

Issue: Group II Written Notice (failure to perform assigned work and comply with established written policy); Hearing Date: 10/16/02; Decision Date: 10/18/02; Agency: ODU; AHO: David J. Latham, Esq.; Case No. 5540



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5540

Hearing Date: October 16, 2002
Decision Issued: October 18, 2002

APPEARANCES

Grievant
Attorney for Grievant
Registrar
Assistant Attorney General for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct such 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 II Written Notice issued for failing to perform assigned work and comply with established written policy.¹ Following failure to resolve the matter at the third resolution step, the agency head qualified the grievance for a hearing.²

Old Dominion University (hereinafter referred to as “agency”) has employed the grievant as a program support technician for three years. She has worked for the Commonwealth for 24 years. The grievant has two prior active disciplinary actions – a Group II Written Notice for failure to follow written policy,³ and a Group I Written Notice for unsatisfactory work performance.⁴ Grievant did not file grievances with regard to either written notice within the time limit and, therefore, they have become final.

Grievant was employed in the graduation unit of the Registrar’s office. The work of receiving and reviewing graduation applications and responding to student concerns is divided among five technicians. The supervisor of these five employees reports to the Associate Registrar. The graduation procedures, which have been in use for several years, are contained in a detailed 11-page document.⁵ Among the procedures is an instruction that final letters must be sent to students informing them of any outstanding requirements within 3 to 10 business days of the last day of the clearance process.⁶ These letters constitute a final evaluation of student records for graduation and are sent only to those students who will not graduate.

Grievant was on annual leave from June 24 through 28, 2002. On June 26, 2002 a student called the registrar complaining that information in a letter sent to her by grievant was incorrect. Grievant had incorrectly advised the student that she had not met two requirements; however, investigation revealed that the student had actually fulfilled the requirements. On June 28, 2002, another student called complaining that she had not received a letter informing her that she had not met the requirements to graduate. Grievant should have sent such a letter to this student within ten days of the last day for clearance processing but failed to do so.

¹ Exhibit 2. Written Notice, issued July 22, 2002.

² Exhibit 2. Grievance Form A, filed August 20, 2002.

³ Exhibit 8. Written Notice, issued June 5, 2002.

⁴ Exhibit 9. Written Notice, issued April 25, 2001. NOTE: Grievant denies receiving this disciplinary action. Based on the testimony and documentation presented during the hearing, the hearing officer concludes that it is more likely than not that grievant did receive the written notice. However, even if grievant had not received the written notice, the outcome of this decision would be unchanged.

⁵ Exhibit 3. *Graduation Procedures*.

⁶ Exhibit 3. Section I.G.2, *Ibid*.

Grievant's supervisor counseled her about her "unsatisfactory work performance" and the need for immediate improvement on July 3, 2002.⁷ On July 16, 2002, grievant's supervisor advised her that disciplinary action was being contemplated and that she had until July 18, 2002 to provide any information or mitigating circumstances. The Group II Written Notice and discharge were issued on July 22, 2002.

Grievant had been verbally counseled in 2001 and early 2002 about making unnecessary requests for student information that had been previously sent to grievant.⁸ However, the supervisor testified that most discussions with the grievant about performance issues were very general in nature, did not identify specific problems, and were more in the nature of "mentoring" the grievant. Grievant's most recent performance evaluation rated her a "contributor" both overall, and in each core responsibility.⁹ The written comments reflect improvement in almost every core responsibility.

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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.

⁷ Exhibit 2. Memorandum from supervisor to grievant, July 16, 2002.

⁸ Exhibit 11. Supervisor's notes of counseling meeting with grievant, February 13, 2002.

⁹ Exhibit 1. Grievant's *Employee Work Profile* and evaluation, signed October 2, 2001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁰

To establish procedures on Standards of Conduct and Performance 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 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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses includes acts and behavior which are more severe in nature than Group I and are such that an accumulation of two Group II offenses normally should warrant removal. Failure to perform assigned work and failure to comply with established written policy are examples of a Group II offense.¹¹

One contested issue during the hearing was the date on which grievant was first told about the student complaints. The totality of the evidence makes it more likely than not that the first discussion occurred on July 3, 2002, and the second discussion was held on July 16, 2002. However, even if grievant's contention (that the first discussion was on July 16, 2002) is correct, the fact remains that grievant was fully apprised of the complaints and given an opportunity to respond prior to the termination of her employment on July 22, 2002.

