

Issue: Group II Written Notice with demotion and salary reduction (failure to follow instructions and perform assigned tasks); Hearing Date: 07/22/05; Decision Issued: 07/25/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8111



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8111

Hearing Date: July 22, 2005
Decision Issued: July 25, 2005

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Human Resource Director
Advocate for Agency
Two witnesses for Agency

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice for failure to follow supervisory instructions and perform assigned tasks.¹ Due to an accumulation of active prior disciplinary actions, grievant was demoted with a fifteen percent salary reduction. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.²

The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") has employed grievant since October 2004. She was a human resources analyst at the time of the disciplinary action. Grievant had previously worked for 25 years at other state agencies; she has worked at three other agencies since 1997. Grievant has three prior active disciplinary actions – a Group II Written Notice for failure to follow supervisory instructions and perform assigned tasks,³ a Group I Written Notice for unsatisfactory performance,⁴ and a Group I Written Notice for failure to perform assigned tasks.⁵ Grievant did not file grievances for any of the prior disciplinary actions and, therefore, they have now become final.

Grievant was hired by the agency in October 2004, largely on the basis of her experience with other state agencies. She stated that she had managed both the workers' compensation program and the Virginia Sickness and Disability Program (VSDP) for a large state agency.⁶ Within one month of grievant beginning employment, her supervisor noticed that grievant's office was disorganized. When the supervisor discussed this with grievant, grievant asserted that she needed a larger office. Grievant's request was granted but, even in a larger office, grievant continued to be disorganized. During the holidays in December 2004, grievant was on leave for several days. The supervisor had to perform some of grievant's functions and found that grievant had not performed many required tasks (processing checks, processing memorandums of agreement, processing VSDP action reports, sending required paperwork to the payroll unit). The supervisor had to work late and complete grievant's unfinished work.

The supervisor discussed the situation with the Human Resource Director and they decided to employ a wage employee to assist grievant in her work. Grievant's performance still did not improve. On January 24, 2005, the Director offered grievant the assistance of two support specialists but grievant failed to utilize this assistance. Subsequently, grievant's supervisor issued a Notice of Improvement Needed to grievant citing specific performance deficiencies and

¹ Agency Exhibit 1. Group II Written Notice, issued April 19, 2005.

² Agency Exhibit 2. *Grievance Form A*, filed May 18, 2005.

³ Agency Exhibit 3. Group II Written Notice, issued February 17, 2005.

⁴ Agency Exhibit 3. Group I Written Notice, issued February 17, 2005.

⁵ Agency Exhibit 7. Group I Written Notice, issued February 13, 2004.

⁶ Agency Exhibit 6. Application for Employment, August 2004.

giving her an improvement plan.⁷ Among other things, the plan required grievant to meet weekly with her supervisor and to submit weekly status reports to the Director.

Grievant did not meet weekly or submit weekly status reports. The Director received complaints from other department managers as a result of grievant continuing to be behind in her work. In February 2005, the Director assigned four people to work on grievant's areas of responsibility until all work was completely current. When this was done, the Director issued two disciplinary actions to grievant for unsatisfactory work and for failing to follow supervisory instructions and perform assigned work. The Written Notices specifically noted that grievant was to submit a weekly status report beginning on March 4, 2005. On March 25, 2005, grievant met with the Director who counseled grievant on failing to report each of the past weeks. The Director told grievant that she was expected to meet with her each week to give a status report on her work. The reports were not required to be in writing – a verbal report would have been satisfactory to the Director. Also in late March, grievant's Employee Work Profile (EWP) Work Description was revised to reduce the scope of her job responsibilities and make it easier for her to maintain her work in a current status.⁸

By mid-April, grievant was still not complying with the requirement to give weekly status reports to the Director. The Director disciplined grievant with the Group II Written Notice at issue herein and demoted her to administrative office specialist with a fifteen percent salary reduction. During the third resolution step of the grievance, the Facility Director offered to change the salary reduction from fifteen to five percent, contingent upon grievant accepting such relief and terminating the grievance. Grievant rejected the offer and requested a grievance hearing.

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

⁷ Agency Exhibit 4. Notice of Improvement Needed/Substandard Performance, January 26, 2005.

⁸ Agency Exhibit 2. EWP Work Description, March 29, 2005.

and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 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. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.⁹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* 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 Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹⁰ Failure to follow supervisory instructions and to perform assigned tasks are two examples of Group II offenses.

The agency has shown, by a preponderance of evidence, that grievant was not performing satisfactorily almost from the beginning of her employment in October 2004. The agency attempted to accommodate grievant by giving her, at her request, a larger office and by providing the assistance of a wage employee. When her performance failed to improve, the agency placed grievant on formal notice by issuing a Notice of Improvement Needed and a performance plan in January 2005. Then, several people were assigned to bring all areas of grievant's responsibility to a current status. When grievant failed to comply with the performance plan requirement to provide weekly status reports, she was

⁹ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

¹⁰ Agency Exhibit 8. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

disciplined in mid-February. Grievant's on-going failure to provide weekly status reports continued in March and April resulting in issuance of the Group II Written Notice at issue.

Grievant knew, or reasonably should have known, following the Notice of Improvement Needed, and particularly following the disciplinary actions in February, that her state employment was in jeopardy. It was critical that grievant comply with all instructions given her by supervision. The requirement to give the Director a verbal status report each week was easy to comply with; grievant has given no reason for not doing so. Grievant avers that she did advise the Director on one occasion that she was ready to meet but that the Director postponed the meeting to a later time. The Director has the prerogative to meet with grievant at a time convenient to both. One postponement does not absolve grievant of the obligation to reschedule that meeting and continue to meet weekly as directed. The requirement for weekly status meetings was specifically mentioned in writing in both the Notice of Improvement Needed in January and, in each of the Written Notices given to grievant in February. Grievant said she had also spoken with the Director on other occasions about specific problems or concerns of the day. However, the Director denied that grievant gave status reports on these occasions.

With the accumulation of active disciplinary actions, the agency could have removed grievant from state employment. However, the agency considered grievant's length of state service a mitigating circumstance and decided to demote her in lieu of terminating her employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice, demotion, and salary reduction issued for failing to follow supervisory instructions and perform assigned tasks is hereby 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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.¹¹ 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.¹²

[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]

¹¹ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer