

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 09/24/07;
Decision Issued: 09/26/07; Agency: NVCC; AHO: Frank G. Aschmann; Case No.
8653; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 8653

Hearing Date: September 24, 2007
Decision Issued: September 26, 2007

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Agency Presenter
Agency Representative
Three Agency Witnesses

ISSUE

Did the Grievant perform his job duties unsatisfactorily on February 22, 2007 and February 23, 2007 such as to warrant the issuance of a Group I Written Notice as disciplinary action by the Agency?

FINDINGS OF FACT

The Grievant is employed by the Agency as a Trades Technician IV. Grievant is a utilities master mechanic whose duties include maintenance of Agency facilities during an evening shift, 2pm to 10:30pm. Grievant's expertise includes electrical systems. Grievant also provides instructions to cleaning crews, which come in at night, about specific clean up jobs which are needed.

On February 22, 2007, after the end of the Grievant's shift, he was still at the Agency facility waiting for the night cleaning crew to arrive and give them instructions. The cleaning crew arrived and were given their instructions. Grievant then proceeded to the parking garage to get his vehicle and leave to go home. As the Grievant prepared to take the elevator to the fourth floor of the garage the electrical power to the facility went out. The Grievant checked the facility to discover the power outage was not a local problem and originated with Dominion Virginia Power. Grievant then returned to the garage, walked up to the fourth floor, drove his vehicle close to the facility's police office and parked it.

The Grievant entered the facility's police office where there was an officer on duty using the telephone. The facility police have a list of personnel that they are to contact in emergency situations. This list includes the supervisor of the Grievant's department. The police officer made no call to the Grievant's supervisor because of the arrival of the Grievant on the scene.

After the police officer finished his call, the Grievant asked if Dominion Virginia Power had been contacted. The police officer indicated Dominion Virginia Power had been contacted and told him it was dispatching repair crews and would notify the police officer when power was restored.

The Grievant and police officer left the facility's police office. The police officer went to check the ITT room where there is equipment sensitive to power loss which could be damaged. The Grievant went to check on the cleaning crews to make sure they were not stuck in an elevator and to the electrical room. The police officer and the Grievant paths crossed outside the mechanical room at which time the Grievant asked the police officer if he had heard anything more from Dominion Virginia Power. The police officer had no new information. The Grievant wanted to go home. The Grievant was concerned about his home and family as there were high winds that night. Grievant expressed his desire to the police officer. The police officer requested the Grievant accompany him through the facility and show him what areas were effected and what he needed to know.

The Grievant went with the police officer to the electrical room and gave the police officer an overview of the facility and procedure for restoring the power to the facility. The electrical room contains a modern circuit breaker system with no exposed circuits. In a locker in the facility is a safety suit for electrical workers.

The Grievant and the police officer went to the Grievant's vehicle and the police officer let the Grievant out of the facility. Upon reflection, the Grievant was concerned that the police officer might try to restore the power to the facility and called the police officer from his cell phone on the way home. The Grievant told the police officer to call him if there was any issue with restoring the power and to notify the Grievant's supervisor that it was alright to call the Grievant back to the facility to restore the power if Dominion Virginia Power got the repair done in the next few hours.

The Grievant's supervisor reported to work at 6:30 am on February 23, 2007 and was notified of the power outage at that time by the police officer. The supervisor then restored power to the facility.

The supervisor conducted an investigation of the matter. The supervisor issued the Grievant a Group I Written Notice for unsatisfactory performance on the basis that the Grievant had not contacted the supervisor and placed another employee in danger. The Group I Written Notice is the subject of this hearing.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that

the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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. The Agency has a sheet of Written Notice Offense Codes. The Grievant has been cited with violating code 11, unsatisfactory performance, which conforms to the Department of Human Resource Management Policies And Procedures Manual, Standards of Conduct, policy 1.60, section V (B) d.

The Agency argues the Grievant's performance was unsatisfactory for two reasons, first, failing to contact his supervisor and notify him of the power outage; second, placing the police officer in danger by showing him the electrical equipment, reviewing the power restoring procedure and leaving with the possibility that the police officer would try to restore the power.

