

Issue: Informal Counseling Memorandum (in form of an email); Hearing Date: 01/28/05;
Decision Issued: 02/14/05; Agency: DEQ; AHO: John V. Robinson, Esq.; Case No. 7985

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 7985

Hearing Officer Appointment: January 10, 2005

Hearing Date: January 28, 2005

Decision Issued: February 14, 2005

PROCEDURAL HISTORY AND ISSUES

In his Grievance Form A concerning this proceeding (the "Form A"), the grievant requested a hearing to challenge the propriety of a short counseling e-mail dated May 4, 2004 sent to him by the office director within the agency (the "Office Director"). The agency head took the position that the grievant's claim did not qualify for a hearing because the e-mail was not a disciplinary action but was rather informal counseling to an employee regarding work performance or behavior.

Similarly, the Department of Employment Dispute Resolution ("EDR") decided that the grievance did not qualify for a hearing under the grievance procedure for classified state employees (*Va. Code § 2.2-3000, et seq.*).

On appeal to the Circuit Court of the City of Richmond, Judge Johnson framed the issue: "At issue is whether a work related e-mail sent to [the grievant] and others constitutes discipline that qualifies for a hearing." (Opinion, page 1).

To determine this issue, amongst other things, Judge Johnson analyzed various dictionary definitions of "discipline" and after examining what he considered analogous cases concerning local governments, Judge Johnson decided that "[t]he court believes that the e-mail in this case fits squarely within many of those definitions." (Opinion, page 5). Accordingly, Judge Johnson proceeded to answer the issue as he framed it in the affirmative and qualified this grievance for a hearing. This court decision is final and not appealable. *Grievance Procedure Manual*, § 4.4.

The agency argues that because the e-mail was not intended as discipline and does not constitute discipline, the grievant bears the burden of proof. However, while the hearing officer finds some support for this contention in the authorities cited by EDR in its Ruling No. 2004-871 dated October 14, 2004, based on Judge Johnson's Opinion, the hearing officer decides that in this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the action it took in sending the grievant the e-mail of May 4, 2004, was warranted and appropriate under the circumstances.

Before the hearing, by e-mail communication sent at 6:52 p.m. on January 19, 2005, the grievant requested that the hearing officer issue an order for numerous documents stored on the agency's computers used by the grievant. The hearing officer requested a conference call with the parties to discuss the document request.

During a thirty-minute conference call with the parties on January 20, 2005, the grievant clarified the nature, scope and conditions of the document request. Firstly, the grievant confirmed that the documents are all on agency property; namely computers, networks, etc. as opposed to his personal property. The grievant stated that in an action or proceeding not part of this administrative due process proceeding (Case No. 7985), the grievant has challenged the agency's right to access the documents and has demanded that the agency not look at the documents. The grievant insisted that the hearing officer order as a condition precedent to any document production order by the hearing officer that the agency not open and not look at any computer files, documents, records, directories or subdirectories created by the grievant within the purview of the request. The hearing officer asked the grievant whether the grievant would object to an *in camera* review by the hearing officer of such documents to determine the nature of the documents and whether they were relevant to the proceeding before the hearing officer. The grievant responded that he would object to such a review by the hearing officer.

Accordingly, because the hearing officer decided that he lacks subject matter jurisdiction or the power to issue an order for the production of documents with a condition precedent that the agency not look at the documents, the hearing officer declined to issue the order requested by the grievant. Furthermore, the hearing officer decided that even if he had the power to issue such an order, he would decline the request where the grievant would not allow even an *in camera* review of the pertinent records by the hearing officer.

Additionally, were the agency to copy computerized documents without even knowing what it was copying, it could potentially be violating copyright laws, etc., without realizing it. Under such circumstances, the hearing officer again declined to issue the requested order.

Accordingly, because of the grievant's insistence upon the condition precedent, the hearing officer denied the grievant's request for an order containing such a condition precedent. Subsequently, the agency did voluntarily deliver to the grievant certain documents including documents requested by the grievant in an e-mail communication to the hearing officer dated January 21, 2005.

