

Issue: Group I Written Notice (inadequate or unsatisfactory job performance); Hearing
Date: 12/04/02; Decision Issued: 04/19/03; Agency: VDOT; AHO: Carl Wilson
Schmidt, Esq.; Case No. 5581



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5581

Hearing Date: December 4, 2002
Decision Issued: April 19, 2003

PROCEDURAL HISTORY

On April 8, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

Cited for poor/inadequate performance of assigned duties as Facility Director Senior.

On May 3, 2002, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 5, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 4, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
District Engineer
Agency Advocate
HR Generalist

Benefits Administrator
Current Electronic Tech Supervisor
Business Manager
Accountant Auditor
Assistant Controller
Electronic Technician

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

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 a Facility Director Senior. She is responsible for overseeing the operations at one of the Agency’s Toll Collection Facilities. She reports to the District Engineer who works in an office several miles away from Grievant’s Facility. Grievant supervises the Supervisor who, in turn, supervises the Electronic Technician.¹

Relationship Between Electronic Technician and the Supervisor

The working relationship between the Supervisor and the Electronic Technician can be described as sometimes volcanic. Their personalities, temperaments, reasoning skills, and methods of communication often conflicted. After working with the Supervisor for many months, the Electronic Technician filed a complaint with the Agency making five allegations including discrimination, harassment, and threatening behavior.² On January 11, 2002, the Electronic Technician met with Agency staff to

¹ The Electronic Technician began working at the Facility in 1996. The Supervisor began working there in 1999.

² Grievant Exhibit 1 (02-14).

discuss his allegations against the Supervisor. As a result of the Electronic Technician's allegations, the Agency began an investigation. Following the investigation, the District Engineer concluded that Grievant's work performance was unsatisfactory.

Interviews of Contract Workers

Tollbooth collectors working at the Agency's Facility are not employees of the Commonwealth. They are employed by a vendor who has a contract with the Agency. The Agency and vendor entered into an agreement specifying certain responsibilities for each party. Under the agreement, the vendor was responsible for human resource functions. When a toll collector position became available, the vendor's managers would interview applicants. Initially, Grievant would participate in those interviews. She interpreted the contract to authorize the Agency's selection of toll collectors. On March 1, 2002, the District Engineer met with Grievant and informed her he did not want her to participate in the hiring process for toll collectors because that was the sole responsibility of the vendor. On March 11, 2002, the District Engineer learned that Grievant was no longer actively participating in the employee interviews but she was sitting in the room listening to the interviews while the vendor interviewed potential employees. On March 27, 2002, the District Engineer informed Grievant that she should not sit in the room while the vendor conducted employee interviews.

Return to Work of the Electronic Technician

When an employee is out of work for a lengthy period of time and wishes to return to restricted work such as light-duty work, certain procedures must be followed. Once an employee is released to return to work, the employee's supervisor must determine whether restricted work is available and if so, must approve the employee's return to work. Once the employee returns to light-duty work, the supervisor must assign only light-duty work.

The Electronic Technician had been on disability leave.³ An organization entitled CORE is responsible for determining when an employee may return to work from disability based on medical reports. A doctor treating the Electronic Technician released him to return to light-duty work for one-half days for the first three days. On January 1, 2002, the Electronic Technician called Grievant and told her he was ready to come back to work on January 2, 2002 because his doctor had released him to work half days for three days. On January 2, 2002, the Electronic Technician gave Grievant the doctor's note. Grievant then showed the doctor's note to the Supervisor. One of the Electronic Technician's first duties was to shovel snow. Shoveling snow was not a light-duty assignment.

³ He came under a doctor's care in October 2001 for a herniated lumbar disc. His doctor instructed that he should "avoid excessive bending and stooping and should not lift more than 25 lbs." Grievant Exhibit 1 (01-3).

