

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: September 13, 2001; Decision Date: September 17, 2001; Agency: Virginia Polytechnic Institute and State University; AHO: David J. Latham, Esquire; Case Number: 5275



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5275

Hearing Date: September 13, 2001
Decision Issued: September 17, 2001

PROCEDURAL ISSUE

The Group I Written Notice included termination of grievant's employment on July 5, 2001 because, at the time of issuance, grievant had three other active Group I Written Notices.¹ However, grievant appealed the three Written Notices and, on July 27, 2001, a hearing officer rescinded one of those Written Notices.² That hearing decision has not been appealed and is now final. Therefore, as of this date, grievant has remaining two active Group I Written Notices. Upon rescission of one written notice, grievant was reinstated to employment. However, it was decided that grievant should be moved to a similar position in an agency office located in a different county.

APPEARANCES

Grievant
Attorney for Grievant

¹ DHRM Policy No. 1.60, *Standards of Conduct*, provides "A fourth active Written Notice for a Group I offense normally should result in discharge."

² Decision of Hearing Officer, *Grievance No. 5198*, issued July 27, 2001.

District Manager for Agency
Attorney for Agency
Three witnesses for Agency

ISSUES

Was the grievant's conduct during June 2001 sufficiently unsatisfactory so 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

The grievant filed a timely appeal from a Group I Written Notice issued on July 5, 2001 because of inadequate or unsatisfactory job performance during June 2001. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

Virginia Polytechnic Institute and State University (hereinafter referred to as "agency") has employed the grievant as a program support technician for three years. Her position is responsible for clerical office management, clerical financial and budget preparation, general clerical tasks and clientele contact.³

The two active prior disciplinary actions involved grievant's discussion of unsolicited personal matters with agency clientele and a contemptuous, insubordinate statement to her supervisor.

On June 1, 2001, grievant responded to a client's inquiry with incorrect information (recommendations on pest control are supposed to be given by an agent, not by clerical staff). On the same date, grievant was overheard during a telephone conversation to tell a client that another client had made a derogatory comment about her supervisor.⁴ She also implied that not all customers are equally important. On June 4, 2001, grievant's clerical coworker resigned citing, among other things, daily conflicts and harassing comments from the grievant as part of the reason for her resignation.⁵ On June 6, 2001, grievant and her supervisor had a disagreement and the supervisor sent her home for the balance of the day. On June 11, 2001, grievant reminded her supervisor in front of other employees that he hadn't yet completed a certain task, but did so in a tone and manner that he perceived as "scolding."

On June 12, 2001, grievant prepared a summary report of evaluation responses from a meeting; her calculations of the average scores in 12 separate categories were all incorrect.⁶ On June 13, 2001, grievant prepared a travel

³ Exhibit 1. *Position and Performance Activity Form*, signed September 27, 1999.

⁴ Exhibit 2, page 13 & 14.

⁵ Exhibit 2, page 19.

⁶ Exhibit 2, pages 15, 16 & 17.

expense reimbursement voucher on which she recorded that the traveler had incurred a lodging expense but she did not attach the hotel bill to the travel voucher prior to submitting it to her supervisor for review and approval.⁷ On June 20, 2001, grievant typed an incorrect last name on a memorandum addressed to several members of an outside committee.⁸ On June 26, 2001, she responded to a handwritten note from her supervisor in a manner perceived by her supervisor as impertinent.⁹ On the same date, she prepared a batch of mailing labels for an agent but failed to check to see if the labels had been printed properly before giving them to the agent.

On July 1, 2001, an agent in the office wrote a memorandum to grievant's supervisor noting that grievant had been uncommunicative with a volunteer who had testified against her in the hearing.¹⁰ Another agent also wrote a memorandum to grievant's supervisor noting that he had observed grievant telling two clients that mistakes were attributable to her supervisor's incompetence.¹¹ During the month of June, grievant made or received a number of telephone calls during which she was observed by office staff to be covering her mouth while speaking into the mouthpiece, as if she were having personal conversations. Grievant knew that her supervisor dislikes the color pink but nonetheless used a pink highlighter on memoranda she gave to her supervisor.

By July 5, 2001, grievant's supervisor concluded that grievant's behavior was unprofessional and disruptive and that her job performance was inadequate and unsatisfactory. He issued a Group I Written Notice on July 5, 2001.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

⁷ Exhibit 2, pages 10 & 11.

⁸ Exhibit 2, pages 5, 6 & 7.

