

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 04/29/08; Decision Issued: 05/02/08; Agency: DMV; AHO: Frank G. Aschmann, Esq.; Case No. 8795; Outcome: No Relief – Agency Upheld In Full; **Administrative Review: DHRM Review Request received 05/16/08; DHRM Admin Review issued 06/11/08; Outcome: HO's decision affirmed.**

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

In the matter of: Case No. 8795\*

Hearing Date: April 29, 2008  
Decision Issued: May 2, 2008

**APPEARANCES**

Agency Presenter  
Agency Representative  
Agency Observer  
Four Agency Witnesses  
Grievant  
Grievant's Attorney  
Three Grievant Witnesses (two by telephone)

**PROCEDURAL ISSUE**

Was the Grievant denied Due Process as a result of the Agency's failure to follow employment termination policy?

**SUBSTANTIVE ISSUE**

Did the Grievant violate the Standards of Conduct policy on September 24, 2007 such as to warrant employment termination?

**FINDINGS OF FACT**

The Grievant was employed by the Agency as a Customer Service Generalist Senior. The Grievant has approximately fifteen years of service with the Agency. The Grievant has received training in customer service principles and is knowledgeable about the Agency's customer service policies. The Grievant was assigned to work in a field office which provides services directly to the public.

On September 24, 2007, the Grievant was directed to work at the information desk by her office manager. The office was busy and customers had formed a line to the left waiting their turn to get help at the information desk.

The information desk provides case screening and assistance to customers so the customers can be prepared when it is their turn to see a clerk to process their transaction. The person working the information desk assesses the needs of the customer, gives out forms, directions and numbers to set an order for customers to be called to the clerks.

The Grievant had worked the information desk during the morning and took a lunch break. The Grievant returned from lunch and resumed working the information desk. The Grievant had helped two or three customers when she was approached from the right by a

customer who requested a VSA66 form. The Grievant directed the customer to go to the end of the line formed on the left. The Grievant continued to work with the customers from the line. The customer requesting the form remained at the desk and asked for the form again. The Grievant, again, told the customer to go to the end of the line.

The office manager was working one of the clerk positions and had been processing the customer's transaction. The customer had come to the office manager's station without the VSA66 form. The station did not have a copy of this form. One could have been printed through the computer system, however, the office manager had directed the customer to go back to the information desk, go directly to the person there and request one. The customer had previously gone through the information desk line while the Grievant was at lunch but had not received the form, waited until his number was called and gone to the clerk position to process his transaction. The office manager did not think he should have to wait in the information desk line a second time.

The office manager continued to process the transaction while waiting for the customer to return with the form. The manager looked up and saw the customer still at the information desk, signaled and yelled at the Grievant to give the customer the form. The Grievant held out the form and the customer took it and returned to the clerk's position. The Grievant claims the customer called her a "f\*\*\*ing black bitch."

The Grievant left her position at the information desk and approached the clerk's window where the customer and the office manager were. The Grievant complained about sending customers back to the information desk and that the customer had cut in front of the other customers which makes them angry. The Grievant then turned and headed back to the information desk, telling the customer, "you're stupid," as she past him.

The Grievant was subsequently called into the office manager's office and told her behavior had been unacceptable and she was sent home to prevent further disruption in the workplace. The Grievant was contacted and the incident discussed, placed on leave with pay pending an investigation and instructed to prepare a statement of what happened and to send it in. The Grievant prepared a statement and faxed it to the office manager on September 26, 2007. On October 1, 2007, a Group II Written Notice was issued by the Agency citing a violation of the Standards of Conduct and terminating the Grievant's employment on the basis that it was a fourth active Written Notice and there were no mitigating circumstances sufficient to justify a lessor sanction.

The Grievant received the Written Notice by mail several days later. The Grievant's employment with the Agency was terminated via the Written Notice. The Grievant requested a due process hearing after completion of the administrative process and requests reinstatement.

#### APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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. The Agency uses these policies for its Standards of Conduct.

Policy number 1.60 contains a provision titled "Procedures related to disciplinary suspension, demotion or transfer with disciplinary salary action, or termination(due process)." Section four, "Exception to advance notification requirement," of this provision is applicable to the present case. Section four allows management to immediately remove an employee from the workplace and place the employee on leave with pay as a pre-disciplinary action leave. Section four requires that as soon as possible after an employee's removal from the work area, management must provide the employee with notice of the intended disciplinary action, the evidence against the employee and a reasonable opportunity to respond before taking any disciplinary action. The Agency acted under this provision when it removed the Grievant from the workplace, sent the Grievant home and placed the Grievant on leave with pay.

The Grievant argues that the Agency violated her due process rights because the Grievant was not given notice that employment termination was proposed as the sanction in the disciplinary action prior to giving her an opportunity to respond. Rights created by an employer through policies and handbooks can create employment rights which are binding on an employer when relied upon by an employee. Progress Printing Co., Inc. v Nichols, 244 Va. 337 (1992). The Agency's first notice to the Grievant that her employment was being terminated was the Group II Written Notice sent in October 2007. The Grievant was given an opportunity to respond to the incident prior to the disciplinary action but was unaware that employment termination was the sanction when the response was made. The Grievant cites Cleveland Board of Education v. Loudermill, 470 US 532 (1985) as authority for the argument. Loudermill stands for the position that an employee who can only be fired for cause has a vested property right in his employment which can only be taken away with the exercise of due process. Under Loudermill due process requires notice and an opportunity to respond.

The Grievant was aware of the incident which was cause for her dismissal. The incident was discussed with the Grievant's office manager who was a witness to the incident. Thus, the Grievant had notice of the facts and the evidence. The Grievant was also aware through these discussions that disciplinary action was being contemplated. In prior disciplinary action the Grievant had been warned that a fourth Written Notice might result in employment termination (see Agency exhibit #8). Grievant was given an opportunity to respond and tell her side of the story which she did prior to the issuance of the Written Notice which terminated her employment. Subsequent to the issuance of the Written Notice terminating the Grievant's

employment an additional administrative review of the matter was conducted. The Grievant was allowed to present her position and a reversal of the termination was one possible outcome. Further due process has been afforded the Grievant through this due process hearing which the Grievant admits is a de novo review of the case by an independent fact finder in which reversal of the termination is one possible outcome. The Grievant has brought forward evidence and been afforded the opportunity to present her case with the assistance of highly competent counsel. The standards of due process set forth in Loudermill have been met in this case. Grievant's argument for dismissal of the case for lack of procedural due process is unsubstantiated.

The Agency presented evidence that the Grievant had been trained in customer service. The Agency places a high priority on customer service which is noted in its policy (see Agency exhibit #9 Code of Professionalism, Service Quality). The Grievant and her witnesses acknowledged that customers are given preferential treatment, even to the detriment of employees. It is uncontradicted that the Grievant left her work station, made a complaint to her office manager while engaged with a customer and then called the customer stupid. This action is a clear violation of the Agency's policy. The Agency categorizes this act as a Group II level offense because it is a violation of a written and established policy. The Agency further supports its determination that the offense is a Group II because the action was done with intent and not accidentally, shown by the Grievant leaving her work station, following the customer to another work station and interjecting herself into the situation. Employment termination was determined to be the appropriate sanction as the Group II Written Notice was the fourth active group notice in the Grievant's employment file. Policy number 1.60, section "Disciplinary actions for specific offenses" states that accumulation of four Group I Written Notices normally should result in discharge from employment.

