

Issue: Group I Written Notice (unsatisfactory job performance) and Group II Written Notice (failure to follow instructions); Hearing Date: 11/14/02; Decision Date: 12/31/02; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No.:5559/5560;
Administrative Review: Hearing Officer Reconsideration Request received 01/10/03; Reconsideration Decision Date: 01/16/03; Outcome: No policy violation identified. Request to reconsider denied. Administrative Review: EDR Ruling requested 01/10/03; EDR Ruling Date: 03/17/03; Outcome: HO neither abused his discretion nor exceeded his authority [Ruling #2003-014]



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5559 / 5560

Hearing Date: November 14, 2002
Decision Issued: December 31, 2002

PROCEDURAL HISTORY

On May 24, 2002, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On August 7, 2002, Grievant was issued a Group II Written Notice for failure to follow instructions.

Grievant timely filed grievances to challenge the disciplinary actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 22, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 14, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Grievant's Representative
Agency Party Designee
Agency Advocate
Supervisor
Engineering Technician IV
Information Technician III

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for unsatisfactory job performance and a Group II Written Notice for failure to follow instructions.

BURDEN OF PROOF

The burden of proof is on the Agency 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 Department of Transportation employs Grievant as an Information Technology Specialist II. The purpose of her position included, “Develop and maintain the SRD Internet/Intranet Website.”¹ She began working for the Agency in her current position on May 25, 2001.

The Agency was in the process of developing a web page for certain aspects of the Agency’s operations. The Supervisor decided that it would be more efficient if the various staff who provide content for the web page would meet at one time with Grievant and they could collectively make edits to the web page design.² On Thursday, May 2, 2002, Grievant’s Supervisor sent her an email stating, in relevant part:

[Grievant], please proceed to schedule a conference room having a net work connection so that we can link to the web files being revised and accomplish these changes. I want to start this as early as Monday of next week, but realize your class schedule may make that difficult. *** I want this work completed over the next two weeks, so schedule the meetings accordingly.

¹ Agency Exhibit 5.

² The Supervisor explained in an email, “Having considered the volume of the corrections and dynamic nature of some of them, and being mindful that written comments are often better implemented when people interact to solve problems, I am recommending ... a team approach [to] help accelerate completing these corrections” See, Agency Exhibit 4.

On May 14, 2002, the Supervisor questioned Grievant about the status of the meeting. Grievant had not scheduled a meeting. On May 20, 2002, the Supervisor confronted Grievant about whether she had scheduled the meeting. Grievant had not scheduled a meeting. The Supervisor then issued Grievant a Group I Written Notice.

On May 20, 2002, the Supervisor sent Grievant a memorandum stating in relevant part:

The six-year plan work is on a very tight schedule and must be completed by June 30. A calendar of related events will be provided to you, once we have it, so that you can plan accordingly. Until that work is completed,

1. If you can not withdraw at no cost to the Division from a conflicting, pre-approved training class, you will need to find someone to attend for you and it would be best if you did not schedule any more training during the period of our contract with ... firm.
2. During this period, neither vacation nor personal days off will be approved for purposes other than an emergency. If you have made prior commitments, I will try to accommodate those needs, but you must advise me of those needs immediately so that I can coordinate them with the project calendar.
3. Absence due to illness will require a doctor's explanation.

The Supervisor later explained to Grievant that he would waive the requirement for a doctor's excuse if Grievant obtained his approval for her absence when she was sick but was not sick enough to go to the doctor.

On July 29, 2002, Grievant was absent from work. She claims she was ill but not ill enough to go to the doctor. She left a message that she would be absent, but did not first obtain the Supervisor's approval to be excused from the requirement to obtain a doctor's excuse. She did not bring in a doctor's excuse for July 29, 2002.