The Supervisor believed Grievant had authorized the return of the Electronic Technician because Grievant indicated the Electronic Technician would be returning to work.⁴ Grievant did not tell the Electronic Technician about what procedure he had to follow before returning to work. Ultimately, the Agency realized the return of the Electronic Technician had not been properly approved. On January 16, 2002, Grievant signed a document granting approval for the Electronic Technician to return to work. The document was backdated to December so that the Electronic Technician could be assured of being paid for his work.

Retaliation Against the Supervisor

On March 16, 2001, an electrical failure occurred in the electric service conduit at the Facility. There was no fire but there was the risk of fire if combustible materials were nearby. Fortunately, the electrical short was away from potential fuel sources.⁵ Grievant permitted a staff member to enter the Facility to retrieve a pocket book. Upon learning of this decision, the Supervisor became outraged and questioned Grievant's decision in front of other staff. He believed Grievant had improperly risked the safety of the employee who went inside the building. He continued to express his displeasure with Grievant's decision to other staff outside of Grievant's presence.

On March 26, 2001, Grievant gave the Supervisor a counseling memorandum because he made negative statements about Grievant to other staff. Grievant stated:

As a manager yourself, you realize one such incident as above can destroy all the positive work that has been done. Negative statements can undermine the whole facility's goals. Your behavior was a big disappointment and unacceptable. Further problems of this nature will result in my taking the appropriate corrective action.⁶

When Grievant was absent from the Facility, she placed the Supervisor in charge. On March 26, 2001, Grievant changed this practice by sending a memorandum to her staff stating:

Effective immediately, [Ms. ML] will be in charge of the overall facility during my absence or unavailability. Each manager will continue to be responsible for his or her own areas and keep [Ms. ML] updated.⁷

⁴ During a conversation on January 8, 2002, the Supervisor said to the Electronic Technician, "[Grievant] had told me you were coming back half-days and the info was on [Ms. AM's] desk"⁴ He also said he did not approve the Electronic Technician's return.

⁵ See Grievant Exhibit 1 (02-5).

⁶ Grievant Exhibit 1 (01-1).

⁷ Grievant Exhibit 1 (01-1).

Grievant also removed some technical duties from the Supervisor and gave them to Ms. ML who was not technically proficient to utilize the skills. For example, Ms. ML would attend technical meetings and take notes. When she returned to the office, she would discuss the meeting with the Supervisor because she did not understand the technical significance of what was said at these meetings.

The Supervisor challenged the counseling memorandum issued by Grievant. On May 8, 2001, the District Engineer sent the Supervisor a memorandum stating:

We met on Monday, May 7, 2001 to discuss the employee relation incident that resulted in your supervisor issuing you a counseling memorandum dated March 26, 2001.

I appreciate you sharing with me the concerns with regards to this specific incident and I assure you that these concerns will be kept in mind. Your work and performance at [Facility] has been recognized and is greatly appreciated.

In an effort to resolve this matter so that the management team at [Facility] can continue with the goals and missions as established, the following guidance and direction was provided:

- The counseling memorandum that was issued on March 26, 2001 will be rescinded immediately and removed from all supervisors' files.
- You and your immediate supervisor, [Grievant] will meet to discuss ways to establish and maintain effective communication that will enhance conflict resolution and performance management.⁸

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).⁹ 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).

⁸ Grievant Exhibit 1 (01-1).

⁹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

“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. Whether performance is inadequate or unsatisfactory is in some respect an opinion of management regarding an employee’s performance. The Hearing Officer must give limited deference to management’s opinion because management is in the best position to form an opinion regarding how well an employee is performing.

The Agency presented evidence of four examples of Grievant’s behavior giving rise to disciplinary action.¹⁰ When an agency alleges more than one basis for disciplinary action, the Hearing Officer must examine each allegation separately and together in order to determine whether disciplinary action is appropriate.

