

Issues: Group II Written Notice with suspension and transfer (failure to follow policy);
Hearing Date: 10/09/07; Decision Issued: 10/10/07; Agency: VDOT; AHO: Frank
G. Aschmann, Esq.; Case No. 8707; Outcome: No Relief, Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 8707

Hearing Date: October 9, 2007
Decision Issued: October 10, 2007

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Grievant Representative
Two Grievant Witnesses
Agency Presenter
Agency Representative
Three Agency Witnesses

ISSUE

Did the Grievant violate Agency policy such as to warrant the disciplinary action issued by the Agency?

FINDINGS OF FACT

The Grievant has been employed by the Agency as a Senior Equipment Repair Technician for approximately seventeen years. Grievant's job duties include maintenance and cleaning of Agency equipment. Grievant was granted authority to purchase supplies necessary to perform his job duties and used a state issued American Express card to do so. The Grievant became a "one man shop" when his supervisor retired. Grievant reluctantly took on additional office work duties at that time. Grievant continued to use the vendors that were in use. Company S was one of the vendors.

Company S has been targeting government procurement agents for sales of its products. Gifts were offered to the agents in exchange for the purchase of products at highly inflated prices. The sales practices of Company S was brought to the attention of Virginia government officials by Maryland state officials who had discovered these sales practices going on in that jurisdiction.

The Agency and the Virginia State Police conducted investigations of Company S transactions in the Agency. The investigations revealed that employees of the Agency had received gifts from Company S corresponding to purchases from the company. The Grievant

was one of the employees identified as having made purchases from Company S and received gifts. The Agency's documentation shows the Grievant made purchases with a total cost of \$17,575.24 from Company S between 1999 and 2003. The documentation shows Company S sent corresponding gifts for purchases totaling \$1407.49

The Grievant was interviewed as part of the investigation regarding his purchases from Company S and admitted receiving some Walmart gift cards from Company S. The Grievant denied receiving many of the gifts which correspond to his purchases from Company S. Company S's products were delivered to several locations and Grievant's business mail is handled by others in the Agency before he receives it.

The Agency issued disciplinary action to the Grievant for accepting gifts from Company Ss. The Grievant was issued a Group II Written Notice, suspended for ten days, directed to take an Adult Education class and transferred to a new work location. This disciplinary action 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 uses these policies for its Standards of Conduct.

The Standards of Conduct list as a Group II violation an employee's failure to follow established written policy. Group II violations provide for issuance of a Written Notice and up to ten days of suspension without pay.

The Agency has established a Procurement Manual which applies to all employees who make purchases on behalf of the Agency. Section 3.9 of the manual references the Code of Virginia and prohibits receiving gifts of more than nominal value.

The Agency has adopted Standards of Conduct from the Commonwealth of Virginia, Department of General Services, Division of General Services in regard to Agency purchases. Section 3.22 references the Code of Virginia and prohibits receiving gifts of more than nominal value. Section 3.22 states the rule of nominal value is that if the value can be questioned as nominal or not then it must be perceived as greater than nominal value. The Agency entered testimony that in its investigation of Company S gifts over \$50 were considered as more than nominal value.

The Code of Virginia §2.2-3103 prohibits the acceptance of any gift which may influence a state employee in the performance of his duties. Code of Virginia §2.2-4371 prohibits any state employee from accepting any gift of more than nominal value. Code of Virginia §2.2-4372 prohibits “kickbacks,” not allowing any state employee to receive anything of value for placing purchase contracts with a vendor to the exclusion of free competition.

The evidence of the Agency shows that the Grievant received gifts from Company S. Multiple sales orders and catch reports link the purchases of supplies from Company S to the Agency by the Grievant. Gifts are noted on the sales orders and catch reports and sent to the attention of the Grievant. The Grievant admits in the Agency investigation of this matter and at the Due Process Hearing that he received Walmart gift cards. There is no way to be certain exactly how many gifts the Grievant received from Company S and it is possible that many gifts intended for him ended up in the hands of others. However, the Grievant’s own admissions show that he received gifts with monetary value which he could use to make purchases of his choice.

These gift cards have more than nominal value. The Walmart gift cards ranged from \$10 to \$60 in value, with a mode value of \$30. The combination of even a few of these gift cards is easily viewed as creating the perception of being more than nominal value which violates Agency policy as defined in Section 3.22 in the Standards of Conduct, Section 3.9 in the Procurement Manual and the Code of Virginia §2.2-4371. The Grievant argued that he did not know he had done anything wrong. If the Grievant had accepted only a coffee mug or cap this would be a different matter but accepting gifts that had cash value creates a totally different perception. The Grievant’s actions violated state laws of which he should have been aware.

While it is not clear whether the gifts influenced the Grievant in his duties such as to violate Code of Virginia §2.2-3103 and §2.2-4372 there is ample evidence to find a violation of the Agency policy in regard to receiving gifts. Therefore, it is hereby held that the Grievant violated an established written policy of the Agency.

The Agency’s policy is one which directs compliance with the law of the Commonwealth and thus is a significant policy. Violation of such a significant policy warrants disciplinary action. The Agency considered the Grievant’s many years of service and his honesty during the investigation when issuing its disciplinary action. The serious nature of the policy violation

justifies the disciplinary action of the Agency.

DECISION

The disciplinary action of the Agency is affirmed.

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