

Issue: Two Group II Written Notices (failure to follow supervisor's instructions, misuse of State time); Hearing Date: 04/22/05; Decision Issued: 05/03/05; Agency: NVCC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8003/8004



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8003 / 8004**

Hearing Date: April 22, 2005  
Decision Issued: May 3, 2005

**PROCEDURAL HISTORY**

On November 11, 2004, Grievant was issued a Group I Written Notice of disciplinary action for "Failure to follow supervisor's instructions." He was also issued a Group I Written Notice for "Misuse of state time and technology resources."

On November 29, 2004, Grievant timely filed two grievances to challenge the Agency's actions. The outcome of the Third Resolution Step of each grievance was not satisfactory to the Grievant and he requested a hearing. On March 15, 2005, the EDR Director issued Ruling #2005-960 consolidating the two grievances. On March 29, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 22, 2005, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUES**

1. Whether Grievant should receive a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions regarding sending a survey to Agency staff.
2. Whether Grievant should receive a Group I Written Notice of disciplinary action for misuse of State time.

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 Northern Virginia Community College employs Grievant as an Information Technology Specialist I. The purpose of his position is:

To set up and install hardware and software and to provide both hardware and software computer troubleshooting support to campus personnel.<sup>1</sup>

On March 24, 2003, Grievant's Supervisor sent Grievant a memorandum stating:

This memorandum is in response to the recent IT Survey that you selectively distributed to certain individuals on our campus. I obtained a copy from an individual who asked me about the survey and I have attached a copy of the survey to this memorandum.

I would like you to remove the remaining surveys from users mailboxes, as the results are arbitrary and unreliable. If a survey is conducted from within the college, it has to be done on an official college letterhead, so that a record can be kept of the information that was gathered. I like the idea of a survey, but this is something you should have brought up in one of our IT meetings. This way the [Department] could work together to develop a survey that is unbiased and is distributed fairly.

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<sup>1</sup> Agency Exhibit C.

I expect you to respond to me in writing as to why you passed out this IT Survey without my knowledge or the knowledge of the IT Staff and what you expected to gain from this survey.

The Supervisor met with Grievant to discuss the memorandum. During that meeting the Supervisor instructed Grievant to refrain from sending any surveys to staff without her prior approval.

On September 30, 2004, Grievant met with the Supervisor regarding his annual performance evaluation. He informed the Supervisor that he disagreed with her evaluation of his performance and believed he should have received an overall rating of "Extraordinary Contributor." Grievant wrote on the evaluation that he wished to appeal the evaluation to the Acting Provost. On October 8, 2004, the Acting Provost drafted a memorandum to Grievant explaining to Grievant that the Acting Provost would not change the evaluation. On October 16<sup>th</sup>, 2004, Grievant reviewed the *Grievance Procedure Manual* of the Department of Employment Dispute Resolution to determine his next course of action regarding filing a grievance for receiving an arbitrary and capricious evaluation.

In order to support his position that his evaluation was inaccurate, Grievant drafted an email<sup>2</sup> addressed to "IT customer." He wrote:

Below is one of my core responsibilities which I'm evaluated on by my supervisor. I'm looking for feedback from you, the customer, on how I'm doing. Any additional comments you may have are appreciated. Please fill out and email it back to me.<sup>3</sup>

On October 21, 2004 after 5 p.m. and on October 22, 2004 prior to 8:30 a.m., Grievant sent this email to over 40 Agency employees. He did not obtain the Supervisor's permission before sending the email. Many of the employees receiving the email reviewed the email, considered Grievant's work performance, drafted their responses, and then sent their responses to Grievant by email. From October 22, 2004 to October 27, 2004, Grievant compiled the response data and assembled paperwork supporting his grievance. On October 27, 2004, Grievant delivered his grievance to the Human Resources department.

### **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

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<sup>2</sup> Grievant drafted the email outside of his normal work hours.

<sup>3</sup> Grievant Exhibit 3.

force.” DHRM § 1.60(V)(B).<sup>4</sup> 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).