Grievant observes that the two students who filed complaints in late June were not present to testify at the hearing. It is surprising that grievant would raise this issue since grievant could have requested their presence at the hearing but did not do so. Further, grievant could have requested the hearing officer to issue Orders for their presence but did not do so. In any event, grievant did not contest the validity of their complaints or dispute the agency's explanation of her errors that precipitated the complaints. Therefore, the absence of these two witnesses does not affect the outcome of this decision.

Grievant had received a "contributor" rating on her performance evaluation nine months prior to her discharge.¹² A careful reading of the evaluation reflects the supervisor's assessment that grievant had been experiencing difficulty in the

¹⁰ § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

¹¹ Exhibit 13. Section V.B.2.a, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² A "contributor" rating signifies that an employee is performing satisfactorily and either meeting or exceeding the expectations set forth in the employee work profile as core responsibilities.

past with certain aspects of her performance but that she had demonstrated improvement in almost every core responsibility and is performing all aspects of her job at a satisfactory or better level. However, the thrust of the agency's testimony during the hearing contradicted the tone of the performance evaluation and painted a picture of long-term performance problems. The agency sought to present evidence of performance problems during 2000 and 2001 as support for the disciplinary action issued in July 2002. While such problems may well have existed in past years, the performance evaluation reflects that the extent of any such problems was nevertheless within an acceptable range. Not a single core responsibility is rated "below contributor."

The Group II Written Notice issued on July 22, 2002 cites only two very specific offenses – failure to send one letter to a student, and giving incorrect information to a second student. The dates of offense are limited to the two dates on which the agency received the complaints. The supervisor's memorandum of July 16, 2002 explaining the reasons for the disciplinary action does not cite any performance problems between the time of the last performance evaluation and the date of the discipline. Therefore, the Group II Written Notice must rise or fall solely on the offenses and dates of offense identified on the notice.

The grievant did not contest either error. Both errors were significant because they resulted in misinformation being given to students who were graduating from college and believed they had met all the necessary requirements to do so. Nonetheless, these were only two errors among the hundreds of graduation records that grievant apparently processed correctly. It is understandable that the agency would prefer to have no errors in the processing of graduation applications. It is also understandable that if grievant's performance has been deteriorating and causing problems, management may conclude that she is not suited for her position. However, the two errors standing alone constitute unsatisfactory work performance - not an intentional failure to perform assigned work or comply with established written policy. Grievant had been performing the vast majority of her work as assigned, and in compliance with policy. Her failures in these two instances, while significant, represent a very small percentage of her overall work product.

Generally, work performance deficiencies are addressed through the performance evaluation process pursuant to policy.¹³ Here, the agency argued that waiting until the annual evaluation period (typically October of each year) could have resulted in more errors in the interim. However, the policy provides that supervisors may complete a performance evaluation at any time during the performance cycle to document and assess an employee's progress. Such documents are not "official" and are retained in the supervisor's confidential file – not in an employee's personnel file. A supervisor may also complete a Notice of Improvement Needed/Substandard Performance form to document substandard performance and the need to improve.

¹³ DHRM Policy No. 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

When poor or unacceptable performance is identified:

Supervisors normally should address first-time minor or marginal performance issues through performance counseling and coaching. An employee may receive a Notice of Improvement Needed/Substandard Performance form at any time during the performance cycle if the employee exhibits substandard performance on any core responsibility, special assignment, agency or unit objective, or core value or core competency.¹⁴
(Underscoring added)

The supervisor testified that most of her discussions with grievant were “mentoring” sessions. Mentoring is an appropriate method of tutoring or coaching employees to help develop them into more productive employees. However, mentoring is not a substitute for counseling an employee about a specific error or deficiency. When an employee errs, the supervisor has a responsibility to bring the specific error to the employee’s attention, explain the impact of the error, and provide guidance as to how the employee can avoid the substandard performance in the future.