Relationship Between Electronic Technician and the Supervisor

The Agency contends Grievant failed to address the conflict between the Electronic Technician and the Supervisor. The Electronic Technician and the Supervisor had ongoing conflict since 1999. Grievant argues she was not aware of the degree of the conflict because the Electronic Technician did not complain to her about the Supervisor.

The evidence is insufficient for the Hearing Officer to conclude that Grievant knew the depth of the conflict between the Electronic Technician and the Supervisor.¹¹ A March 1, 2002 memorandum prepared by the Agency as part of its investigation, states:

[Electronic Technician] felt [Grievant] could not help him, because when he would go to her she would say she needed evidence. [Electronic Technician] indicated that members of his family recommended that he tape [Supervisor’s] conversations as evidence needed.¹²

In contrast, the Electronic Technician testified during the hearing that he had not complained to Grievant about the Supervisor. Moreover, the Supervisor informed Agency investigators that the Electronic Technician had not expressed any problems

¹⁰ In the District Engineer’s April 8, 2002 memorandum to Grievant, he describes four allegations of inadequate job performance. See Agency Exhibit 3.

¹¹ Grievant knew some employees had difficulty working with the Supervisor because of his abrasive personality. She likewise had difficulty working with the Supervisor. The evidence is insufficient, however, for the Hearing Officer to conclude that Grievant should have known the conflict between the Electronic Technician and the Supervisor was any greater than the Supervisor’s conflicts with other staff.

¹² Grievant Exhibit 1 (02-14).

about their relationship to the Supervisor.¹³ The Electronic Technician's failure to report his concerns to Grievant is consistent with his personality which the Agency describes as "quite passive and unsure of himself."¹⁴

Interviews of Contract Workers

The Agency contends Grievant was asked not to participate in employee interviews for tollbooth employees employed by a vendor. Grievant contends she was obligated to participate in the hiring of the vendor's tollbooth employees based on the contract the Agency had with the vendor. Grievant relies on Section G of the contract¹⁵ which states:

VDOT reserves the right to reject any personnel referred for employment. All potential candidates selected by the Contractor for employment will be interviewed by facility management. (Emphasis added).

Contrary to Grievant's assertion, the contract does not authorize Grievant to sit in on Contractor employee interviews. Only candidates selected for employment by the Contractor would be interviewed by facility management. Thus, Grievant's involvement with Contractor employees would arise only after an employee had been selected for employment by the Contractor. By "sitting in" on all candidate interviews for Contractor positions, Grievant devoted a number of hours to vendor employee interviews that should have been devoted to other business duties.

Return to Work of the Electronic Technician

The Agency contends Grievant improperly permitted an employee to return from disability leave. A doctor treating the Electronic Technician authorized him to return to light-duty work for one-half days for a three-day period. When he returned to work, his activities included heavy lifting such as shoveling snow. Grievant contends she did not know that the Electronic Technician had not been authorized by the Supervisor to return to work. She stated she showed the doctor's note to the Supervisor. She believes it was the Supervisor's fault that the Electronic Technician was not properly authorized to return to work.

Grievant should have informed either the Electronic Technician or the Supervisor of the proper procedure for returning to work after an employee has been on leave resulting from short-term disability. Employees would not be expected to know the details of this policy since short-term disability is not normally a frequently occurring event in an employee's work career. When the Electronic Technician informed Grievant

¹³ The Electronic Technician told Agency staff that he felt the Supervisor may not be aware of the Electronic Technician's feelings towards the Supervisor.

¹⁴ Grievant Exhibit 1 (02-14).

¹⁵ Only portions of the contract were offered as evidence during the hearing.

he was returning, Grievant did not express any conditions to his return. When Grievant informed the Supervisor that the Electronic Technician was returning, she led the Electronic Technician to believe she had authorized the return to employment.

The Agency has established that as the senior most manager at the Facility, Grievant is the one who knew or should have known the procedures required of an employee returning to work. This is especially true because only a short time period earlier, Grievant had returned to work from short-term disability and had to comply with the necessary procedures. Grievant had the opportunity to inform or remind the Supervisor that certain procedures were necessary before the Electronic Technician returned to work. Grievant should have exercised her judgment to remind her subordinates of the policy.