On August 6, 2002, the Supervisor sent Grievant an email outlining his intention to take disciplinary action. He discussed several options and then stated:

However, I will allow the day in question [July 29, 2002] to be charged against personal leave balances and take no additional disciplinary action, if you acknowledge that you are henceforth:

- a. To speak personally to me in advance about vacation plans and
- b. To speak personally to me about why you need an urgent day off, and
- c. In an emergency situation, during the first day of the absence, to let me know personally why you are going to be late or not going to be at work, as soon as possible, or

- d. In any of the above situations, to speak to [other managers] in my absence, and
- e. To provide a doctor's slip – required because of the issues outlined above – if you plan to request sick leave, and
- f. Failing any of the above, you acknowledge a Group 2 with suspension may result.

I am seeking your acknowledgment of the above expectations by the end of business Tuesday, August 6, 2002, and if provided I will grant a day of personal leave instead of the day of sick leave requested. If you do not acknowledge that you have read, understand and in the future intend to abide by these expectations, then leave will not be granted and I will proceed with disciplinary action: Group 2 Notice without suspension for failure to follow instructions with removal from the payroll for the day in question.

CONCLUSIONS OF POLICY

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." DHRM § 1.60(V)(B).³ 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." DHRM § 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." DHRM § 1.60(V)(B)(3).

Group I Written Notice

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet. Grievant was instructed by her supervisor to schedule a meeting during which the group would agree on edits to a web page and Grievant would make the changes during the meeting. Grievant failed to schedule the meeting. Her failure to do so constitutes inadequate or unsatisfactory work performance thereby justifying issuance of a Group I Written Notice.⁴

Grievant offers numerous excuses for her failure to schedule the meeting. These excuses include not having enough time to schedule the meetings, not being aware of

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ Grievant's refusal to schedule a meeting amounts to a failure to follow her supervisor's instructions which would otherwise justify issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice.

the instruction to schedule the meetings, and being unable to schedule the meeting due to illness. The Hearing Officer finds that these reason are insufficient to support Grievant's arguments against being disciplined because Grievant did not intend to schedule the meeting. She preferred to work on an individual basis with other staff (rather than in a group) and then implement the proposed changes.⁵ She did not intend to schedule the meeting within the time frame directed by her supervisor.⁶

Group II Written Notice

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.⁷ An employee is expected to follow a supervisor's instruction if that instruction is lawful, ethical, and within the scope of the supervisor's authority to issue the instruction.

The central question that arises in this case is what instruction did Grievant fail to follow and was that instruction appropriate. If the Agency had issued Grievant a Group II Written Notice for failing to bring in a doctor's excuse after having been instructed to do so, then one could argue Grievant failed to follow her supervisor's instructions and disciplinary action is warranted.⁸ If this were the only evidence presented, the Hearing Officer would be inclined to uphold the disciplinary action. The Agency, however, did not discipline Grievant for failing to bring in a doctor's excuse. The Supervisor testified that he issued the Written Notice because he instructed Grievant to acknowledge that she agreed to comply with his instructions regarding taking leave and that she failed to do so. The Supervisor's email states Grievant must indicate her intention to abide by his instructions.

An Agency may not discipline an employee for having a difference of opinion regarding an employee's obligations under a policy. An employee's obligation under leave policies exists regardless of whether the employee agrees with the policy. Likewise, an employee is obligated to follow the proper instruction of a supervisor regardless of whether the employee agrees with the instruction. It was unnecessary for

⁵ Grievant contends working individually rather than in a group would be more efficient. Whether working individually or in a group is more efficient is a decision to be made by the Supervisor. Grievant cannot circumvent that decision.

⁶ Grievant confirms this in a May 20, 2002 email regarding her meeting with the Supervisor. Grievant states, "[Supervisor] also accused me of not following his instructions in setting up a meeting for editing the web. I explained to [Supervisor] that I was not at that point to setup the meetings. I was doing the editions and I would setup the meetings." See Agency Exhibit 3.

⁷ DHRM § 1.60(V)(B)(2)(a).

