

Issue: Group II Written Notice (failure to follow instructions and insubordination); Hearing
Date: 11/13/17; Decision Issued: 12/05/17; Agency: VDH; AHO: John V. Robinson, Esq.;
Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
The Office of Equal Employment And Dispute Resolution
at the Department of Human Resource Management

DIVISION OF HEARINGS

In the matter of: Case No. 11093

Hearing Officer Appointment: October 20, 2017
Hearing Date: November 13, 2017
Decision Issued: December 5, 2017

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued on March 8, 2017 by Management of the Virginia Department of Health (the "Department" or "Agency"), as described in the Grievance Form A dated April 6, 2017.

The hearing officer was appointed on October 20, 2017. The hearing officer scheduled a pre-hearing telephone conference call at 2:00 p.m. on October 25, 2017. The Grievant's attorney (the "Grievant's Attorney"), the attorney for the Agency (the "Agency's Attorney") and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by counsel, confirmed and clarified that she is challenging the issuance of the Group II Written Notice for the reasons provided in her Grievance Form A and is seeking various forms of relief, including rescission of the Group II written notice.

By e-mail communication dated November 7, 2017, the hearing officer confirmed that the grievance is limited to the charge of insubordination alone.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency's Attorney represented the Agency. The Grievant's Attorney represented the Grievant. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency exhibits 1-15 and 17-20 and Grievant's exhibits 1-12.¹

¹ References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

There were no issues concerning non-attendance of witnesses or non-production of documents.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant has been employed by the Agency for approximately thirty-five (35) years. The Grievant works in a program of the Agency as a liaison. Her direct supervisor is the State Coordinator for the program, (the "Supervisor"), who in turn is supervised by the Program Manager. The Division Director heads the whole program.
2. The Grievant agreed to assist and actively assisted a local health district (the "District") prepare an application for a federal award.
3. The Supervisor only found out about the application which involved lots of work (AE 2 at 3) on Thursday, December 8, 2016. The Grievant told the Supervisor that the application was due on Monday, December 12, 2016. This was incorrect because the application deadline was actually Wednesday, December 14, 2016.
4. The Supervisor informed the Grievant that the Program Manager or the Supervisor must review the application before it could be submitted and requested a copy promptly.
5. The Grievant did not provide the application for review as requested and a written request was sent. AE 17.
6. The Grievant was out sick from work Monday, December 12 and Tuesday, December 13, 2016, so the Supervisor had to contact the applicant District directly to request the materials to review.
7. The Program Manager and the Supervisor reviewed the application and made a clear, final, unequivocal determination for a clearly stated reason that the application was insufficient to submit. The joint determination by the Program Manager and the Supervisor was clearly communicated in writing by e-mail of December 13, 2016, to both the Grievant and the District. AE 18.

8. On Wednesday, December 14, 2016, the Grievant returned to work. Around 9:00 a.m. on December 14, 2016, the District representative responded to the Supervisor's December 13, 2016 e-mail (copying the Grievant and the Program Manager) asking if it would still be possible to submit the application adding that the District representative would only be available to noon. GE 7.
9. The Grievant could have contacted her Supervisor, who was out of the office, by phone but instead took it upon herself to send an e-mail at 1:25 p.m. (when the District representative was unavailable) to her Supervisor, copying the Program Manager, the Division Director and the District Representative.
10. Amongst other things, the Grievant stated in this e-mail as follows:

"Good Afternoon,

Thank you for taking the time to review [the District Representative's] application representing [the District's] Program.

I had already reviewed the required documentation and narrative and found them to be acceptable; however, I can understand why you found her application to be incomplete. She has made the following minor corrections and wishes to resubmit the application for your approval:

....

I hope this clears any doubts in your mind about [the District's] application.

....

[The District's] application satisfies the requirements and [the District representative] is prepared to justify any response on the application and is prepared to support any component on [the Application] that USDA may question.

This application is complete and exemplary requirements met therefore [the District] is eligible to apply for [the Award]. [The District representative] is resubmitting her corrected application and documentation for your review. Your approval would be greatly appreciated.

Please advise her of your decision, so she can submit her application and documentation which is due at 11:59 p.m.

Many Thanks for your re-consideration.

[Grievant]

11. The Grievant admits that she should not have copied the District Representative on this e-mail.
12. The Grievant also met with the Division Director to circumvent the chain of command and in order to get him to countermand the joint decision by the Program Manager and her Supervisor.
13. The Grievant did not inform the Division Director of the decision by the Program Manager and the Supervisor but when the Division Director was informed of what had transpired by his executive assistant, the Grievant's efforts were thwarted. AE 19.
14. The Grievant told the Division Director by e-mail of 1:42 p.m. on December 14, 2016 that the reason the Grievant copied the District Representative on the 1:25 p.m. e-mail was for her "to know that her application which both [the Supervisor] and [the Program Manager] are already aware is being reconsidered." GE 9.
15. This latter statement was a deliberate misstatement by the Grievant and when asked about it in the hearing by her attorney, the grievant responded that she cannot address that line. The Grievant was similarly recalcitrant on cross-examination.
16. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.
17. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
18. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
19. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct (the "SOC") 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. AE 3.

Pursuant to the SOC, the Grievant's infractions can constitute a Group II offense, as asserted by the Department.

The disciplinary offense for which Grievant is cited in the Department's Written Notice is insubordination. The Grievant, by counsel, argued that Management has overreached by issuing a Group II Written Notice citing Grievant for insubordination, where Grievant ultimately was compelled to accept her Supervisor's and the Program Manager's decision and essentially did not throw a tantrum.

Management argued that the level of insubordination exhibited by Grievant warranted a Group II Written Notice. Management also clearly asserted its position that insubordination can occur even where a Grievant ultimately accepts a management decision or performs the task assigned. Of course, a contrary position would lead to the absurd result that a subordinate could never be guilty of insubordination if the employee ultimately was forced to accept a management decision or if the assigned task was ultimately completed even though the subordinate took active steps to defy or undermine or circumvent any manager's authority.

Management's position is in keeping with the plain, ordinary meaning of the word "insubordination." For example, Webster's Online Dictionary ("Webster's") defines insubordination as "(1) Not submissive to authority; 'a history of insubordinate behavior'; 'insubordinate boys'; (2) Disposed to or engaged in defiance of established authority."

<http://www.websters-online-dictionary.com/definition/insubordinate>. Webster's gives as synonyms for insubordination "resistant" and "resistive".

The hearing officer agrees with Management that under the facts and circumstances of this case, especially in the context of many prior warnings to Grievant, the level of insubordination exhibited by Grievant could constitute a Group II offense. This decision was made by Management in a carefully considered, collaborative, coordinated determination. In short, in making this determination, the hearing officer finds that Management has not in the least overreached, as was argued by Grievant.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Agency did not suspend the Grievant as it could have and the Agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The Grievant's apparent refusal to recognize and accept the seriousness of her violations of Agency policy and procedures and all of the previous warnings to Grievant concerning her insubordination preclude a lesser sanction. The hearing officer agrees.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for the insubordination offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the Group II Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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.

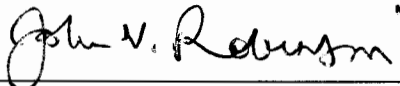
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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].

ENTER: 12 / 05 / 2017



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.