The Grievant does not deny her actions in this matter but asserts that employment termination is inappropriate because she was provoked and mistreated by the customer prior to her calling him stupid. The evidence produced by the Grievant showed that time after time the customers were supported by management even when the customers had been abusive to employees. The Grievant was well aware of this yet chose to engage the customer and insult him. The Grievant showed poor judgment confronting the customer knowing it was a violation of policy and that she would not be supported by management. No policy provides that an employee is entitled to directly retaliate against a customer even if inappropriate behavior is displayed by a customer. The Agency policy specifically provides that the employee is to disengage the customer, report to management and allow management to handle the belligerent customer.

The Grievant cites this policy as an excuse to leave her work station but this is a disingenuous interpretation and application of the policy. The Grievant claimed she left her work station to report the improper behavior of the customer as the policy directs, however, the policy is clearly intended to protect an employee while being confronted by a hostile customer by letting another employee intervene and defuse the situation. The Grievant attempts to use the policy as a sword not a shield to give her an excuse to go confront the customer a second time. The original confrontation had ended and had the Grievant simply let the incident pass she would not have been subjected to the discipline which is the subject of this hearing. By re-engaging the customer the Grievant initiated the conflict which violated the Agency policy and justified the Group II level.

The Grievant, additionally, argues that a personal conflict with the Agency District Manager has caused the Agency to take disciplinary action against her. The Agency presented unimpeached testimony that the District Manager was not involved in the decision to discipline or terminate the employment of the Grievant and was only notified of the action. Regardless of any personal conflict with a member of upper management the Grievant's admitted action is a violation of established policy and carried out in such a manner as to justify the level of discipline imposed.

Policy Number 1.60 of the Standards of Conduct provides for a Group II Written Notice for failure to follow a supervisor's instructions and written policies. Grievant's actions are within the parameters of this policy. The Grievant's actions were taken intentionally and disrupted the operation of the Agency facility. A Group II Written Notice is found to be appropriate and warranted. The sanction of employment termination is justified as this is the fourth active Written Notice in the Grievant's personnel file.

### DECISION

The disciplinary action of the Agency is affirmed.

### APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**ADMINISTRATIVE REVIEW:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the

date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**JUDICIAL REVIEW OF FINAL HEARING DECISION:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contrary to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

---

Frank G. Aschmann  
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Motor Vehicles  
May 11, 2007

The grievant, through her representative, has appealed the hearing officer's decision in Case No. 8795. The grievant is challenging the decision because she contends that the decision is inconsistent with state policy and federal law. For the reason stated below, the Department of Human Resource Management will not interfere with the application of this decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Motor Vehicles employed the grievant as a Customer Service Generalist at one of its locations until she was terminated. Among other things, she performed the following activities in her position:

Performs customer service transactions, administers vision, knowledge and road tests for driver licensing, and issues DMV credentials. Performs daily essential management functions as assigned in management's absence and performs other senior level functions as assigned. All programs and services are administered in a customer service-focused manner and in accordance with statutory and administrative procedural requirements such as the Motor Vehicle Code of Virginia, DMV policies, procedures, rules and regulations, the Privacy Protection Act and the Freedom of Information Act.

According to the Findings of Fact as spelled out by the hearing officer, on September 24, 2007 the grievant was assigned by her manager to work at the information desk. Her job at the time was to greet and screen customers, give directions and pass out forms and numbers to set an order for customers to be called to the desks. On this date, at an earlier time of the day, before the grievant was on duty, a customer had gone to the information desk to pick up a form. Unbeknown to the grievant, he did not get the particular form he needed and had been instructed by the office manager to go to the front of the line to secure the form. The grievant instructed him to go to the end of the line. The customer returned and asked for the form, after which the office manager instructed the grievant to give him the form. After he received the form, he called the grievant a "Fucking black bitch." The grievant went to the office manager's workstation to complain about the name calling as well as to disagree with the manager about how the whole situation was handled, including permitting that customer to cut the line in front of other complaining customers. As she was leaving to return to her workstation, she called the customer "stupid."