⁹ Exhibit 2, page 9.

¹⁰ Exhibit 2, page 12.

¹¹ Exhibit 2, page 18.

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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹²

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training¹³ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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. Section V.B.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses are the least severe of three groups of offenses. One example of a Group I offense is inadequate or unsatisfactory job performance.¹⁴

The preponderance of evidence in this case is sufficient to demonstrate that grievant made errors in calculations, preparation of memoranda and other tasks. Similarly, grievant's attitude toward coworkers, her supervisor and clientele was unprofessional and, at times, even hostile. Thus, there is ample evidence to support a conclusion that some form of corrective action was required.

However, there are several factors complicating this case that require discussion. First, the agency has presented no evidence to show that grievant had previously been counseled about inadequate or unsatisfactory job performance relating to the clerical errors made during June 2001. Each of the clerical errors (typing error, miscalculations, incomplete travel voucher, improperly prepared mailing labels) is significant and each merited counseling from the supervisor. However, there is no evidence that these types of errors had occurred previously or that grievant had ever been counseled about them.

¹² § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

¹³ Now known as the Department of Human Resource Management (DHRM).

¹⁴ Exhibit 4, page 38. *Classified Employee Handbook*.

Second, it appears that the clerical errors made during June 2001 were accumulated, and combined with feedback from other employees to create a stack of evidence that would hopefully support a Group I Written Notice. In addition, it cannot be ignored that the supervisor was well aware that a fourth Group I Written Notice would result in the termination of grievant's employment.¹⁵

Third, although a preponderance of the evidence suggests that the grievant's attitude in the office was negative, the previous grievance hearing was protracted and resulted in testimony by both sides that apparently widened an already significant rift between grievant and her coworkers. After that hearing ended in early June 2001, there was increased tension in the office. Coworkers characterized grievant as cold, hostile and uncommunicative. Grievant similarly noted a cold and hostile atmosphere from her workers. Both grievant and her coworkers undoubtedly contributed to the chilly atmosphere; it is impossible to assign a percentage of responsibility to either side. In any case, this was certainly an aggravating factor in this case.

Fourth, the supervisor, in at least one instance attempted to shift responsibility to the grievant for his own error. The signing supervisor is the person who certifies to the accuracy of the voucher, not the clerical person who prepares it. The supervisor has the final responsibility to assure the accuracy and completeness of vouchers that he reviews and signs. Here, the supervisor did not advise grievant of the missing hotel receipt. It would have been more appropriate for him to advise grievant of the deficiency, let her correct it and then have her resubmit the completed voucher for his review, approval and signature.

Finally, there was obvious friction between grievant and her supervisor. The supervisor was easily irritated by insignificant issues such as the use of a pink highlighter on memoranda. Grievant, however, knowingly antagonized her supervisor when she deliberately used pink highlighter notwithstanding her knowledge of his dislike for that color. Thus, both grievant and supervisor seem predisposed to get on each other's nerves. There is no evidence that the supervisor attempted to reason and counsel with the grievant about her attitude. There is also no evidence that any attempts were made to employ the services of outside resources to resolve the conflict. For example, the agency's human resources management could have been called upon for assistance in counseling or to conduct team building sessions. Further, the professional counselors at the Department of Employment Dispute Resolution could have been called upon to provide training, individual counseling or mediation.

Given all of these factors, the situation that existed following the contentiousness of the previous hearing was a recipe for more of the same. The line between grievant and coworkers hardened and, with no efforts to resolve the matter amicably, resulted in the supervisor accumulating sufficient data to justify

¹⁵ At the time this Group I Written Notice was issued, grievant's supervisor presumably believed that the previous three Group I Written Notices would be affirmed by the Hearing Officer.

a Written Notice. Thus, the result is that both grievant and others in the office must share culpability for deterioration of the working relationship. Therefore, it must be concluded that there are sufficient mitigating circumstances to require rescission of the disciplinary action taken herein.

DECISION

The disciplinary action of the agency is reversed.

The Group I Written Notice issued to the grievant on July 5, 2001 is **RESCINDED**. This Written Notice shall be removed from the grievant's personnel file and retained by the agency pursuant to the procedure outlined in Section VII.B.4.b of the Standards of Conduct policy.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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 four 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.
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.

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 **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-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 10 days; the day following the

issuance of the decision is the first of the 10 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 10 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 HRM, 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 contradictory 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.

David J. Latham, Esq.
Hearing Officer