#### Group I for Failure to Follow a Supervisor’s Instructions

Failure to follow a supervisor’s instructions is a Group II offense. The Agency chose to issue Grievant a Group I Written Notice. Grievant’s supervisor instructed Grievant to refrain from sending surveys to Agency staff without her prior permission and approval. Grievant drafted a survey to obtain feedback regarding his work performance. Grievant failed to follow his supervisor’s instructions because he sent out a survey to Agency staff without first obtaining approval from the Supervisor. Accordingly, the Agency’s issuance of a Group I Written Notice for failure to follow a supervisor’s instructions must be upheld.

Grievant contends his actions were protected because he was exercising his rights under the *Grievance Procedure Manual*. In particular, Grievant cites section 8.8 of the *Grievance Procedure Manual* stating:

Grievances are official business. Therefore, in processing grievances, parties and state employee representatives of parties may make reasonable use of agency office equipment including computers, copiers, fax machines, and telephones.

Grievant’s argument fails because it does not distinguish between the use of office equipment and the labor of employees reading, considering, and responding to his email. Grievant was free to send emails using office equipment. Grievant was not free to ask employees not reporting to him to divert their time from their work and participate in data collection for his benefit. Section 8.8 does not require or authorize the use of other Agency staff in the pursuit of an employee’s grievance. Agency managers are the ones who determine how staff labor will be utilized. In this instance, Agency managers decided that responding to an employee’s survey was not an appropriate use of employee labor. To prevent the misuse of employee labor, the Supervisor instructed Grievant to refrain from sending out surveys without her approval.

No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

#### Group I for Misuse of State Time and Technology Resources

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<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

There is a difference between an employee's behavior and the consequences of his behavior. In some cases, an employee's single action may have more than one consequence.<sup>5</sup> The focus of DHRM Policy 1.60, *Standards of Conduct* is on employee behavior. Written Notices are issued in response to an employee's behavior.

In this instance, Grievant's behavior giving rise to disciplinary action was the surveying of Agency employees. Although the Agency may perceive that behavior as having the consequences of being contrary to a supervisor's instructions and resulting in the misuse of State time, there remains only one behavior at issue. Thus, the Agency may take disciplinary action against Grievant for either failure to follow a supervisor's instructions or for misuse of State time<sup>6</sup>, but not both.<sup>7</sup> Grievant's behavior may be most accurately described as being a failure to follow a supervisor's instructions. While the Agency's issuance of a Group I Written Notice for failure to follow a supervisor's instructions must be upheld, the Agency's issuance of a Group I Written Notice for misuse of State time and technology resources must be reversed because the latter is duplicative.

### Retaliation

Grievant contends the Agency took disciplinary action against him in order to retaliate against him for filing a grievance challenging the Agency's evaluation of his work performance. Based on the evidence presented, the Agency took disciplinary action because Grievant acted contrary to instructions given to him by his supervisor. No credible evidence of retaliation by the Agency was presented during the hearing.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. The Agency's issuance of a Group I Written Notice for misuse of State time and technology resources is **reversed**.

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<sup>5</sup> In some cases an employee's behavior may have no consequences to the Agency, yet his behavior remains subject to disciplinary action. For example, an employee may be disciplined for violating a safety rule without someone suffering an injury.

<sup>6</sup> For the purpose of discussion, the Hearing Officer assumes without deciding that the Agency would be able to present sufficient evidence to support its assertion that Grievant misused State time and technology resources.

<sup>7</sup> If the Agency's logic were adopted, an employee taking one action could receive many written notices. For example, if the Agency had viewed Grievant's behavior as (1) a failure to follow supervisor's instructions, (2) a misuse of State time, (3) inadequate or unsatisfactory job performance, and (4) disruptive behavior, the Agency could have issued four Group I written notices and removed Grievant from employment. This outcome would be contrary to the intent of DHRM Policy 1.60 to focus on employee behavior, instead of on the consequences of behavior.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>8</sup>

[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].

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer