

Issue: Group I Written Notice (unsatisfactory job performance) and misapplication of policy and retaliation; Hearing Date: 01/13/05; Decision Issued: 01/24/05; Agency: DCJS; AHO: Carl Wilson Schmidt, Esq.; Case No. 7940



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7940

Hearing Date: January 13, 2005
Decision Issued: January 24, 2005

PROCEDURAL HISTORY

On July 14, 2004, Grievant was issued a Group I Written Notice of disciplinary action for:

Failure to comply with established written policy: On Monday, July 12, 2004, you loaned your access card to another employee in violation of written security policies in Quality Manual, Section 16(16.3.4.1). Your action granted unauthorized access to the evidence vault and created the potential for compromise of evidence security and non-compliance with accreditation standards.

On August 11, 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. On November 19, 2004, the EDR Director issued Ruling Number 2004-898. On December 14, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 13, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for inadequate or unsatisfactory work performance, and whether the Agency misapplied policy and/or retaliated against grievant.

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 Department of Criminal Justice Services employs Grievant as a Forensic Evidence Specialist Supervisor. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

Employees working at the Agency's Office use cards to gain access to portions of the building. An employee's level of security access depends upon the employee's work duties and position within the Agency. Only a few employees have access to the Evidence Vault where certain evidence is stored prior to being used to prosecute individuals accused of criminal behavior. One of the reasons access is limited to the Evidence Vault, is because of evidence rules requiring a chain of custody. In other words, for prosecutors to admit evidence into court, they must be able to identify all individuals who may have had access to the evidence at any given time after being collected. For example, if a local police officer brought evidence to the Agency, the Agency would be required to show who received the evidence, who handled the evidence, and who returned the evidence to the local police officer when he retrieved it from the Agency.

The Division Deputy Director scheduled a staff meeting on July 12, 2004 for all but a few employees in the division. He was concerned about how Agency employees would receive and handle evidence while so many employees were in the staff meeting.

He told Grievant that the Agency would have one person to sit at the console and answer the telephone and greet visitors. A part-time employee would also be available if necessary to complete data entry and receive items of evidence. If other matters arose during the staff meeting requiring an evidence specialist, the visitor delivering the evidence would have to wait 20 or 30 minutes until the meeting ended.

Grievant was not present when the staff meeting began. He arrived during the question and answer portion of the meeting. After the meeting ended, the Division Deputy Director expressed concern to Grievant that he was not at the meeting on time and did not learn all of the information discussed. Grievant said he was not able to get to the meeting since he had loaned his access card to a temporary employee and did not have access to the second floor where the meeting was being held. The Division Deputy Director asked Grievant why he provided his card to someone else. Grievant answered that he was concerned that some emergency may arise where a visitor needed immediate access to evidence and would not be able to obtain evidence since Grievant was in the meeting.

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).¹ 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).

“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.

Quality Manual Policy 16.3.4.1 states, “Employees are strictly forbidden to loan/give their assigned keys, combinations, codes, and/or cards to any other person.”² (Emphasis original). Grievant loaned his access card to another employee. His actions were contrary to established written policy thereby justifying the issuance of a Group I Written Notice for inadequate or unsatisfactory work performance.

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² On March 18, 2002, signed his name on a form acknowledging that he had read understood and would comply with the Quality Manual. See Agency Exhibit 5.

Grievant argues that his decision was prudent and intended to enable him to complete his duties as a supervisor. Grievant's argument fails because the Division Deputy Director had already established procedures to minimize the impact that the staff meeting might have on Agency operations. Agency managers had not given Grievant the authority to circumvent the access card policy.

Grievant asserts he cannot be disciplined for violating the security policy because he did not know his actions were forbidden under the policy and he did not intend to violate the policy. It is not necessary for the Agency to show that Grievant knew of the policy and intended to violate it. All the Agency must show is that Grievant intended to take the actions that resulted in a violation of policy. The Agency has done so.

Grievant contends that the Agency retaliated against him because he participated in litigation initiated by a former employee of his section. The evidence, however, showed that the Division Deputy Director began working at the Agency's Office in May 2004. He was not aware that Grievant had participated in any litigation involving the Agency. His actions were motivated by his concern about Grievant's breach of security. Accordingly, the Agency did not retaliate against Grievant.

Grievant argues that the Agency failed to follow its normal practice of progressive discipline. He contends the Agency should have counseled him rather than taking formal disciplinary action. Grievant's argument fails because the Agency is not obligated by the Standards of Conduct to follow a pattern of progressive discipline. In addition, the Agency, in fact, did follow a pattern of progressive discipline in his case. Failure to follow established written policy is a Group II offense, yet the Agency issued Grievant only a Group I Written Notice.

DECISION

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 **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].

Carl Wilson Schmidt, Esq.
Hearing Officer

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.