

Issue: Group II Written Notice (failure to follow supervisor's instructions);
Hearing Date: 03/07/06; Decision Issued: 03/08/06; Agency: DJJ; AHO:
David J. Latham, Esq.; Case No. 8279; Outcome: Employee granted full relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8279

Hearing Date: March 7, 2006
Decision Issued: March 8, 2006

PROCEDURAL ISSUE

Grievant requested as part of her relief that retaliation be stopped. However, at the outset of the hearing, grievant withdrew her allegation of retaliation as an issue. Therefore, no evidence was offered on this issue and it will not be addressed in this decision.

APPEARANCES

Grievant
Two advocates for Grievant
Project Manager
Advocate for Agency
One witness 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

Grievant filed a timely grievance from a Group II Written Notice for failure to follow a supervisor's instructions.¹ 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 Juvenile Justice (hereinafter referred to as "agency") has employed grievant as an information technology specialist³ for ten years.

Grievant had been the agency's Webmaster. Her work description lists primary work duties and tasks as software projects, enhancement projects, and maintenance activities. Although the description did not specifically mention web site maintenance and publication, grievant was performing these functions and the work title on the document is Webmaster. During this period, agency management persons wishing to have something published on the web sites would send it directly to grievant who would then publish the item on the sites.

On August 1, 2005, a different supervisor was assigned to supervise grievant. Grievant complied with all of her supervisor's instructions from the time of his assignment in August until the date of the incident that is the subject of this grievance. In September 2005, it was determined that agency business needs required development of both a new Internet site and a new Intranet site. Because of the time and effort needed for this project, the supervisor sent an e-mail to grievant, a coworker, and several other affected people instructing that no further changes were to be made to either site, that all current work on the sites was to cease, and that all changes or requests for changes were to come to him for review and approval.⁴

In mid-October 2005, the supervisor sent an e-mail to grievant with three attachments advising that they were not mission-critical items and were not to be processed (posted on the web sites) at that time.⁵ One attachment was a news story about inmates raising funds for Hurricane Katrina victims. On October 27, 2005, the agency's deputy director (who is two supervisory levels above the supervisor) sent an e-mail to the supervisor with a copy to grievant.⁶ The message directed that a meeting agenda and the news story about fund-raising

¹ Agency Exhibit 1. Group II Written Notice, issued November 4, 2005.

² Agency Exhibit 2. *Grievance Form A*, filed December 2, 2005.

³ Agency Exhibit 3. Grievant's Employee Work Profile work description, January 3, 2005.

⁴ Agency Exhibit 1. E-mail from supervisor to grievant, September 28, 2005.

⁵ Agency Exhibit 1. E-mail from supervisor to grievant, October 12, 2005.

⁶ Agency Exhibit 1. E-mail from deputy director to supervisor, October 27, 2005.

inmates be posted on the web sites. The e-mail concluded by stating, "Even with the upgrade we should be able to post this." Grievant promptly (within 20 minutes) posted both items on the web sites; it took only five minutes to post the inmate story. A few minutes later, the supervisor sent grievant an e-mail directing her to post only the agenda item.⁷

Several minutes later, the supervisor checked the web sites to assure that the agenda item had been published and learned that grievant had already posted both the agenda and the inmate fund-raising story. Subsequently, after consultation with his supervisor and human resources, the supervisor disciplined grievant with a Group II Written Notice.

The inmate news story was a positive-sounding item praising inmates who had voluntarily raised funds for hurricane victims. The supervisor did not dispute grievant's testimony that it required only five minutes to post. He also acknowledged that he would have approved it for web site posting after he had a chance to review the entire story. There was no adverse impact on the agency as a result of the posting of the item.

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).

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.

⁷ Grievant Exhibit 4. E-mail from supervisor to grievant, October 27, 2005.

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, such as a claim of retaliation, grievant must present her evidence first and prove her claim by a preponderance of the evidence.⁸

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 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.⁹

The evidence demonstrates, and grievant acknowledges, that she published a story on the web site without having received a formal go-ahead from her supervisor. This action was not consistent with her supervisor's earlier instruction not to make web site changes with his prior review and approval.

Nonetheless, from the totality of evidence in this case, one must conclude that grievant did not *deliberately* fail to follow a supervisor's instructions. When an employee makes a willing and conscious decision not to follow a supervisor's instructions, such an act constitutes a Group II offense. However, when an employee reasonably believes that her action comports with supervisory instructions, an act that is inconsistent with the instruction does not constitute a *deliberate* failure to follow policy. Rather, at most her action might be considered unsatisfactory work performance. Unsatisfactory work performance can be addressed either by a Group I Written Notice or by verbal counseling. In most cases, first occurrences of minor misunderstandings are addressed by verbal counseling with the supervisor having the option to document the counseling session in writing. In this case, even the third step respondent in the grievance process recognized that grievant's offense was no more than unsatisfactory work performance.¹⁰

Mitigation

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

⁹ Agency Exhibit 4. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹⁰ Agency Exhibit 2. Step 3 Response of Deputy Director, January 5, 2006.

The normal disciplinary action for a Group II offense is a Written Notice or a Written Notice and up to 10 days suspension. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and an otherwise satisfactory performance record.

A hearing officer is required to give an appropriate level of deference to actions by agency management. However, where discipline exceeds the limits of reasonableness, the discipline may be mitigated in appropriate circumstances. This case presents such circumstances. Grievant has 10 years of state service with this agency. Her record is one of satisfactory or better performance. She has no prior disciplinary actions. The evidence is devoid of any indication that grievant deliberately failed to follow her supervisor's instructions. Rather, the evidence supports a conclusion that grievant made a reasonable assumption that the agency's deputy director had made a decision to publish the inmate story on the web sites. The deputy director gave a clear, unambiguous, written instruction to a supervisor to publish the inmate story. He sent a copy of the instruction to grievant. Grievant had no reason to believe that her supervisor could or would countermand the deputy director's instruction. Moreover, the last sentence of the deputy director's instruction stated, in effect, that the website upgrade should *not* be a basis not to publish the story. Grievant reasonably assumed that her supervisor would tell her to publish the story and she promptly accomplished the five-minute task without waiting for formal ratification from her supervisor.

Thus, grievant acted diligently and promptly to comply with a supervisor's instruction by following the deputy director's instruction to publish the story. Since the deputy director significantly outranks grievant's supervisor, she reasonably assumed her supervisor would have to comply with the deputy director's instruction; she had no reason to know otherwise. The fact that the deputy director copied grievant on the e-mail led grievant to conclude that he was copying her to assure that she received the same instruction being given to the supervisor. If the deputy director had not intended that the story be published, there would be no reason to send grievant a copy of the instruction. It was, therefore, reasonable for grievant to conclude that her supervisor was being given the instruction only as a formality or courtesy. Unfortunately, grievant's desire to comply with the instruction was a little too prompt. Had she waited for an hour, she would have received the supervisor's instruction to publish only the agenda and not the inmate story. Nonetheless, grievant should not be disciplined for acting with such alacrity. At most, she made an error in judgment by not waiting for her supervisor to play his role by formally approving the deputy director's instruction. Because this was a first occurrence, and because there is no evidence that the grievant was attempting to do anything other than perform her work assiduously, her error in judgment warrants no more than counseling.

DECISION

The disciplinary action of the agency is reversed.

The Group II Written Notice issued on November 4, 2005 is hereby **RESCINDED**. The agency shall remove the disciplinary action from grievant's personnel record.

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]

David J. Latham, Esq.
Hearing Officer

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.