

Issues: Group II Written Notice (failure to follow instructions), Work Conditions – (supervisor/employee conflict); Hearing Date: 03/15/07; Decision Issued: 03/22/07; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8535; Outcome: Agency upheld in full. **Administrative Review: DHRM Ruling Request received 03/30/07; DHRM Ruling issued 05/29/07; Outcome: HO's decision affirmed.**



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:  
Case No: 8535

Hearing Date: March 15, 2007  
Decision Issued: March 22, 2007

**PROCEDURAL ISSUE**

Subsequent to the hearing, the agency suggested that it might be appropriate to reopen the hearing in order to rehabilitate the testimony of one of its witnesses who had testified erroneously about an e-mail she authored. The hearing officer determined that reopening the hearing for this purpose would serve no useful purpose because he had already determined to accord little evidentiary weight to the witness' testimony about the e-mail. The hearing officer further concluded that the decision in this case would be unchanged with or without the testimony of that particular witness.

**APPEARANCES**

Grievant  
Attorney for Grievant  
One witness for Grievant  
Division Manager  
Representative for Agency  
Seven 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 grievant harassed?

### FINDINGS OF FACT

Grievant filed a grievance from a Group II Written Notice for failure to follow supervisory instructions.<sup>1</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant as an administrative and program specialist for 35 years.

In February 2006, grievant's Division Manager counseled grievant, in writing, about improperly leaving her telephone off the hook.<sup>3</sup> In April 2006, grievant complained to the Deputy Director that the office manager was harassing her. Grievant told him that the medical reviewers could do their work without a supervisor.<sup>4</sup> As a result of this discussion, the Deputy Director interviewed employees who work in close proximity to grievant. His investigation did not reveal any evidence of harassment. One coworker (grievant's sole witness at the hearing) told the Deputy Director that there was stress in the workplace only when grievant was present. She also related that grievant often threatened to go to the Commissioner when she disagreed with something.

Also in April 2006, the Director of Driver Services (fourth management level above grievant) found it necessary to counsel grievant about her disruptive behavior.<sup>5</sup> In addition, because of concerns about grievant's behavior toward her then supervisor, the agency required grievant to meet with a licensed clinical psychologist. The psychologist concluded that grievant was not dangerous to others around her but noted that grievant is defensive, not open to criticism, and not skillful at self-analysis.<sup>6</sup> The psychologist recommended that grievant receive further counseling with a professional psychotherapist. Grievant agrees that she is not dangerous to others but disagrees with the rest of the psychologist's findings. The human resources employee relations manager has met with grievant in the past regarding her loud and disrespectful behavior.

Four specialists, including grievant, comprise the medical review unit; one of the specialists supervises the remaining three specialists including grievant. The current supervisor was hired in May 2006 as a reviewer and was made

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<sup>1</sup> Agency Exhibit 4. Group II Written Notice, December 1, 2006.

<sup>2</sup> Agency Exhibit 1. Grievance Form A, filed December 11, 2006.

<sup>3</sup> Agency Exhibit 6. Memorandum from division manager to grievant, February 23, 2006.

<sup>4</sup> Grievant Exhibit 10. Memorandum of Deputy Director, April 21, 2006.

<sup>5</sup> Agency Exhibit 5. Memorandum from Director to grievant, April 26, 2006. See also Agency Exhibit 15. Memorandum from Director to grievant, May 8, 2006.

<sup>6</sup> Agency Exhibit 14. Letter from licensed clinical psychologist to human resources director, May 1, 2006.

supervisor in October 2006. In addition to reviewing medical requests, the unit responds to telephone inquiries from the public and agency employees.<sup>7</sup> The practice of the unit is to have two reviewers available to answer telephones at all times. On a rotating basis, each reviewer is given one day off the phones to work on other work. The two people assigned to telephones are required to log on their telephone in the morning and be available for incoming calls throughout the day.<sup>8</sup> When assigned to be on the telephone, a reviewer may place the telephone in auxiliary (AUX) mode only for lunch, breaks, or other required time away from the work station.<sup>9</sup> A red light appears on the telephone when it is placed in AUX mode. The proper telephone procedures have been discussed with the reviewers in monthly meetings, e-mails, and other memoranda. The reviewer who is not assigned to telephone duty is not to log on her telephone.<sup>10</sup>