⁸ The May 20, 2002 memorandum indicates that work on the six-year plan was to be completed by June 30, 2002. This suggests Grievant's obligation to bring in a doctor's excuse may have ended on June 30, 2002. On the other hand, the memorandum also suggests Grievant's obligation continued "Until that work is completed ..." thereby suggesting Grievant's obligation may have continued beyond June 30, 2002 and governed her behavior on July 29, 2002. It is not necessary for the Hearing Officer to resolve this issue since, the Agency did not discipline Grievant for failing to bring in a doctor's excuse.

the Supervisor to instruct Grievant to agree she was bound by leave policies, since her agreement would be irrelevant. The Supervisor should have simply instructed Grievant regarding her reporting responsibilities and if she failed to meet those responsibilities, take disciplinary action. If Grievant disagreed with the instructions, she could file a grievance to test whether those instructions were consistent with DHRM leave policies. By forcing Grievant to agree to be obligated by the Supervisor's instructions, the Agency may have reduced Grievant's ability to challenge whether the Supervisor's instructions were consistent with DHRM policy. The Supervisor lacked the authority to compel Grievant to agree⁹ with his authority to set leave requirements and to sanction her with a Group II written notice.¹⁰ For this reason, the Group II Written Notice must be reversed.

Grievant's Defenses

Grievant argues she is being discriminated against because of her race. She offers as evidence in support of her contention that (1) someone wrote a swastika on a document near one of the entrances to the building (2) her plants and desk were disturbed while she was away from her desk, (3) her supervisor made comments about her manner of ethnic dress and (4) she is the only one asked to write weekly reports.

There is no credible evidence suggesting Grievant was discriminated against by anyone in the Agency. The Agency reported the swastika to the police who investigated the matter. Whoever wrote the swastika could have been directing his or her action toward several hundred agency employees, rather than to Grievant. The Agency has problems with rodents which could have explained the damage to Grievant's plants. None of Grievant's supervisors made negative remarks about Grievant's manner of dress. Possibly one co-worker questioned Grievant's judgment about her choice of dress, but that expression was based on taste not based on racial preference. Grievant was asked to write weekly reports because she is a poor communicator. If she receives a request for information and she does not wish to respond, she will sometimes ignore the request.

Grievant seeks a transfer to another division within the Agency. The Hearing Officer lacks the authority to transfer employees.¹¹

⁹ From Grievant's perspective, the Supervisor could appear to be negotiating a removal of possible disciplinary action (failure to bring in a doctor's excuse) in return for Grievant's agreement to comply with leave restrictions that she believed were contrary to DHRM leave policies.

¹⁰ Whether the Supervisor was correct in his interpretation of the leave policies and the Standards of Conduct is not relevant.

¹¹ GPM § 5.9(b)(2).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action, dated May 24, 2002 is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action, dated August 7, 2002, is **rescinded**.

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.¹²

[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].

¹² Agencies must request and receive prior approval from the Director of EDR 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 No: 5559 / 5560-R

Reconsideration Decision Issued: January 16, 2003

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant contends she did not schedule the meeting to revise the web page because of a death in the family and not because of illness. Regardless of the excuse given by Grievant, the Hearing Officer concluded that Grievant did not intend to schedule the meeting. There is no causal relationship between Grievant’s failure to schedule the meeting and the death in her family. Thus, Grievant’s testimony that she had a death in her family is insufficient to excuse her failure to schedule the meeting. There is no basis to reverse the Group I Written Notice.

Grievant contends she also sought to have her “vacation time reinstated that my supervisor had taken while not approving my sick days.” In Grievance Form A, Grievant states the relief she wants is “Transfer.” She does not explicitly state she seeks to change annual leave to sick leave. If Grievant had requested relief to include altering leave status, the burden of proof would have been on her to show the Agency misapplied DHRM policy. Grievant has not identified any DHRM policies violated by the Agency in its denial of Grievant’s sick leave. State policy permits an agency to require an employee to present a doctor’s excuse before approving sick leave. Thus, her request for relief regarding sick leave must be denied.

For these reasons, Grievant’s request for reconsideration is **denied**.

APPEAL RIGHTS

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