Issue: Group I Written Notice (disruptive behavior); Hearing Date: 11/01/06; Decision Issued: 11/02/06; Agency: JMU; AHO: David J. Latham, Esq.; Case No. 8448; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8448

Hearing Date: November 1, 2006
Decision Issued: November 2, 2006

PROCEDURAL ISSUE

Grievant requested as part of his relief that mediation be ordered for grievant and his director. A hearing officer does not have authority to compel parties to participate in mediation.[1] Mediation is, by definition, a *voluntary process* through which individuals, with the assistance of mediators, may reach an agreement to resolve work-related issues.[2] If both parties agree to participate in a mediation process, the Department of Employment Dispute Resolution (EDR) will be glad to arrange for a neutral mediator and facilitate the mediation process.

APPEARANCES

Grievant
Two Advocates for Grievant
Two witnesses for Grievant

[1] § 5.9(b)7 & 8. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[2] § 9. *Id.*

Director of Procurement Services
Attorney for Agency
Two witnesses for Agency
Human Resource 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?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group I Written Notice issued for disruptive behavior.[3] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4] James Madison University (Hereinafter referred to as "agency") has employed grievant for nine years. He has been employed by the Commonwealth for 16 years. He is a procurement practitioner.[5]

Grievant had been the Assistant Director of Procurement Services since 1999.[6] In February 2005, a new Director of Procurement Services took over the department. On March 28, 2006, the Director requested feedback from grievant and a senior buyer on the performance of a student wage employee who provided administrative support to buyers. Both grievant and the senior buyer stated that the wage employee's performance was substandard in several respects.[7] Based on this feedback, the Director advised both grievant and the buyer that she would be terminating the employment of the student wage employee that afternoon. When she advised the student of his removal from employment, the student requested to work out the remainder of the semester and the Director acceded to his request.

On April 5, 2006, the student met with the Director because he was confused about why he was being removed. He told the Director that grievant said he was completely satisfied with the student's performance, and that the Director and the senior buyer had made up their minds to remove the student prior to the March 28th meeting. The following day, the Director met with the student, the senior buyer, and grievant. When asked to repeat what he had said in the March 28th meeting, grievant averred that he couldn't remember but believed that he had spoken in support of the student. Both the senior buyer and the Director recalled that grievant had not supported the student but had given

[3] Agency Exhibit 7. Group I Written Notice, issued June 21, 2006.
[4] Agency Exhibits 4 & 5. Grievance Form A, filed July 18, 2006.
[5] Agency Exhibit 12. Employee Work Profile Work Description, April 10, 2006.
[6] Agency Exhibit 13. Employee Work Profile Work Description, August 30, 2004.
[7] Agency Exhibit 3. Director's notes of meeting, March 28, 2006.

specific examples of the student's substandard performance. As a result of this situation, the Director met with grievant on April 7, 2006, and counseled him verbally and in writing about his fabrication of an untrue story in the April 6th meeting.[8] She also demoted grievant from Assistant Director to senior buyer.[9]

After the student's employment ended, a new wage support employee was hired in May 2006. The new employee appeared to work into the job well and the Director considered her a good fit for the position. On June 15, 2006, grievant went to the wage employee's office, closed the door, and spoke with her about what had happened to the previous support person. He told her that he did not trust the senior buyer (referred to in the two preceding paragraphs), that the office is very dysfunctional, and that people only work well together in an emergency.[10] He also stated that everyone is out to get him, and that he didn't trust anyone. He suggested that the new employee watch the senior buyer and not trust her. The following day, the wage employee met with the Director because she was upset about what grievant had told her, specifically about his negative comments regarding the senior buyer. She told the Director she was considering whether to quit her job because she did not want to work in the atmosphere portrayed by grievant. On June 21, 2006, grievant asked the wage employee if what he had told her the previous week made her feel uncomfortable; she told him he had made her feel very uncomfortable.

The Director felt that grievant's comments to the new employee had been disruptive and had created distrust in the office. She reassigned the new employee to work with other buyers in the office. After that, the new employee felt that the situation improved and she decided to stay in her position (she is still employed). The Director then gave grievant a Group I Written Notice after consulting with the human resources office. In an e-mail to the Director, grievant subsequently acknowledged that he had learned a lesson and would not express negative opinions in the future.[11]

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

[8] Agency Exhibit 3. Memorandum from Director to grievant, April 7, 2006.
[9] Grievant did not file a grievance regarding his demotion.
[10] Agency Exhibit 5. Grievant's attachment to Grievance Form, memorandum dated June 15, 2006.
[11] Agency Exhibit 14. E-mail from grievant to Director, August 24, 2006.

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.[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 (DHRM) 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 I offenses include acts and behavior that the least severe.[13] The agency has promulgated its own policy, which defines Group I offenses similarly to the DHRM policy.[14] Disruptive behavior is an example of a Group I offense.

