

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 02/03/05; Decision Issued: 02/14/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 7959; **Administrative Review: HO Reconsideration Request received 02/24/05; HO Reconsideration Decision issued 03/31/05; Outcome: No newly discovered evidence or incorrect legal conclusions. Request denied.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7959

Hearing Date: February 3, 2005
Decision Issued: February 14, 2005

PROCEDURAL HISTORY

On September 24, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

Group II Written Notice for unauthorized dissemination of flyers advertising an employee meeting connecting the meeting with the union, as well as soliciting union membership. Using an employee meeting for the purpose of promoting union activity and union membership was not authorized by management.

On October 20, 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 December 30, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 3, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative

Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow established written 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 Department of Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Rehabilitation Tech. No evidence or prior disciplinary action against Grievant was introduced at the hearing. Grievant works at one of the Agency's regional Facilities.

Grievant contacted the Central Officer Human Resource Director and asked that she come to the Facility where Grievant worked to meet. She agreed and a meeting was scheduled at the Facility.

At the conclusion of Grievant's work shift on August 18, 2004, he left his workplace and met another person at a location near the Facility. Grievant received approximately 75 copies of a document. On one side of the document it read, "YOUR BOSS BUGGIN YOU?! THEN YOU SHOULD BE IN [Union Name]." On the other side of the document it read,

UP COMING EMPLOYEE MEETINGS VERY IMPORTANT
THERE WILL BE A MEETING ON FRIDAY AUGUST 20, AT 10: AM
BUILDING ONE CONFERENCE ROOM B
COME OUT AND SUPPORT OUR EFFORTS TO REVISE UNFAIR
POLICY AND UNJUST DISCIPLINE
FOR MORE INFO CONTACT [Grievant's name and telephone number]

TO ALL [Union name] MEMBERS MONTHLY MEETING WILL BE HELD
MONDAY AUGUST 23, AT THE [location]
ELECTIONS, ORGANIZING AND THE OUT COME OF MEETINGS WITH
[Central Office HRO] ARE TOPICS OF DISCUSSION
AN INJURY TO ONE IS AN INJURY TO ALL
JOIN [Union name] TODAY CALL [Union telephone number]

Grievant took the flyers and returned to the Facility campus and began distributing the flyers to employees working at the Facility.

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).

Facility Instruction # 1-5, *Use of Campus Facility and Solicitation/Fund Raising*, provides:

- A. The only organizations permitted to solicit on the grounds of the campus are:
 - Annual Combined Virginia Campaign
 - American Red Cross Blood Drive
 - Facility Family Organizations
 - Facility Volunteer Advisory Councils with approval of respective Facility Director

- B. Solicitation on behalf of commercial, civil, religious, political, charitable, or any other types of organizations not listed in Section A above, regardless of their profit/non-profit status, is prohibited.²

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.³ Language stating, “YOU

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

² Agency Exhibit 4.

³ DHRM § 1.60(V)(B)(2)(a).

SHOULD BE IN [Union Name]" and JOIN [Union name] TODAY CALL [Union telephone number], is a solicitation on behalf of the union. By distributing the document at the Facility, Grievant acted contrary to Facility Instruction 1-5. Accordingly, he failed to follow established written policy.

Grievant contends he was attempting to notify employees of the meeting with the Central Officer HRO and not trying to solicit for the union. He testified that he made an oversight and failed to properly proof the document. Grievant's assertion does not alter the outcome of this case. Grievant intentionally distributed the flyers. He had the opportunity to review the document and refrain from distributing it. Although Grievant may not have intended to violate the policy, it is not necessary for the Agency to prove that Grievant intended to violate the policy so long as the Agency has established that Grievant engaged in intentionally behavior resulting in a violation of a written policy.

Grievant testified credibly and with certainty that during a meeting as part of the Step Process of his grievance, he and the Facility Director agreed that Grievant would receive a Group II Written Notice for distributing an unauthorized document (as opposed to soliciting for a union). The Facility Director's recollection of the meeting was less clear. Grievant contends the Facility Director has breached that agreement and now asks the Hearing Officer to enforce the agreement.

The Hearing Officer has only the authority granted to him by the Grievance Procedure Manual. The Grievance Procedure Manual does not authorize the Hearing Officer to enforce agreements between parties made during the Step Process of a grievance. Accordingly, Grievant's request must be denied.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7959-R

Reconsideration Decision Issued: March 31, 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.

Grievant contends he is not bound by Policy 1-5 because the policy became effective on July 30, 2003 when Grievant was away from work on disability leave. Actual knowledge of a policy or physical presence at work on the effective date of the policy is not a prerequisite for enforcement of a policy. If a policy has been distributed to employees in general or is made available such that employees could locate the policy, an employee is presumed to have adequate notice of the policy. In this case, no evidence was presented showing the Agency failed to distribute the policy to its employees or failed to place the policy in a location where employees could access the policy. Accordingly, there is no reason to alter the application of Policy 1-5.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, 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 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