On November 16, 2006, grievant was not assigned to telephone duty and therefore should have been logged off. At one point during the morning, the supervisor noticed that grievant's telephone and one other reviewer's telephone were in the AUX mode even though both employees were at their work stations. The third reviewer's telephone was logged off even though that employee was on telephone duty that day. In this situation, no calls from the public could be received. The supervisor immediately told the reviewers to open their telephones (cancel AUX mode). The employee who had been logged off promptly logged on, and the other reviewer promptly canceled the AUX mode on her telephone. Grievant told the supervisor that she needed time off the telephone because she had not gotten time off three days earlier. Grievant also said that she had placed her telephone in AUX in order to receive personal calls. However, witnesses testified that personal calls can be received on the phone's other line while the public line is logged off, i.e., there is no need to be in AUX to receive personal calls. The supervisor nevertheless told grievant to open her telephone for incoming calls.<sup>11</sup> Grievant became argumentative, loud, and refused to comply with the supervisor's instructions. Grievant continued to refuse to open her telephone. At noon when one of the other reviewers left work, grievant opened her telephone to receive calls.

For some time, the practice had been for the reviewers to submit their time sheets to the supervisor each Friday afternoon. In October 2006, the supervisor told the reviewers that she was changing the practice by extending the time to submit timesheets to the following Monday, thereby giving reviewers one extra day to fill out their timesheets. She sent the reviewers a reminder e-mail in

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<sup>7</sup> Grievant Exhibit 17. Grievant's Employee Work Profile Work Description, October 12, 2006.

<sup>8</sup> Reviewers' telephones require entry of an individual code to log on for receipt of calls from the public.

<sup>9</sup> Agency Exhibit 6. Various monthly staff meetings 2004-2006 and, memorandum of discussion with grievant, February 23, 2006.

<sup>10</sup> Even though a telephone is logged off for calls from the public, the phone has a separate line on which the employee can receive and make calls.

<sup>11</sup> Agency Exhibit 4. Attachment to Written Notice.

November 2006.<sup>12</sup> At 4:50 p.m. on Monday, November 20, 2006, the supervisor called for timesheets and the other two reviewers gave their timesheets to the supervisor.<sup>13</sup> On the following morning, grievant had still not submitted her timesheet so the supervisor asked grievant to give it to her. Grievant loudly protested that she was tired of the supervisor picking on her about her timesheet. Grievant argued that she had previously done timesheets and that they were not as important as the supervisor was making them out to be.<sup>14</sup> The grievant continued to be loud and argumentative. Five other employees in the nearby area heard grievant loudly arguing with her supervisor.<sup>15</sup> They described grievant as disrespectful and increasingly loud during the discussion; the supervisor maintained a soft tone during the incident. Finally, when the supervisor told grievant that she could not get paid without turning in her timesheet, grievant submitted it to the supervisor about one half to one hour later.

On November 27, 2006, the supervisor met privately with grievant to ask grievant why she had displayed hostility and been argumentative when the supervisor gave her instructions. She gave grievant a memorandum documenting the two incidents (addressed in the preceding paragraphs);<sup>16</sup> grievant rejected the memorandum.<sup>17</sup> Grievant told the supervisor that she didn't mind taking the supervisor "upstairs" (presumably to the Commissioner or other upper management employees). The supervisor told grievant that when she yelled and argued with the supervisor in the open work area<sup>18</sup> where others could overhear, she was disrespecting the supervisor. Grievant told the supervisor that the supervisor did not show respect to the reviewers.

After reviewing the November incidents, the agency determined that grievant should be disciplined because she had reverted to the unacceptable behavior for which she had been counseled in the spring of 2006. The agency decided that disciplinary action was needed to get grievant's full attention. However, in view of grievant's length of service and otherwise good work performance, the agency did not impose a suspension.

### 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

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<sup>12</sup> Agency Exhibit 10. E-mail from supervisor to reviewers, November 15, 2006. [NOTE: the term "mrs" in the To line of the e-mail means "medical review staff."]

<sup>13</sup> Grievant's regularly scheduled work hours are 8:15 a.m. to 5:00 p.m.

<sup>14</sup> Agency Exhibit 12. Memorandum from supervisor to grievant, November 29, 2006.

<sup>15</sup> Agency Exhibits 18-22. Affidavits from five employees, March 7, 2006.

<sup>16</sup> Agency Exhibit 13. Memorandum from supervisor to grievant, November 27, 2006.

<sup>17</sup> The supervisor asserts that grievant threw the memorandum back across the table; grievant denies this, contending only that she disagreed with certain words in the document.

<sup>18</sup> Agency Exhibit 3. Floor plan of open work area.

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.<sup>19</sup>

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.<sup>20</sup> Failure to follow a supervisor's instructions is a Group II offense.

