

Issue: Group II Written Notice with 3-day suspension (failure to follow supervisor's instructions); Hearing Date: February 27, 2002; Decision Date: February 28, 2002; Agency: Virginia Commonwealth University; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5383; **Administrative Review: Hearing Officer Reconsideration Request received 03/13/02; Reconsideration Decision Date: 04/03/02; Outcome: Request untimely; request to reconsider denied**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5383

Hearing Date: February 27, 2002
Decision Issued: February 28, 2002

PROCEDURAL HISTORY

On November 23, 2001, Grievant was issued a Group II Written Notice of disciplinary action with three-day suspension for:

Failure to follow supervisor's instructions. On Nov. 6, 2001, [Grievant] was issued instructions to ensure the readiness of the VCU Meeting Center air conditioning/hearing system. On Nov. 7, 2001¹ the Meeting Center was occupied by a Board of Visitors meeting. Temperatures were found to be at a very uncomfortable level due to air conditioning problems. These problems could have been corrected if [Grievant] had performed an advance inspection as instructed.

On December 13, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 6, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 28, 2002, a hearing was held at the University's regional office.

¹ The Board of Visitors meeting was held on Thursday, November 8, 2001.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with three-day suspension.

BURDEN OF PROOF

The burden of proof is on the University to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Commonwealth University employs Grievant as a Master Mechanic HVAC. The purpose of his position² is to:

Provide hands-on direction to a team of skilled and unskilled personnel to operate, repair, and perform preventive maintenance on building mechanical and electrical equipment so as to maximize the availability of equipment for service and minimize unscheduled [downtime].

Although Grievant has no formal status as a supervisor, his duties include directing lesser skilled and experienced mechanics in their daily duties. Grievant reports directly to the CME Supervisor. He began working for the Commonwealth of Virginia in September 1977 and has no prior disciplinary action.

Grievant works in a "shop" with other employees. On Monday, November 5, 2001, Grievant read the dry board in the shop and noticed that a University Board of Visitors' meeting was scheduled at the Meeting Center on Thursday, November 8,

² Grievant Exhibit 1.

2001. Grievant knew that a Board of Visitors' meeting was very "high profile" and that the HVAC systems in the Meeting Center should be working properly to ensure a pleasant meeting so as to avoid any unnecessary embarrassment to the University. Grievant selected the mechanic in his shop with the most experience with HVAC systems in the Meeting Center and instructed that Mechanic to check out the Meeting Center.

On November 6, 2001, Grievant again asked the Mechanic to check out the Meeting Center. Later in the day, the CME Supervisor approached Grievant and asked Grievant to have someone inspect the Meeting Center. Grievant replied that he had already done so.

On Wednesday, November 7, 2001, an individual informed the CME Supervisor that the temperature in the Meeting Center was too high. The CME Supervisor switched the building automation from heating to cooling in order for the air conditioning "to go to full cool." He then instructed Grievant "to have someone check the building thermostat and equipment."³ Grievant asked the Mechanic to check out the building. The Mechanic informed Grievant that someone had raised the thermostat in the Meeting Center and that the Mechanic had lowered it from 75 degrees to 72 degrees. The CME supervisor monitored the room temperature remotely and the temperature remained normal for the rest of the day. The CME Supervisor instructed Grievant "to have the Meeting Center equipment thoroughly checked before the end of that day and early Thursday morning before the building is occupied."⁴

At approximately 7:00 a.m. on the day of the Board meeting, Grievant entered the Meeting Center and noticed that the meeting room was very hot and that the thermostat had been set at 80 degrees. He turned down the thermostat to 72 degrees and returned to the shop. The CME Supervisor spoke with Grievant at the shop and asked him the status of the Meeting Center. Grievant informed the CME Supervisor that the room was too hot and that he had turned down the thermostat. The CME Supervisor instructed Grievant to return with him to the Meeting Center. Once they arrived at the Meeting Center at 7:55 a.m., the CME Supervisor inspected the HVAC equipment and found that the supply fan belt was too loose and the evaporator coil was iced over. He found the condensing unit to be low on refrigerant on both circuits to the point where the second circuit was totally ineffective. He replaced the belt, which brought the airflow back to normal. He added refrigerant to the condensing unit.

The Board began meeting at approximately 8:00 a.m. in a very hot room. By approximately 9:30 a.m., the room temperature returned to normal. Three factors caused the excessive room temperature: (1) an incorrect thermostat setting, (2) a loose fan belt, and (3) inadequate level of refrigerant. The latter two items existed before the first inspection by the Mechanic.

³ Agency Exhibit 4.

⁴ Agency Exhibit 4.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” P&PM § 1.60(V)(B).⁵ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” P&PM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” P&PM § 1.60(V)(B)(3).

“Inadequate or unsatisfactory work performance” is a Group I offense.⁶ Grievant failed to properly direct the Mechanic regarding how to conduct a “check” of the HVAC equipment in the Meeting Center and failed to properly verify that the Mechanic had performed his assigned duties. Grievant assumed the Mechanic understood his instruction “to check” to mean the Mechanic would examine the HVAC equipment including the belts and refrigerant level. The Mechanic, however, likely understood the instruction to mean merely enter the building and feel the temperature.⁷ When the Mechanic reported his findings to Grievant, Grievant did not inquire regarding the status of an equipment inspection. Had Grievant so inquired, Grievant could have determined that the Mechanic did not fully inspect the equipment. Grievant’s behavior justifies a Group I Written Notice for inadequate or unsatisfactory work performance.

Grievant argues that because he does not hold a supervisory position, he cannot be held accountable for the work of a subordinate.⁸ His argument fails because his position requires him to lead other employees and make decisions regarding the activities and utilization of those employees. The University entrusted him with the responsibility of directing other staff. It is not necessary for the University to formally designate him as a supervisor as long as it has clearly informed him of his responsibilities. The University has done so.

The University contends Grievant should be given a Group II Written Notice for failure to follow supervisor’s instructions. This argument fails because Grievant complied with the CME Supervisor’s instruction “to have someone check the building thermostat and equipment.” Grievant had the Mechanic check the building and believed

⁵ The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM”) setting forth Standards of Conduct for State employees.

⁶ P&PM § 1.60(V)(B)(1)(d).

⁷ Neither party called the Mechanic as a witness. It is unlikely he inspected the HVAC equipment because given his level of experience he would have been able to determine that the fan belt was too loose and that additional refrigerant was needed.

⁸ Grievant is not being disciplined for the work of the Mechanic; he is being disciplined for failing to properly direct and follow-up the work of the Mechanic.

he had complied with the CME Supervisor's instruction. Grievant simply carried out the instruction inadequately.

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Group II Written Notice of disciplinary action with a three-day suspension is **reduced** to a Group I. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant's suspension for three days is **rescinded**. GPM § 5.9(a)(2). Standards of Conduct, Policy No. 1.60(D)(1)(a). The University is directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2).

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 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 Resource 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 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 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.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5383-R

Reconsideration Decision Issued: April 3, 2002

PROCEDURAL HISTORY

On February 28, 2002, the Hearing Officer issued a decision in Case Number 5383. The Agency faxed a request for reconsideration to the Hearing Officer on March 13, 2002. In response to the Agency's request for reconsideration, Grievant asked the Hearing Officer to comment on the Agency's request. This request was granted and the Hearing Officer reviewed Grievant's comments.

DISCUSSION

"[A]ll 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." *GPM* § 7.2(a). (Emphasis original.) The decision issued February 28, 2002⁹ states:

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. (Emphasis original.)

The Agency faxed its request for reconsideration on Monday, March 13, 2002, which is more than ten calendar days following the issuance of the original decision on

⁹ At the request of the Office of the Attorney General, the Hearing Officer's practice is to have hearing decisions faxed to the Legal Assistant Advocate representing the Agency on the day of or the day following issuance of the Hearing Officer's decision.

Thursday, February 28, 2002. The Agency's request for reconsideration is untimely and must be denied.

RECONSIDERATION DECISION

For the reasons stated herein, the Agency's request for reconsideration is **denied**.

APPEAL RIGHTS

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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.

Carl Wilson Schmidt, Esq.
Hearing Officer