

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 05/23/07; Decision issued: 05/24/07; Agency: VDH; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8578; Outcome: Full relief.

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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 8578

Hearing Date: May 23, 2007  
Decision Issued: May 24, 2007

PROCEDURAL HISTORY

On December 13, 2006, Grievant was issued a Group I Written Notice of disciplinary action for:

*Failure to follow supervisor's instructions. Continues to make lengthy phone calls to the State [ ] office regarding internal district concerns, human resource issues, and basic [ ] policy and procedures. See counseling memo March 22, 2006, October 6, 2006, November 2, 2006, team meeting minutes November 30, 2006 and email from [ ] December 5, 2006.*

On January 18, 2007, 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 she requested a hearing. On April 26, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2007, a hearing was held at the Agency's regional office.<sup>1</sup>

APPEARANCES

Grievant  
Advocate for Grievant  
Advocate for Agency  
Three witnesses for Agency

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<sup>1</sup> This matter was previously assigned to another hearing officer, but the first hearing officer assignment was interrupted, with the hearing delayed, because of the hearing officer's unavailability to complete the assignment.

## ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

## 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

The Department of Health employs Grievant as a nutritionist and program coordinator. She has been employed by the agency in this capacity for approximately 8 years. Other than the counseling memos attached to the Written Notice, no evidence of prior active disciplinary action was introduced during the hearing.

The agency witnesses, including the district director, nurse manager, and Grievant's direct supervisor, testified that the Grievant, by contacting the agency's State office for questions and advice, without involving or notifying her supervisor, breached the chain of command and, therefore, was guilty of failing to follow her supervisor's instructions. The witnesses testified that the proper chain of command, and proper conduct within the chain of command, was communicated to the Grievant, and other employees, through individual, group and team meetings. The Grievant's email to and response from the agency's State office, a copy of which was attached to the Written Notice, was the principal evidence of misconduct.

The Grievant testified that she believed she had complied with her supervisor's instructions when she ceased telephone calls to the agency's State office, and used email correspondence as requested. She testified that she did not intend to undermine her supervisor's authority.

Four agency exhibits were admitted for the grievance record.

## 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).

Grievant contends that the Group I Written Notice should be reversed because she did not receive adequate notice of the Agency's contention that she was failed to follow chain of command. Grievant points to the Group I Written Notice which describes the offense as "Failure to follow supervisor's instructions." The Grievant contends that the Written Notice is defective for not putting her on notice of the conduct being disciplined. No evidence was presented by the Agency showing that the Grievant's supervisors gave her a specific instruction and that she failed to comply with that instruction. Accordingly, Grievant believes that the Group I Written Notice is defective and should be removed.

The Agency contends Grievant failed to follow her supervisor's instructions by breaching the appropriate chain of command. In order for an employee to be disciplined for failing to follow a supervisor's instruction, the instruction must be sufficiently specific to enable the employee to know what behavior he or she should perform or avoid. For instance, a general admonition to behave better or behavior more civilly toward others lacks the necessary specificity to be enforced.

Procedural Due Process is inextricably intertwined with the grievance procedure. The *Rules for Conducting Grievance Hearings* state:

In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the *Rules* cite *O'Keefe v. USPS*, 318 F.3d 1310 (Fed. Cir. 2002). In *O'Keefe*, the agency removed an employee with the general charge of "improper conduct/fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

Agencies are expected to issue Written Notices that properly place employees on notice of the supporting facts and reasons for the agency's disciplinary actions. To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. It is incumbent on the agency to specify the employee's conduct

or actions that are being disciplined. Whether an agency has met this standard is often a matter of degree.

Under the *Rules for Conducting Grievance Hearings*, the first issue in every disciplinary grievance is:

Whether Grievant engaged in the behavior described in the Written Notice?

Here, the Written Notice is for “Failure to follow supervisor’s instructions.” That statement, alone, would be woefully inadequate in putting the employee on notice. The Written Notice, however, goes on to detail references to attached counseling memos, meeting minutes, and email correspondence. None of these attached documents specify a breach of the agency’s chain of command.

The Written Notice alleged Grievant continued making lengthy phone calls to the agency’s State office. The counseling memos attached to the Written Notice concerned conduct involving excessive phone calls to the agency’s State office (and an admonition to use email instead); insufficient skills on determining client eligibility; and inappropriate printing of client checks. Also attached to the Written Notice were copies of the minutes of a team meeting and a copy of an email exchange between the Grievant and the agency’s State office. No evidence was presented to show that the Grievant continued with any prohibited phone calls to the agency’s State office. Rather, the gravamen of the agency’s intended discipline turned out to be the Grievant’s failure to follow the proper chain of command. The agency’s witnesses asserted the Grievant had been instructed on her conduct and to cease seeking advice at higher levels without involving her supervisor. Hence, the description in the Written Notice of the Grievant’s failure to follow supervisor’s instructions is not sufficient to support discipline for breach of chain of command.

If the standard set forth in *O’Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. The agency’s Written Notice is at least confusing and omits any articulation of the breach in “chain of command.” Based on the Written Notice and the evidence presented of the Grievant failing to honor the “chain of command,” I find that the Written Notice did not sufficiently detail the nature of the offense, and the agency, necessarily, did not present evidence to show the Grievant failed to follow supervisor’s instructions. Accordingly, the Agency’s contention that Grievant failed to comply with her supervisor’s instruction fails.

It is possible for the agency to add other offenses to a Written Notice so long as there is sufficient notice to the Grievant. The agency apparently wished to proceed on an offense of breaching the chain of command, or amplifying the failure to follow supervisor’s instruction to include the specific charge on the chain of command issue. The agency considers the chain of command charge as an included element of the failure to follow supervisor’s instructions. However, the specific facts alleged on the face of the

Written Notice do not sufficiently raise the chain of command issue. Additional charges outside the Written Notice cannot be considered as a valid reason for the discipline levied. While it is not unheard of to add additional offenses after the initial Written Notice, this too creates confusion and issues of notice. This Hearing Officer would recommend when additional charges are brought, an Amended Written Notice should be issued to the Grievant. The agency complains of the Grievant's inadequate communication skills, but the Written Notice itself is not a clear, adequate communication of the conduct being disciplined.

In making this finding, I recognize that the Grievant's supervisor, in the agency's first resolution step response, mentioned the issue of the Grievant's breach of the chain of command by sending the offending email to the agency's State office. However, that issue was not raised as an amendment to the Written Notice. Nor was it raised sufficiently as to cure the lack of specific notice in the Written Notice when the Written Notice itself was clearly directed to other conduct previously counseled.

Based on the aforementioned, the Hearing Officer finds that the agency inadequately informed Grievant of the allegation that she disregarded the chain of command and undermined her supervisor's authority by questioning the agency's State office. Because the initial issue is resolved in the claimant's favor, we do not reach the other issues.

### DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

### 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. 14<sup>th</sup> Street, 12<sup>th</sup> 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 Street, Suite 400, Richmond, VA 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 the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

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Cecil H. Creasey, Jr.  
Hearing Officer