Retaliation

The Agency contends Grievant created the perception that she had retaliated against the Supervisor by removing his responsibility as second in charge and by assigning some of his technical duties to Ms. ML. One of the Agency's assumptions underlying its conclusion that Grievant created the perception of retaliation against the Supervisor was that Grievant's counseling memorandum to the Supervisor was improper. Based on the evidence presented,¹⁶ it is clear to the Hearing Officer that Grievant correctly issued a counseling memorandum to the Supervisor for his insubordination. The Supervisor's assessment of the risk of injury following the electrical failure was overstated. Even if the Supervisor's assessment had been correct, his open display of contempt for Grievant's decision to permit an employee to enter the Facility to retrieve a pocketbook was inappropriate.¹⁷

No evidence was presented showing that Grievant lacked the authority either to determine who was second in command in her absence or to determine the tasks performed by positions reporting to her. Given Grievant's legitimate concerns about the work performance of the Supervisor, her removal of his status as second in command and altering some of the tasks he performed is understandable. For example, she did not want the Supervisor to attend peer technical meetings, in part, because he did not represent the Facility well. Given the potential for him to offend others, Grievant's concern was understandable.

Based on the evidence presented, the Agency's conclusion that Grievant created the perception of retaliation against the Supervisor is unfounded.¹⁸

¹⁶ The District Engineer did not testify regarding his reasoning why he reversed Grievant's counseling memorandum to the Supervisor other than saying he disagreed with its issuance.

¹⁷ Indeed, the Supervisor's behavior would have warranted issuance of a written notice.

¹⁸ Interestingly, after concluding Grievant was not performing her job adequately, the Agency removed some of her job responsibilities. Grievant took similar action when she concluded the Supervisor was not performing adequately.

Other Contentions

Grievant believes she should have been first counseled by the Agency before being issued a Group I Written Notice in order to meet the goal of progressive disciplinary action. DHRM Policy 1.60 does not require an Agency to counsel an employee before taking disciplinary action. Although the Agency could have counseled Grievant before taking disciplinary action, it had no obligation to do so.

An employee may be disciplined only with the sanctions provided under DHRM Policy 1.60, *Standards of Conduct*. When an employee commits a Group I offense, the appropriate disciplinary action is issuance of a Group I Written Notice. An Agency may not attach as part of that Written Notice the issuance of a Notice of Improvement Needed/Substandard Performance Form. In addition, the penalty for issuance of a first Group I Written Notice does not include removing duties from an employee.

If the Agency issued a Notice of Improvement Needed and removed duties from Grievant as part of the Group I Written Notice, then those actions must be reversed. The Agency removed two employees from Grievant's reporting relationship on April 2, 2002, prior to the issuance of the Group I Written Notice on April 8, 2002. Thus, there is no basis to reverse the Agency's action regarding Grievant's duties. Although the Written Notice refers to two due process memorandums that reference a Notice of Improvement Needed,¹⁹ the Notice of Improvement Needed appears to have been issued coincidentally with the Group I Written Notice rather than as part of the Group I Written Notice. Grievant's request for relief cannot be granted.

Conclusion

After considering all of the founded allegations against Grievant, the Hearing Officer concludes that the Agency has presented sufficient evidence to support its opinion that Grievant's performance was inadequate or unsatisfactory thereby justifying issuance of a Group I Written Notice. Grievant incorrectly interpreted the Agency's contract with the vendor responsible for hiring toll collectors. She continued a limited participation in the toll collector hiring process after being instructed not to do so. Grievant should have informed the Electronic Technician or the Supervisor of the proper procedure to return to work from short-term disability.

DECISION

¹⁹ "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." DHRM Policy 1.40.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

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.²⁰

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

²⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

