

Issue: Group II Written Notice (failure to perform assigned work and follow supervisor's instructions); Hearing Date: 08/11/03; Decision Issued: 08/12/03; Agency: NSU; AHO: David J. Latham, Esq.; Case No. 5773



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5773

Hearing Date: August 11, 2003
Decision Issued: August 12, 2003

PROCEDURAL ISSUE

The grievant and co-grievant in this case have both requested that their individual grievances be consolidated for a single hearing. The Director of the Department of Employment Dispute Resolution (EDR) has reviewed the request and agreed to consolidate the cases for hearing.¹ However, a separate decision will be issued for each grievant.

APPEARANCES

Grievant
Co-Grievant
Attorney for Grievants
Two witnesses for Grievants
Interim Human Resources Director
Advocate for Agency

¹ Exhibit 1. EDR *Compliance Ruling of Director*, Nos. 2003-133 and 2003-134, July 11, 2003.

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant timely filed a grievance from a Group II Written Notice issued for failure to perform assigned work and comply with a supervisor's instructions.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ Norfolk State University (Hereinafter referred to as "agency") has employed the grievant for 28 years. She is currently a human resource manager.

Effective March 7, 2003, an Assistant Vice President with other areas of responsibility at the university was given the added responsibility of being interim Human Resource Director until a new director could be selected. She soon identified areas in human resources that required improvement. In an April 7, 2003 meeting with staff she discussed several such areas including the importance of meeting deadlines.⁴ She advised staff, including both grievants, that if anyone encountered difficulty in meeting a deadline, they should discuss it with the Director prior to the deadline date.

During this period of time, a new employee had been hired to fill an opening for a temporary six-month wage position. However, in error, the position was advertised and filled as a full-time classified position. Grievant and co-grievant had some involvement in this error. Filling the position with a classified employee caused a significant budget and funding problem but the agency was able to resolve the problem in April. The interim Human Resources Director wanted to prevent a recurrence of this error. To that end, she sent a memorandum to both grievants requesting that they review the hiring process, make recommendations to prevent recurrence, and take interim steps until they gave the Director their recommendations.⁵ The Director requested the recommendations be returned to her by April 29, 2003.

Grievant and co-grievant discussed the memorandum upon receipt and immediately implemented the interim steps as instructed by the Director. Over the next two weeks, they were busy with the normal human resources work as

² Exhibit 4. Written Notice, issued April 30, 2003.

³ Exhibit 4. Grievance Form A, filed May 28, 2003.

⁴ Exhibit 4. Minutes Executive Staff Meeting, April 7, 2003.

⁵ Exhibit 4. Memorandum to grievant from Interim Human Resource Director, April 15, 2003.

well as increased employee inquiries resulting from the state's decision to change the employee health benefits plan. They forgot to respond to the Director's memorandum by the deadline and did not discuss with her that they would be unable to comply with the deadline. When the Director had not received a response to her memorandum by April 29, she promptly prepared and issued a Group II Written Notice to each grievant on April 30, 2003.

The grievants prepared a written response to the Director's April 15th memorandum the following day, providing her with three recommendations.⁶ To date, the Director has neither responded to the grievants nor taken any other action to implement their recommendations.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁷

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

⁶ Exhibit 7. Memorandum from grievants to Human Resources Director, May 1, 2003.

⁷ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

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 Standards of Conduct policy provides that Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal [from employment].” One example of a Group II offense is failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy.⁸

It is undisputed that grievant failed to provide a response to the Director by the deadline. In fact, grievant candidly acknowledged that she forgot to prepare a written response by the deadline. Thus, the agency has established, by a preponderance of evidence, that grievant did fail to follow supervisory instructions and perform assigned work. Accordingly, grievant did commit an offense that is subject to corrective action under the Standards of Conduct. The remaining issue is to determine the most appropriate corrective action.

Grievant contends that the human resource office was very busy in April, however, grievant did not dispute that human resources is always busy. In fact, she stated that for several years she has worked more than 40 hours per week to complete her work. In any case, having a busy workload is not a mitigating circumstance. When grievant received the assignment in writing, with a firm deadline, she knew, or reasonably should have known, that this was a priority assignment – not something that one could afford to forget. Moreover, the Director had emphasized to grievant just one week earlier the importance of meeting deadlines.

To determine an appropriate corrective action, it is necessary to consider all relevant circumstances. Grievant has been employed with the agency for 28 years and has received satisfactory or better performance evaluations. She has no prior disciplinary actions. These circumstances mitigate in her favor, and no aggravating circumstances have been identified. While failure to perform assigned work or comply with a supervisory instruction is an example of a Group II offense, one cannot ignore the overarching definition of a Group II offense (cited above).

In evaluating the circumstances of this case, one cannot reasonably conclude that grievant’s offense was so severe that one more such offense should result in the termination of her employment. Although the Director considered the incorrect hiring of an employee as classified rather than wage to be very serious, grievant was not disciplined for that mistake. She was

⁸ Exhibit 6. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

disciplined solely for her failure to respond to the request for recommendations by the deadline date. It was entirely appropriate to require grievant to provide recommendations for improving the hiring procedure in order to avoid a recurrence of the problem. However, the agency has not demonstrated that failure to receive the recommendations by April 29, 2003 had an adverse impact on any agency mission or goal.⁹ This is not to say that grievant could ignore the deadline without consequences – to the contrary, when a supervisor imposes a deadline, the employee who fails to comply does so at her own peril. Nonetheless, the corrective action taken must be proportionate to the offense.

Typically, when an employee fails to accomplish a task within an established time frame, the usual corrective action for a first occurrence is to counsel the employee to assure that the employee fully understands the need to comply with deadlines. If the employee again fails to meet a subsequent deadline, firmer corrective action in the form of discipline may be merited. In this case, grievant had not previously been individually counseled about the necessity to meet a deadline. However, she had been so instructed in a staff meeting that took place one week earlier, during which the Director counseled the entire group. Therefore, when she received the April 15, 2003 memorandum, the admonition to comply with deadlines should have been fresh in her memory. Unfortunately, it appears that the group counseling was not effective in grievant's case. Grievant took the immediate action called for in the Director's memorandum but failed to follow up and make written recommendations. This demonstrates her willingness to comply but an inadequate follow-through on the second portion of the assigned task. In sum, her overall handling of the situation was much more akin to inadequate or unsatisfactory work performance than to deliberate failure to follow instructions. Given the totality of these circumstances, grievant's offense is most appropriately categorized a Group I offense.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice for failure to follow a supervisor's instructions issued on April 30, 2003 is hereby REDUCED to a Group I offense. The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

⁹ The Director has never told the grievants to implement their recommendations because she assumed they would implement them without being told to do so.

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.¹⁰ 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.¹¹

[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

¹⁰ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