Based on her behavior, she was called into the manager's office and told that her behavior was unacceptable and sent home for the rest of the day to prevent any further disruption. She was later put on leave with pay and instructed to write her account of the incident and send it in to the office. She faxed it



in on September 26, 2007, and on October 1, 2007, a Group II Written Notice was issued by the agency which terminated the grievant.\* The Written Notice stated the following: “You are a generalist senior and are expected to be a leader and lead the work of others. On September 24, 2007, you openly confronted a customer and called him stupid in front of management and the general public. You were also loud and rude to your supervisor. Your conduct has the effect of undermining your position, that of your supervisor, and the value and mission of the Agency. This conduct is considered to be consistent with other Group II notices as listed in the Commonwealth’s Standards of Conduct.” The grievant filed a grievance and when she did not receive the relief she sought through the management steps, she asked for a hearing by an administrative hearing officer. The hearing officer upheld the disciplinary action that was taken by agency officials.

The relevant policy, the Department of Human Resource Management’s Policy No. 1.60, states that it is the Commonwealth’s objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive.

### DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must cite a particular mandate or provision in policy. The Department’s authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer’s assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The grievant opines that the hearing officer’s decision is inconsistent with state policy and federal law. The grievant contends, in part, the following: “The DMV is bound and adheres to the Department of Human Resource Management Standards of Conduct Policy No. 1.60. That policy contains a section entitled “Procedures related to disciplinary suspension, demotion, or transfer with disciplinary salary action, or termination(due process).” Paragraph 4 of that section is applicable to Ms. Meadors’ situation. It allows management to immediately remove an employee with pay from the work area without advance notification. It provides “as soon as possible after an employee’s removal from the work area for reasons stated above management must provide the employee with notification of the intended disciplinary action and evidence of the offense for which the disciplinary action being

---

\* Prior to the September 24, 2007 incident, the grievant had three other active written notices in her personnel file.

contemplated and provide the employee with a reasonable opportunity to respond before taking any disciplinary action.”

According to the hearing decision, “The Grievant was aware of the incident which was cause for her dismissal. The incident was discussed with Grievant’s office manager who was a witness to the incident. Thus, the Grievant had notice of the facts and the evidence. The Grievant was also aware through these discussions that disciplinary action was being contemplated. In prior disciplinary action the Grievant had been warned that a fourth Written Notice might result in employment termination (see Agency exhibit #8). Grievant was given an opportunity to respond and tell her side of the story which she did prior to the issuance of the Written Notice which terminated her employment. Subsequent to the issuance of the Written Notice terminating the Grievant’s employment an additional administrative review of the matter was conducted. The Grievant was allowed to present her position and a reversal of the termination was one possible outcome. Further due process has been afforded the Grievant through this due process hearing which the Grievant admits is a de novo review of the case by an independent fact finder in which reversal of the termination is one possible outcome. The Grievant has brought forward evidence and been afforded the opportunity to present her case with the assistance of highly competent counsel. The standards of due process set forth in *Loudermill* have been met in this case. Grievant’s argument for dismissal of the case fro lack of procedural due process is unsubstantiated.”

The Department of Human Resource Management agrees with the hearing officer’s application of Policy No. 1.60. It is clear that the grievant knew what charges the agency was considering placing against her and the possible consequences of those charges. She also was given an opportunity to give her side of the story and to respond to the charges before the agency took disciplinary action. Furthermore, there was more discussion regarding the incident after the grievant submitted her side of the story but before the agency took disciplinary action. Thus, this Agency has determined that, as related to Policy 1.60, the grievant was afforded due process and will not interfere with the application of the hearing decision. This Agency does not find that the hearing officer violated Policy 1.60 when he made his decision. Please be advised, however, that this Agency has no authority to evaluate whether the decision complies with the provisions of federal law as regards due process.

---

Ernest G. Spratley, Assistant Director  
Office of Equal Employment Services

\*Corrected case number, case originally cited as #8794.