Description, October 2005.

⁴ Agency Exhibit 6. Supervisory Expectations of Hotline Staff.

⁵ Agency Exhibit 5. 2004 Performance Evaluation, September 24, 2004.

⁶ Agency Exhibit 7. Memorandum from supervisor to grievant, February 22, 2006.

⁷ Agency Exhibit 7. Supervisor’s documentation of counseling sessions.

information meets criteria. A similar complaint on May 25th was received; again the supervisor counseled grievant. On June 5th, grievant failed to properly search the OASIS system to see if there had been prior referrals on a child; the supervisor counseled grievant to follow the procedure he was taught and not to use his own procedure. Grievant took a day of leave on May 8, 2006 but did not request the leave in advance and did not tell the supervisor that he had arranged for someone to take his place.⁸

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 the employee must present his evidence first and must prove his claim by a preponderance of the evidence.⁹

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

⁸ Agency Exhibit 2. Memoranda and reports documenting the incidents in this paragraph.

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

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.¹⁰ Failure to follow supervisory instructions is an example of a Group II offense.

The agency has demonstrated, by a preponderance of evidence, that grievant had been repeatedly counseled over long period of time, beginning in 2004, for the same issues that are part of the instant disciplinary action. As the Standards of Conduct explain, counseling is usually a first step taken by a supervisor to correct unacceptable performance.¹¹ However, when it appears that counseling is not having the desired effect, it is not only reasonable but appropriate that the agency escalate corrective action to a disciplinary action in order to assure that the employee gets the message that his conduct and behavior must change. Here, grievant had been told repeatedly that his job was to take reports, not argue with reporters about the validity of reports, put all information into the OASIS system and then provide the report to the appropriate local agency for action. Notwithstanding the clear messages from the supervisor, grievant failed to follow his supervisor's instructions. Therefore, it was appropriate for the agency to take corrective action in the form of a disciplinary action.

In his grievance, grievant asks whether an employee can be disciplined twice for the same reasons. As a general rule, the answer to that question is no. However, there is no evidence that grievant was disciplined twice. Grievant has been given only one disciplinary action – the Group II Written Notice at issue herein. Pursuant to the *Standards of Conduct*, counseling is not a disciplinary action; counseling is a corrective action that does not result in any detriment to the person being counseled. Counseling is intended only to bring to an employee's attention that there is a deficiency in their performance or behavior that must be corrected in order to avoid possible future disciplinary action.

Grievant complains that the incidents for which he was disciplined were not brought to his attention in a timely manner. The evidence in this case demonstrates otherwise. The supervisor testified credibly that he had counseled grievant on each occasion; his documentation, prepared contemporaneously with the counseling, corroborates his testimony. Moreover, grievant acknowledged that the supervisor had spoken to him about these incidents. Grievant's real complaint is that he considers those counseling sessions to have been too brief and not "in depth." The *Standards of Conduct* permits counseling sessions to be

¹⁰ Agency Exhibit 10. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

¹¹ Section II, *Id.*

verbal, in writing, or both. In this case, the supervisor complied with policy by verbally counseling grievant.¹²

Although grievant did not specifically mention the word “harassment” in his grievance, he contends that his supervisor did not promptly bring some of the problems to his attention. In her report to the agency’s Commissioner, the Family Services Division Director infers in her concluding paragraph that the supervisor may not have promptly discussed complaints with grievant.¹³ While the evidence discussed in the immediate preceding paragraph supports the supervisor’s contention that he did counsel promptly, the supervisor would be well-advised to follow the best practice regarding counseling discussed in footnote 12, *supra*. Grievant also suggests that the supervisor’s decision to make him leave the work site for three days prior to the imposition of discipline and the security escort from the worksite were heavy-handed. Initially, the three days off constituted administrative leave – not a suspension – because grievant was to be paid for those days.¹⁴ An agency may give an employee administrative leave with pay for the resolution of work-related conflicts.¹⁵ However, given that grievant’s offense involves work performance and not anything requiring security guards, a security escort from the building does appear to have been unnecessarily embarrassing and unwarranted by the offense.

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 *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 a moderate length of state service. His recent performance evaluations have been satisfactory overall. However, there is an aggravating circumstance that counterbalances these mitigating circumstances and supports disciplinary action - the multiple prior counseling sessions conducted by the supervisor with grievant. After carefully reviewing the circumstances of this case, it is concluded that the agency appropriately applied the mitigation provision by suspending grievant for only three days.

¹² The best practice when verbally counseling an employee is to follow up the counseling with a written memorandum *to the employee* that documents the substance of the counseling discussion.

¹³ Agency Exhibit 3. Memorandum from Family Services Division Director to Commissioner, July 12, 2006.

¹⁴ See Section II.E, DHRM Policy 1.60. By definition, a suspension is without pay. See also Section VIII.B.1, *Id.* Suspensions may be imposed only for investigations of employee conduct or court actions. In the instant case, there was neither an investigation conducted by the agency nor a court action.

¹⁵ Section II.A.3, DHRM Policy 4.05, *Administrative Leave*, revised September 10, 2005.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on June 29, 2006 and the three-day suspension are 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.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]

*S/*David J. Latham

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.