

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 05/24/07; Decision Issued: 06/04/07; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No. 8592; Outcome: Agency upheld in full.

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 8592

Hearing Officer Appointment: April 30, 2007

Hearing Date: May 24, 2007

Decision Issued: June 4, 2007

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group I Written Notice issued on January 17, 2007 by Management of the Department of Juvenile Justice (the “Department” or “Agency”), as described in the Grievance Form A dated February 15, 2007. The hearing officer was appointed on April 30, 2007. The hearing officer scheduled a pre-hearing telephone conference call at 3:00 p.m. on May 2, 2007. The Grievant, the Agency’s advocate and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed that she is challenging the issuance of the Group I Written Notice for the reasons provided in her Grievance Form A and is seeking the relief requested in her Grievance Form A, including having the written notice permanently rescinded from her manual personnel file and automated personnel record in PMIS (the Personal Management Information System), as clarified to the hearing officer by the Grievant during the pre-hearing conference call.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

The agency was represented by the Chief of Security at one of the Department’s local juvenile correctional facilities. The grievant was represented by her advocate. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on May 3, 2007, which is incorporated herein by this reference.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency’s binder and Grievant Exhibits 1 through 20.<sup>1</sup>

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<sup>1</sup> 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, if any.

At the request of the Agency, the hearing officer issued several orders for witnesses. No issues concerning non-attendance remained by the conclusion of the hearing.

### APPEARANCES

Representative for Agency  
Three Additional Witnesses for Agency  
Grievant  
One Agency Witness called by Grievant

### FINDINGS OF FACT

1. The grievant is an Administrative & Office Specialist III (HR Assistant) employed by the agency at its central office.
2. The grievant was so employed on November 22, 2006.
3. On November 22, 2006, the agency's Human Resources Director (the "Director") gave the grievant an employee's leave folder and instructed the grievant to double-check or review the leave eligibility date which had been calculated by the Director (the "Task"). The Task should have taken approximately 10 minutes to complete.
4. It is unusual for the Director to assign work directly to the grievant and normally he would assign routine, non-priority work to the grievant's supervisor.
5. On November 27, 2006, the Director, the grievant's supervisor and the agency's employee relations manager met with the grievant to discuss specifically, the grievant's failure to key leave instructions as instructed by the Director; generally, occurrences where the grievant failed to follow the Director's instructions; and to make clear the Director's expectations concerning the grievant's performance.
6. Following this meeting, the Director sent the grievant a counseling memorandum dated November 29, 2006. AE.
7. The Memorandum counseled the grievant, amongst other things, as follows:

**I understand that you have a demanding workload, as we all do. However, this is not an acceptable explanation for your failure to perform the work that I had assigned to you or at a minimum to follow up with me promptly on these issues.**

**During this meeting we also discussed the expectation of providing timely and accurate guidance, information, and assistance to customers in a prompt, courteous, and professional manner. . .**

**Please be aware that I expect you to follow all instructions or tasks given to you by me or other supervisors in the future, and to make completion of these requests a priority. If you have questions, concerns or conflicts regarding these assignments, you should raise these issues promptly. These are not unusual demands; they are the same expectations that I have for the entire HR team, myself included. You should know that any further conduct of this nature may result in disciplinary action under the Standards of Conduct.**

**If you want to discuss this further, please let me know.**

8. Upon receiving a complaint concerning the subject leave file from a field office, the Director discovered on December 21, 2006 that the leave file was still in the grievant's inbox and that the grievant had failed to check the dates as directed.
9. When the Director questioned the grievant about the file, the grievant responded that she had forgotten to check the dates and really could not remember what she was supposed to do with the file.
10. The grievant never followed up with the Director to inform him that she could not complete the Task in a timely manner.
11. At first, the Director was inclined to issue a Group II Written Notice for failure to follow a supervisor's instructions but after discussing mitigating factors, including the grievant's workload and the holiday context, with the grievant, the grievant's supervisor and the Employee Relations Manager, the Director ultimately decided that a Group I Written Notice for inadequate or unsatisfactory work performance was appropriate.
12. The grievant currently has an active Group II Written Notice for an unrelated disciplinary infraction at a different state agency, but also for failure to follow a different supervisor's work instructions, perform assigned work, or otherwise comply with established written policy.
13. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
14. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

15. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses 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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses include inadequate or unsatisfactory work performance.

Pursuant to Standards of Conduct Policy No. 1.60, the grievant's infraction can clearly constitute a Group I offense.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline 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 (4<sup>th</sup> 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 Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The grievant's argument that the Director failed to state a deadline when he assigned the Task to the grievant might have gained some traction in different circumstances but is negated under the facts and circumstances of this proceeding, especially by the counseling meeting on November 27, 2006 and counseling memorandum dated November 29, 2006. 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 as a Group II Written Notice was certainly within the realm of possibility. The grievant's apparent refusal to recognize and accept the seriousness of her violations of Agency policy and procedures preclude a lesser sanction. The hearing officer agrees.

#### DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the Group I Written Notice 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. 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, 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:

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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).