The agency has shown, by a preponderance of evidence, that grievant failed to follow supervisory instructions on November 16 and 20, 2006. Specifically, she failed to turn on her phone and take calls when directed to do so, and, she failed to turn in her time sheet when directed to do so. Grievant compounded her insubordinate behavior by loudly arguing with her supervisor about these instructions in front of other employees. If these two instances had

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<sup>19</sup> § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

<sup>20</sup> Agency Exhibit 23. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

been grievant's first such behavior, the agency might possibly have considered other corrective action.<sup>21</sup> However, grievant's behavior was a repetition of similar argumentative behavior that had occurred several months earlier. Grievant's earlier behavior had so concerned the agency that it referred grievant to a clinical psychologist for professional evaluation.

Several other employees in the area witnessed and/or heard grievant's loud, argumentative, and disrespectful behavior towards her supervisor in November 2006. It must be noted that this was a new supervisor – not the supervisor with whom grievant had a problem in the spring of 2006. In view of the previous counseling, the agency's decision to take more emphatic corrective action in this case was warranted. By issuing a Group II Written Notice, the agency has advised grievant that such disrespectful behavior towards any supervisor will not be tolerated.<sup>22</sup>

The agency acknowledges that grievant performs her work correctly and satisfactorily. She is generally quiet and reserved when performing her work. In her most recent evaluation, grievant was rated an extraordinary contributor in two of her core responsibilities. Grievant's problem is not so much following directions but rather her unruly reaction to being given supervisory instructions. The employee relations manager notes that grievant's behavior when given instructions is loud, abusive, arrogant, and disrespectful. Grievant's demeanor during cross-examination reflected controlled hostility, condescension, evasiveness, and argumentativeness. The testimony and evidence in this case suggest that grievant does not recognize that, while it is acceptable to disagree with a supervisor, such disagreements should be addressed in private and in a calm and respectful manner.

Grievant argues that other employees who have submitted late time sheets have not been disciplined and that makes her discipline arbitrary and capricious. This argument is not persuasive. Grievant was not disciplined just because her time sheet was late. She was disciplined, in part, because she refused to submit her time sheet even after been told to do so on multiple occasions, *and*, because she was argumentative and disrespectful to a supervisor when again asked to submit the time sheet.

### Harassment

Grievant asserts that the division manager has 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 that the division manager harassed her. The encounters

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<sup>21</sup> In such a case, the agency might possibly have considered a Group I Written Notice for disruptive behavior to be appropriate.

<sup>22</sup> A second active Group II Written Notice normally results in removal from state employment.

that precipitated this disciplinary action involved grievant's immediate supervisor, not the division manager. To the extent that grievant did not agree with the supervisor's instructions, she might characterize them as unwelcome conduct. However, grievant has not shown either that the supervisory instructions were based on any protected classification, or that any supervisory conduct was so severe or pervasive as to be considered an abusive work environment. Accordingly, grievant has not proven either the second or third prongs of the above test. Therefore, consideration of the fourth prong is unnecessary.

### 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 does have long state service and her work performance has been generally satisfactory. Recognizing these mitigating factors, the agency elected not to impose a suspension in conjunction with this disciplinary action. Based on the totality of the evidence, the hearing officer concludes that the agency's disciplinary action was within the tolerable limits of reasonableness.<sup>23</sup>

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for failure to follow supervisory instructions is 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.

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<sup>23</sup> 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.'"



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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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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<sup>24</sup> 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).

<sup>25</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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David J. Latham, Esq.  
Hearing Officer

May 29, 2007

**RE: Case No. 8535**

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, as advised on pages 7 and 8 of the hearing decision dated March 22, 2007, and the Grievance Procedure Manual, §7.2(a), either party to the grievance may file for an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that 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.

Concerning your request for review, you stated, "The basis for my challenge is that the decision rendered by Hearing Officer, David J. Latham, is inconsistent with the following: Code of Virginia § 2.2-3000. Policy of the Commonwealth; responsibilities of state agencies under chapter A. "It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." You also stated that there was a violation of 42 USC §12112 (d) (4) (A), the Americans with Disabilities Act.

In our opinion, you have not identified any Department of Human Resource Management or Department of Motor Vehicles policy with which the hearing officer's decision is inconsistent or violates. Rather, it appears that the issues you raised are related to how the hearing officer assessed the evidence and how much weight he placed on that evidence. The authority of DHRM is

restricted to reviewing issues related to the application and interpretation of policy. Absent any identified, specific policy violation committed by the hearing officer in making his decision, this Agency has no basis to interfere with the application of this decision.

If you have any questions regarding this correspondence, please contact me at (804) 225-2136 or 1 (800) 533-1414.

Sincerely,

Ernest G. Spratley, Manager  
Employment Equity Services