The Agency concedes that there is no written policy which directs the Grievant to contact his supervisor in a case of a power outage. The Grievant's supervisor, however, contends that at some point since assuming the supervisory position in July 2006 he directed the Grievant to contact him in emergency situations. The Agency also presented evidence that in prior performance appraisals there had been criticism of the Grievant's communication skills. It is clear in the facts that the Grievant did not contact his supervisor and advise him of the power outage.

The Grievant counters that the established policy is that the police are to contact the Grievant's supervisor and other personnel as evidenced by the contact list which the police maintain. Grievant contends that this policy was established to centralize communication through the police department, avoid random calling and cease complaints from personnel who did not want to be contacted.

The Grievant's supervisor's testimony in regard to establishing a policy that it was the Grievant's responsibility to contact him is vague at best. He could not specify any particular meeting or time when this directive was given. He could not specify exactly what was said and described the event as, "I'm sure we discussed communication".

The Grievant's position is supported by the testimony of the police officer who acknowledges the police have a contact list and he is suppose to make these contacts. The Grievant was not even required to be on site at the time, his shift having ended, adding to the inference that the police officer should be contacting the supervisor.

The apparent break down in the system occurred when the police officer made contact with the Grievant on site and then saw no need to attempt contact with the supervisor on the list. This points to a defect in the system as the police officer knew the Grievant had left the facility and still did not make contact with the supervisor or confirm that the Grievant had done so. The police officer assumed it was the Grievant's job to call the supervisor and the Grievant assumed the police officer had contacted the supervisor.

The Agency must bare the responsibility of poorly articulated unwritten policies and procedures. It is improper for the Agency to hold employees to standards which have not been clearly articulated, established and acknowledged. The Agency has failed to demonstrate that

there was a policy which required the Grievant to contact his supervisor when the power outage occurred on February 22, 2007 and February 23, 2007. The Grievant staying after hours and the end of his shift to try and assist did not create an additional responsibility for him to contact the supervisor. The police officer was responsible for making the contact in an after hours emergency situation. While the police officer may have felt no need to contact the supervisor while the Grievant was on site, he was acutely aware the Grievant had left the site leaving no personnel from that department on site and should have contacted the supervisor at that time. The clear purpose of the contact list is to have the police notify supervisors when there is no one on duty so the supervisor can act accordingly. The police officer had no authority to transfer his duty to the Grievant or assume it had been performed by the Grievant. The Grievant had completed his shift and had no responsibility to perform the supervisor's duty or the police officer's duty.

Thus it is improper to find the Grievant performed his duty unsatisfactorily when it was not a duty he was obligated to perform in the first place. Therefore, it is hereby held the Grievant did not perform his duties unsatisfactorily when he did not contact his supervisor during a power outage on February 22, 2007 and February 23, 2007.

In the second allegation of inadequate performance it is easy to view the situation with hindsight and say the Grievant should not have shown the police officer the electrical room and the restart procedures, as it is a place the police officer had no business being. However, at the time, the police officer was the responsible authority in the facility and directed the Grievant to provide him with information. It is substantial that the Grievant did not direct or request the police officer take on any responsibilities in regard to restoring power should the opportunity arise. It is clear from the testimony of both the police officer and the Grievant that the police officer initiated the tour of the electric room and actively sought information about it.

The Agency's own witness, an electrical expert, revealed there was no actual danger to the police officer even if he had tried to restore power. The electrical room has very modern equipment with no exposed circuits. There would have been no risk of electrocution by the police officer unless he actually tried to dismantle the equipment.

The Agency has pointed to OSHA regulations about wearing safety gear, however, these regulations are not particularly applicable to the situation. As was testified to by the Agency's witness, the safety suits are not used simply to flip a circuit breaker switch. Thus there is considerable question as to whether the police officer would have been in any danger even if he had tried to restore the power.

Under the facts as the situation occurred the police officer never did try to restore the power and thus was never in any danger. Further, the Grievant can not be said to have placed the police officer in danger when it was the police officer who interjected himself into the situation.

Thus, it is found that the Grievant did not place another employee in danger. Therefore, it is held that the Grievant did not perform his duties unsatisfactorily by placing another employee in danger.

DECISION

The Agency has failed to meet its burden of proof to demonstrate the Grievant performed his job duties unsatisfactorily. It is hereby ordered that the Agency remove the Group I Written Notice from the Grievant's file.

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. 14th Street, 12th Floor, Richmond, VA 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 contrary 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.

Frank G. Aschmann
Hearing Officer