

Issue: Group II Written Notice with suspension (failure to follow a supervisor's instruction, failure to follow written policy, violation of workplace harassment policy, and violation of workplace violence policy); Hearing Date: 11/19/04; Decision Issued: 01/03/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 7903; **Administrative Review: HO Reconsideration Request received 01/12/05; Reconsideration Decision issued 01/19/05; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7903

Hearing Date: November 19, 2004
Decision Issued: January 3, 2005

PROCEDURAL HISTORY

On May 25, 2004, Grievant was issued a Group II Written Notice of disciplinary action five work day suspension for:

"1. Failure to Follow Supervisor's Instruction's, 2. Failure to Follow Written Policy, 3. Violation of Policy 2.30, Workplace Harassment, 4. Violation of Policy 1.80, Workplace Violence (subjecting an individual to extreme emotional stress)."

On June 17, 2004, 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 he requested a hearing. The EDR Director issued Ruling #2004-876 on October 12, 2004. On October 26, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 19, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee

Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to follow a supervisor's instruction, failure to follow written policy, violation of workplace harassment policy, and violation of workplace violence policy.

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 Survey Field Office Manager. Grievant began his employment with the Agency on February 1, 1985. He supervises three employees (including Ms. M and Mr. G) making up a survey crew. No evidence of prior active disciplinary action against Grievant was presented at the hearing.

On April 13, 2004 at about 7:15 a.m., Grievant heard Ms. M ask Mr. G for assistance regarding preparing time sheets. Mr. G said he would not assist Ms. M. Grievant did not like Mr. G's answer. Mr. G was sitting next to a conference room table with his feet placed on the table. Grievant walked toward Mr. G and told him to "get his damn feet off the table."

In order to survey, one must know the principles necessary to solve triangle problems. On a day when the survey crew was in the office, Grievant asked Ms. M to solve a right triangle problem. His objective was to test her knowledge and then to improve her knowledge to the extent necessary. Grievant gave Ms. M a set amount of time to solve the problem. She was unable to do so. Grievant asked Ms. M if she had solved the problem. He did so in a manner she considered to be intimidating.

Grievant works in a building with a designated smoking area. Grievant smokes cigarettes. His practice is to stand in an outside doorway with the screened door open or stand completely outside the doorway to smoke.

Grievant's practice is to use two passwords to access the Agency's computer network. He suggested his employees use the same two passwords so that they would not forget the passwords. Grievant's employees construed Grievant's comments to be supervisory instructions and they followed Grievant's instructions.

On October 16, 2002, Grievant signed a statement acknowledging that he understood DHRM Policy 1.75 dealing with computers and security. The Agency's practice is for employees to create their own passwords and not to share those passwords with coworkers.

Upon learning that some employees had complained about him, Grievant told his staff that he did not appreciate them going over his head and that when problems arose the problems should be resolved within the survey crew office. Grievant made his comments because he believes in following the chain of command to resolve problems.

After receiving disciplinary action, Grievant moderated his management style and the level of conflict between Grievant and his subordinates has been minimized.

CONCLUSIONS OF POLICY

Grievant's management style is abrasive. He is sometimes distant and insensitive to the feelings of his subordinates when interacting with them. For example, telling a subordinate to get his "damn the off the table" is an inappropriate method of expressing displeasure with that employee. Grievant's management style amounts to unsatisfactory job performance.

DHRM Policy 1.75 *Use of Internet and Electronic Communication Systems* requires employees to:

maintain the conditions of security (including safeguarding of passwords) under which they are granted access to such systems.¹

Grievant failed to follow established written policy because he suggested his subordinates should use particular passwords that were known to coworkers. An employee following Grievant's suggestion would be able to access information stored on the Agency's computer by another employee. Grievant's actions were not consistent with maintaining the conditions of security for the Agency's computer system.

¹ Agency Exhibit 2.

VDOT *Safety Rules* are posted in all buildings used by the Agency, including Grievant's building. One of these rules states, "Smoking is prohibited except in specifically designated areas."² Grievant failed to follow established written policy because he smoked in areas other than those specifically designated for smoking.