The agency has demonstrated, by a preponderance of evidence, that grievant's closed door comments to the wage employee in June were disruptive. Grievant argues that his conduct was not disruptive because it did not involve yelling, shouting, loud behavior, or any physical interruption of business. Grievant's argument is not persuasive. The *Standards of Conduct* does not limit disruptive behavior only to conduct that creates a loud disturbance or physical commotion. Since the *Standards* does not define the word disruptive, it must be presumed that the policy intended the word to have its commonly accepted meaning. The dictionary defines "disruptive" as "to break apart, to throw into

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[12] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

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

[14] Agency Exhibit 2. Policy 1317, *Standards of Conduct and Performance for Classified Employees*, revised June 2006. See also Agency Exhibit 1, Section II, *Classified Employee Handbook.*

disorder, to interrupt the normal course or unity of."[15] Thus, disruptive behavior includes conduct that interrupts the normal course of business. In this case, grievant's conduct resulted in the support person giving consideration to quitting her job, multiple meetings between the support person and the department director, meetings between grievant and the department director, and the issuance of disciplinary action. The consternation of the support person, plus the aggregate amount of time in subsequent meetings, constitutes an interruption in the normal course of work and is, therefore, disruptive behavior.

Grievant maintains that when he spoke to the student wage employee in early April, he told the student that he had not done his job as he was supposed to. However, if that was all grievant told him, it would have been illogical for the student to tell the Director that grievant gave him a different story. Although the student's statements to the Director were hearsay, grievant has not demonstrated why the Director and the senior buyer would have fabricated such a story against grievant. Moreover, the Director held a meeting with grievant, the senior buyer, and the student, during which the student again recounted what he had earlier told the Director. There is absolutely no evidence to suggest that the student conspired with the Director and senior buyer against grievant. However, grievant's statement that everyone is out to get him is consistent with his other statement that he has been paranoid about being fired.

Grievant cites an October 2005 counseling as evidence of unfair treatment by the Director. Grievant had a variety of medical problems and three operations since mid-2005 and had exhausted his available sick leave benefits. Grievant requested, and was granted, permission to use annual leave time whenever he called in sick until his sick leave benefit was replenished. The Director requested that whenever grievant was requesting annual leave because of illness, that he submit a physician's excuse. While grievant may consider the supervisor's request to be onerous, it did not constitute disparate treatment. The Director had consulted with human resources, which affirmed the appropriateness of requesting a physician's excuse in this situation. The Director also offered unrebutted testimony that two other employees were likewise required to submit physician excuses when using annual leave for illness reasons. Moreover, state policy requires supervisors to verify illness in some situations in order to assure that benefits are not being abused.[16] It is common for supervisors to request such verification when the amount of sick leave being taken significantly exceeds the amount of leave used by most employees.

Grievant suggests that the disciplinary action was motivated by the poor relationship between him and his supervisor. While it is apparent that this relationship is in need of repair (see section on Mediation below), there is nothing to suggest that the disciplinary action was motivated by a poor relationship. The agency has shown that it had a reasonable basis to escalate the corrective action from the previously issued counseling memorandum to a Group I Written Notice

[15] *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.
[16] DHRM Policy 4.55, *Traditional Sick Leave*, revised July 10, 2004.

in order to emphasize to grievant that his comments to new employees are disruptive and unproductive.

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. 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 have long state service and his evaluations have been satisfactory. However, these factors are counterbalanced by the fact that grievant had been counseled two months earlier about the same type of unacceptable conduct. The counseling included a warning that a recurrence of such behavior could result in disciplinary action. After carefully reviewing the circumstances of this case, it is concluded that the agency appropriately applied the mitigation provision.

Mediation

It is obvious from both the documentation in the file and the testimony at hearing that there is a serious disconnect between grievant and his supervisor. The supervisor stated that she was willing to participate in mediation with grievant but only on condition that grievant first have a mediation session with the senior buyer. Grievant avers that he has talked with the senior buyer three times and that more talking would not be helpful. As stated at the beginning of this decision, a hearing officer cannot order parties to participate in mediation. A hearing officer may make a recommendation and parties are then free to decide whether to accept the recommendation. It does appear that the parties would benefit from an open, frank, and wide-ranging mediation session. It also appears that grievant's concerns about the supervisor's intentions are sufficiently serious that a mediation between them should not be conditioned upon a separate mediation between grievant and the senior buyer. If the supervisor is not trying to remove grievant, is not biased against him due to his age, or in any other way treating him disparately, it would reassure grievant to hear that from her in a face-to-face mediation. Of course, if grievant has differences with the senior buyer, mediation between those two would also be beneficial.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on June 21, 2006 is hereby UPHELD.

It is RECOMMENDED that the supervisor and grievant mediate their concerns or find some other method to improve their mutual communication.

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.[17] 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

[17] 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).

decision becomes final.[18] 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

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David J. Latham, Esq.
Hearing Officer

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