The interim evaluation process does not prevent the agency from taking disciplinary action based on the employee’s poor performance. However, the evidence presented in this hearing is not sufficient to sustain a Group II Written Notice. Before discipline for work performance issues can be sustained, there must be a showing that (i) grievant was advised of specific examples of substandard work performance, and (ii) that she understood that she was being counseled about a deficiency, and (iii) that she was given appropriate guidance to prevent a recurrence of the behavior. Typically, most agencies memorialize these types of verbal counseling by giving the employee a copy of the supervisor’s written memorandum documenting the discussion. Absent such counseling, an employee can only assume that the level of her performance that resulted in the most recent satisfactory performance evaluation continues to be acceptable.

Moreover, the agency may not amend the disciplinary action after the fact by seeking to include other alleged performance errors that occurred prior to the dates of offense cited on the written notice. If the agency had wanted to discipline grievant for deteriorating performance since her last evaluation, it must (i) notify grievant in the pre-disciplinary due process memorandum that her contemplated discipline is for errors made from October 2001 through July 2002, (ii) cite at least some examples of the errors in the pre-disciplinary due process memorandum, and (iii) cite both the date range and some examples of the errors on the written notice.

¹⁴ DHRM Policy 1.40, p.6, *Ibid.*

Racial discrimination - favoritism

Grievant asserted on her grievance form that the disciplinary action was prejudiced. Grievant had never previously raised the issue of racial discrimination with her supervisor, the registrar, human resources or anyone else at the University. During the hearing, grievant failed to present any testimony or evidence to support her allegation. Therefore, it is concluded that this allegation is without merit.

During the grievance process, grievant told the Registrar that, instead of prejudice, grievant had meant to allege favoritism. She argues that another employee in the department had made an error resulting in the printing of approximately 1,000 graduation diplomas with an incorrect date. The diplomas were destroyed and new ones prepared at a cost of approximately \$2,000. The employee responsible for this error was counseled but not disciplined. Thus, grievant raises this issue as an example of disparate treatment.

According to agency testimony, another employee should have been checking behind grievant to assure that all required letters were sent out. The person who should have been providing backup did not detect that the letter to the second student was not sent. This matter was not investigated and the responsible employee was not counseled or disciplined. If another employee failed to perform the backup procedure, that employee would share some portion of the culpability for the failure to send a final letter to the second student. Since that employee was not even counseled, this too suggests disparate treatment.

Relief requested by grievant

Grievant requested reinstatement to another position in the University. The hearing officer advised grievant that a hearing officer's authority is limited to reinstating an employee to the position held prior to their discharge. Hearing officers do not have authority to transfer an employee to a different position.¹⁵ Grievant was also advised that a hearing officer has no authority to remove from her personnel file previous written notices that were not timely grieved. When an employee fails to grieve a disciplinary action within the time limit, the disciplinary action becomes a part of the employee's personnel file until the notice becomes inactive.¹⁶

The agency contends that a Group II Written Notice following two active Group I Written Notices should normally result in discharge. However, this position is not supported by the Standards of Conduct. A Group II Written Notice following three active Group I Written Notices normally should result in discharge.¹⁷

¹⁵ § 5.9(b)2. EDR *Grievance Procedure Manual*, *Ibid.*

¹⁶ Exhibit 13. Section VII.B.2, 3 & 4. *Ibid.*

¹⁷ Exhibit 13. Section VII.D.2.b.(2) *Ibid.*

Conclusion

For the reasons above, the evidence in this case does not support a Group II Written Notice. However, the evidence is sufficient to conclude that grievant made more errors than her coworkers and that such errors constitute unsatisfactory job performance. Given the significance of the errors, a Group I Written Notice is reasonable and appropriate under the circumstances presented in this case.

It is recognized that the modification of disciplinary action automatically results in the reinstatement of grievant to her position, and that the agency may still have concerns about whether grievant is suited for this position. Grievant should recognize that this decision still leaves her perilously close to future dismissal if her performance does not significantly improve. The agency, by application of the policies discussed in this decision, has the opportunity to help grievant improve her performance or, should that be unsuccessful, to conclude the matter in a sustainable and appropriate fashion.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued to the grievant on July 22, 2002 is hereby VACATED. The agency shall prepare in its place a Group I Written Notice for unsatisfactory work performance. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

The grievant is reinstated to her position with full back pay and benefits.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.¹⁸

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

David J. Latham, Esq.
Hearing Officer

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.