The Agency contends Grievant engaged in Workplace Violence. DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

No credible evidence was presented showing Grievant engaged in workplace violence. Although some of Grievant's subordinates may have been upset by his abrasive management style, none of Grievant's actions amount to work place violence.

² Agency Exhibit 4.

The Agency contends Grievant acted contrary to DHRM Policy 2.30 because he created a hostile work environment. DHRM Policy 2.30 defines Workplace Harassment as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

A hostile work environment is defined as:

A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

No credible evidence was presented suggesting Grievant's actions were based on "race, color, national origin, age, sex, religion, disability, marital status or pregnancy." No credible evidence was presented suggesting Grievant engage in any behavior remotely related to sexual harassment.

When the Agency fails to establish all of the facts underlying its basis for disciplinary action, the Hearing Officer has greater discretion to determine the appropriateness of the disciplinary action. In this instance, Grievant's behavior rises to the level of a Group II Written Notice without suspension. Grievant failed to follow established written policy thereby justifying issuance of a Group II written Notice. His actions, however, were not so severe as to warrant suspension. This conclusion is especially true given that Grievant has acted to improve his management style after receiving disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's suspension is **rescinded**. GPM § 5.9(a)(2). Standards of Conduct, Policy No. 1.60(D)(1)(a). The Agency 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

You may file an administrative review request within **15 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.³

[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].

³ 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: 7903-R

Reconsideration Decision Issued: January 19, 2005

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.

The Hearing Officer upheld Grievant’s receipt of a Group II Written Notice, but removed the suspension. The Agency contends Grievant’s suspension should be upheld and seeks reconsideration.

The Agency argues the Hearing Officer should not have considered Grievant’s behavioral modification following the disciplinary action. The Hearing Officer did not consider Grievant’s improved behavior after the disciplinary action was taken when the Hearing Officer determined the appropriateness of the disciplinary action. The Hearing Officer cited Grievant’s improved behavior, as an aside, to confirm the conclusion already made that a suspension was unnecessary given Grievant’s rational response to disciplinary action with which he disagreed.

The Agency argues the Hearing Officer “cannot plainly say that the actions of the grievant were not so severe as to warrant suspension as you do not have the knowledge of events leading up to the discipline, as closely as management rendering the discipline.” Hearing decisions are based on the evidence presented at the hearing. The burden of proof is on the Agency. If the Agency fails to prove the significance of relevant “events leading up to the discipline”, then the Agency has not met its burden of proof and the disciplinary action cannot be upheld.

The Agency issued Grievant disciplinary action including suspension for four reasons:

1. Failure to Follow Supervisor's Instruction's, 2. Failure to Follow Written Policy, 3. Violation of Policy 2.30, Workplace Harassment, 4. Violation of Policy 1.80, Workplace Violence (subjecting an individual to extreme emotional stress).

The Agency's allegation that Grievant engaged in Workplace Harassment was frivolous. No evidence whatsoever was presented by the Agency showing any of Grievant's actions were on the "basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy." When Grievant contested the Agency's asserting during the Step Process, the Agency's Second Step Response was:

while the harassment policy specifically related to harassment based on an individual's race, color, national origin, age, sex, religion, disability, marital status or pregnancy, the behavior you have exhibited does not appear to be based on any of these motivations. However, the spirit of this policy with particular attention to the retaliation portion of the policy follows closely with the circumstances at hand.

An employee may be disciplined for violating a policy. An employee may not be disciplined for violating an Agency's interpretation of the "spirit" of a policy. No deference is due to an Agency, when that Agency concludes an employee has not violated policy but should be disciplined based on the "spirit" of a policy.

The Agency failed to support its allegation that Grievant engaged in Workplace Violence. Grievant asked an employee to solve a simple mathematical problem for which she lacked the ability. The employee reacted by becoming upset and crying. These facts are insufficient to show a violation of the Workplace Violence policy.

When an Agency disciplines an employee for four reasons, but can establish only two of them, the Hearing Officer cannot give deference to the Agency. When all credible evidence is considered in this case, Grievant's behavior rises to the level requiring disciplinary action but not to the level necessitating suspension.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency'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 15 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