APPEARANCES

Grievant
One Agency Witness called by Grievant
Representative for Agency
One Witness for Agency

ISSUES

The grievant requested the hearing to challenge the propriety of the Office Director's e-mail of May 4, 2004 in all aspects that pertain to the grievant, as described in the Form A and the grievant is seeking a complete rescission of such action, and a finding by the hearing officer that the sending of such e-mail to the grievant by Management was unwarranted and unjustified.

FINDINGS OF FACT

1. The agency employs the grievant as an environmental engineer consultant.
2. In March, 2004, a co-worker employed by the agency in the same capacity as the grievant, posted on the co-worker's office door a photograph of Saddam Hussein, which had been altered to show Hussein holding a sign stating "Will Tyrannize for Food."
3. The co-worker's office and the grievant's office are on the same floor of the agency's building.
4. The grievant found the altered photograph offensive and on or about March 26, 2004, the grievant wrote a notation on the photograph asking the co-worker to take it down. The notation stated: "[Co-worker]: I'm tired of seeing this! How 'bout taking it down? [Grievant]." GE 1.¹
5. Between March 26, 2004 and April 6, 2004, the co-worker added the notation "Not at this time!" to the photograph, which remained in place. GE 1 and 3.
6. On April 6, 2004, the grievant added a notation stating "But it is so hateful to so many!" GE 1 and 3.
7. After the co-worker failed to remove the photograph from his office door, the grievant took it down himself on April 13, 2004. GE 3.
8. The co-worker then posted the image and some other similar images which the grievant found offensive (GE 2 and 3), both on the door of his office and within his office.
9. The grievant again removed certain images, always in the presence of the co-worker and the conflict between the two escalated to the extent that the behavior

¹ References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

of the grievant and the co-worker was disruptive to their fellow employees and Management received complaints to this effect.

10. Ultimately, in the wake of the escalating conflict, the co-worker complained to the Office Director about the grievant's conduct, and the grievant complained to the agency's Human Resources Office.
11. After conducting an appropriate investigation and properly exercising his professional judgment and discretion concerning the Commonwealth's policy of progressive discipline, the Office Director determined that discipline was unnecessary. However, again properly exercising his professional judgment and expertise as a senior supervisor of employees within the agency, the Office Director determined to send the grievant and the co-worker an e-mail communication dated May 4, 2004, counseling them to be sensitive to others' perceptions in posting materials in and around their offices and to address any concerns about the conduct of other employees through supervisory channels rather than through self-help. GE 4.
12. The grievant engaged in the behavior described in the May 4, 2004 e-mail and the grievant's behavior constituted misconduct.
13. The Office Director's e-mail of May 4, 2004 and Management's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
14. The Officer Director's actions concerning this grievance were reasonable and consistent with law and policy.
15. The testimony of the Office Director was both credible and consistent on the material issues before the hearing officer. The demeanor of the Office Director at the hearing was candid and forthright.

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).

Va. Code § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances 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 Standards of Conduct Policy No. 1.60. 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 Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example of a Group I offense is disruptive behavior. The Standards of Conduct also include Group III offenses, which include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the sending of the e-mail communication dated May 4, 2004 was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Office Director's actions were clearly consistent with law and policy and, accordingly, the exercise of his professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the disruptive conduct of the grievant and the co-worker clearly could have resulted in the issuance by Management of a Group 1 Written Notice constituting more serious formal discipline. The Office Director, exercising his professional judgment and applying the Commonwealth's policy of progressive discipline, decided that a Written Notice was inappropriate under the circumstances. However, the Office Director did decide, under the circumstances, that an informal counseling applied equally to both protagonists was appropriate. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The hearing officer agrees. The fact that the subject behavior could well have resulted in formal discipline, the lengthy period and the degree of the escalation of the conflict, and the self-help exercised by the grievant all preclude any lesser sanction or action by Management.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in sending the e-mail communication dated May 4, 2004 and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of

Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

- 3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9)