

Issue: Group I Written Notice (failure to follow instructions and insubordination); Hearing Date: 07/24/18; Decision Issued: 08/23/18; Agency: VDH; AHO: Thomas P. Walk, Esq.; Outcome: No Relief - Agency Upheld.

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

IN RE: DEDR CASE NO.: 11213

DECISION OF HEARING OFFICER

HEARING DATE: July 24, 2018

DECISION DATE: August 23, 2018

I. PROCEDURAL BACKGROUND

The grievant commenced this matter by filing her Form A on October 4, 2017, challenging a disciplinary action taken against her on September 5, 2017. The Third Step response from the agency was made on December 2, 2017. The agency head qualified this matter for hearing on May 9, 2018. No explanation has been provided for the delay between the Third Step response and the matter being qualified. The grievant has not argued that she has been prejudiced by the delay.

I was appointed as Hearing Officer effective June 6, 2018. I conducted a prehearing conference call on June 15 with counsel for the agency and the grievant, who was unrepresented at the time. The hearing occurred on July 24, 2018. At the hearing counsel requested leave to file written arguments, which request was granted. The final written submission was filed by counsel for the agency on August 15, 2018.

II. APPEARANCES

The agency presented three witnesses and eleven total exhibits. Counsel represented the agency.

The grievant testified and presented one additional witness. She submitted seven total

exhibits. She was represented by counsel at the hearing.

III. ISSUE:

Whether the agency was justified in issuing the grievant a Group I Written Notice on September 5, 2017 for failure to follow instructions and insubordination?

IV. FINDINGS OF FACT

In August, 2017 the grievant worked for the agency as a Registered Nurse. On August 16, 2017 a Supervisor notified her that she was being given additional duties on a temporary basis. These duties would be as a Disease Investigation Specialist (DIS). The agency wanted her to take on these duties due to that role being temporarily vacant, the full-time specialist being out on leave. The grievant stated that she would consider taking on those duties but had unexpressed concerns about being physically able to do so. She was worried that her chronic pain issues and a lack of stamina would prevent her from being fully effective in that position in addition to her regular duties. She had previously performed the DIS duties and had been commended for her performance in that role.

The following day, on August 17, she advised her Supervisor that she felt that she must decline the temporary assignment. On August 18 she restated her intent to decline the duties. She stated that she would not perform them unless she was compensated at the rate being paid other nurses under the direct supervision of her Supervisor. She had been apprised that the assignment was anticipated to be temporary only, with a review of September 5 being planned.

A Human Resource Manager met with the grievant on August 21, three days later. The grievant again declined the duties of the DIS position. Nevertheless, the grievant began performing the DIS duties on August 24. She was notified on that same date that the agency was

considering formal disciplinary action against her. The evidence is unclear which happened first on that date. She has continued to perform the DIS role through the date of the hearing.

The agency issued the subject Group I Written Notice to the grievant on September 5 for failure to follow instructions and insubordination.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The parties agree that the facts are undisputed. The grievant declined the additional duties on three separate occasions over four days. I find that these statements by her clearly qualify as misconduct. The agency issued this disciplinary action pursuant to Policy 1.60 of the Department of Human Resource Management, commonly known as the Standards of Conduct. That policy groups employment-related misconduct into three categories. The agency has charged the grievant under the least serious category, Group I. Those offenses are described in the Standards of Conduct as episodes of “minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention.” The failure to follow instructions is listed as also being a possible offense under the Group II Classification. The agency chose the less serious classification upon consideration of the facts and circumstances.

Insubordination is not defined in the Standards of Conduct, or elsewhere in the Code of Virginia that I can find. The failure to follow a Supervisor’s instructions is merely one form of insubordination. Declining to perform work when requested is inarguably a form of insubordination. The grievant has argued because she eventually started performing the duties, no discipline should be imposed. That argument would have more appeal had she not declined the duties on multiple occasions.

Counsel for the grievant framed the situation in the workplace as being a “failure to communicate.” To the contrary - the grievant clearly was communicating her frustration with what she saw as a pay inequity and a lack of appreciation for her efforts. That message was received by the agency loud and clear. To that extent, I agree with her counsel that an appropriate analogy is to the dynamic between the characters played by Strother Martin and Paul

Newman in the movie *Cool Hand Luke*. Newman's Luke paid the consequences (extreme as they were) for his disrespect shown to the Captain (played by Martin).

The actions of the grievant, however, are more reminiscent of the main character in the short story by Herman Melville, *Bartleby the Scrivener*. The refrain from Bartleby to his employer that he would "prefer not to" perform certain duties is echoed in the statements of the grievant. Her statements were even more direct and definite.

The Supervisor gave the grievant the general direction that she would be performing the DIS duties. The agency did not show any specific task that went undone in that role from August 16 through August 24 that had any impact on the agency operations. (aside from that arising from this grievance and the issuance of the notice). Nevertheless, I find that the actions of the grievant are appropriately classified as insubordination and a failure to follow instructions.

I find that the action of the agency is consistent with law and policy. The grievant has made no argument that she has been treated differently from any similarly situated employee or subject to discrimination. Although the grievant had her private concerns about her physical ability to take on the new task, she failed to seek any reasonable accommodation from the agency for any physical condition that she believed might impair her ability to perform the duties. I also find that the action of the agency in classifying the offense as a Group I should not be further mitigated.

VI. DECISION

For the reasons stated above, I hereby affirm the issuance of each of the Group I Written Notice dated September 5, 2017.

VII. APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. 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.^[1]

See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant.

RENDERED this August 23, 2018.

/s/Thomas P. Walk