

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 10/22/07;
Decision Issued: 10/30/07; Agency: GMU; AHO: Jane E. Schroeder, Esq.; Case
No. 8709; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of Case Number 8709

Hearing Date: October 22, 2007
Decision Issued: October 30, 2007

PROCEDURAL ISSUES

One telephonic pre-hearing conference was held on October 1, 2007. At the beginning the hearing on October 22, 2007, a Confidentiality Stipulation and Protective Order offered without objection and endorsed by both parties was entered. The Hearing Office overruled the Agency's Objections to the Statement of Co-Worker "C". The Hearing Officer granted the Agency's request (without objection) for attendance at the hearing by the Agency's Director of Human Resources.

Note: As directed by the Rules for Conducting Grievance Hearings, the Agency provided a tape recorder and tapes. In this case, the recorder was a large free-standing machine that was unfamiliar to the hearing officer. As a result, the hearing officer had to frequently get assistance from a technician on site. Unfortunately, the resulting tapes are incomplete. Side B of Tape two did not record. For the unrecorded sections of the hearing, the hearing officer relied on her notes and memory from the hearing in preparing this decision.

EXHIBITS

The following Exhibits were accepted into evidence:

Agency # 1.	Grievant #8	November 1, 2005 memo from Assistant Chief to Grievant
Agency # 2.	Grievant #11	November 1, 2005 memo from Assistant Chief to Co-Worker B
Agency # 3.		April 12, 2007 memo from Captain to Grievant
Agency #4.	Grievant #10	April 16, 2007 memo from Assistant Chief to Grievant
Agency #5	Grievant #9	May 4, 2007 Written Notice of Group II Offense to Grievant
Agency #6		Undated written statement of Co-Worker B
Agency #9	Grievant #12	April 17, 2007 memo from Assistant Chief to Co-Worker B
Agency #10	Grievant #13	July 24, 2007 memo from Assistant Chief to Co-Worker B
Agency #11	Grievant #17	October 12, 2007 memo from Assistant Chief to Co-Worker B
	Grievant #1	Employee Grievance Procedure Form B
	Grievant #2	Employee Grievance Procedure Form A
	Grievant #3	June 21, 2007 letter from Grievant's counsel to Chief
	Grievant #4	July 17, 2007 Second Step Response by Chief
	Grievant #5	April 11, 2007 e-mail from Grievant to Captain
	Grievant #6	July 18, 2007 Reply to Second Step Response
	Grievant #7	July 27, 2007 Reply to Third Step Response
	Grievant # 14	Grievance Procedure Manual

Grievant #15 Rules for Conducting Grievance Hearings
Grievant #16 Standards of Conduct
Grievant #18 Declaration
Grievant #19 Two emails from Co-Worker B to Grievant on 11, 2007

APPEARANCES

Grievant
Counsel for Grievant
Two Agency Representatives
Counsel for Agency
Witnesses for Agency:
 Captain (Grievant's Supervisor)
 Grievant's Co-Worker "B"
 Agency's Assistance Chief (Grievant's Supervisor's Supervisor)
Witnesses for Grievant:
 Grievant

ISSUE

Grievant was issued a Group II Written Notice for a violation of State Personnel Policy 1.60V.B.2.a, for failure to follow a supervisor's instructions due to her undesired nonofficial contact with Co-Worker B in violation of an order issued November 1, 2005.¹ The Agency alleges that on April 11, 2007, the Grievant made several telephone calls to Co-Worker B. The Grievant filed a timely grievance from the Group II Written Notice. Following failure of the parties to resolve the grievance at the third step resolution step, the agency head qualified the grievance for a hearing.²

Issue: Whether the Group II Written Notice to the Grievant on May 24, 2007, should be maintained or rescinded.

FINDINGS OF FACT

The Grievant and Co-Worker B work in the same department for the agency in similar positions. They maintained a romantic relationship outside of the workplace for several years. In the fall of 2005, the relationship soured and problems arose at work when contact between the two was disruptive to the department where they worked. On October 31, 2005, a meeting at the agency was held. The Assistant Chief testified that the reason for the meeting was that Co-Worker B had complained to the Captain about unwanted non-official contact from the Grievant. Attending the meeting were the Assistant Chief of the department, two Captains (Supervisors), the Grievant and Co-Worker B. The Grievant and Co-Worker B agreed that the relationship was over. Each agreed to terminate undesired non-official contact. On November 1, 2005, memos to both workers from the

¹Agency Exhibit #5.

² Grievant Exhibits 1,2.

Assistant Chief, and signed by the two co-workers, directed them to terminate all further undesired non-official contact and to report any such contact initiated by the other party to the Assistant Chief.³

For the three months following these memos, there was no non-official contact between the Grievant and Co-Worker B. After the three months, the Grievant and Co-Worker B resumed their romantic relationship which continued until April 11, 2007 on an on-again-off-again basis. The captain testified that the supervisors were aware that the the relationship had resumed, but there were no complaints by either side of any *undesired* non-official contact until April 11, 2007.

According to the testimony of the Grievant, on April 11, 2007, the Grievant, who was not working that morning, called Co-Worker B at work around eight a.m. to confirm lunch plans made the day before. Co-Worker B asked her to call back around ten a.m. to set the time. Grievant and Co-Worker B sent two e-mails each, first regarding where to eat, and finally an e-mail from Co-Worker B to Grievant saying he was busy and wanted to reschedule for tomorrow.⁴ Grievant called Co-Worker B and was angry that he canceled the lunch. He told her to take her service weapon and kill herself and hung up on her. She called back several times. He told the Captain that the Grievant kept calling him and that he needed to leave to go to a training. The Captain asked Co-Worker B to have the calls transferred to the Captain's phone. The next two times the Grievant called, she heard the Captain's voice and she hung up.

According to the testimony of Co-Worker B, the Grievant called him two or three times in a row on April 11, 2007. He told her he could not talk right then. When asked if these calls were disruptive, he answered that the calls could be construed as disruptive. He testified that the Captain happened to be passing his office, and Co-Worker B told him about the calls. Co-Worker B testified that he did not remember discussing lunch plans with the Grievant, that he did not remember any phone calls earlier in the day from her, and he did not communicate with her that day by e-mail. He did not remember if he was seeing the Grievant socially at the time. He did recall that he had been to her home several times in 2007.

The testimony of Co-Worker B was not credible, and must be almost entirely discounted by this Hearing Officer. While Co-Worker B was quick to point out that his phone records show that he did not *initiate* any phone call to the Grievant on that day, he had a memory loss as to any call he had from her. He denied any e-mail communication. When shown copies of the e-mails he wrote to the Grievant that morning, he replied that he may have sent them, but that it was a long time ago, and he didn't recall. A statement regarding the events of that morning that he purports to have made shortly after the incident has been lost. He wrote an undated statement during the last month before hearing.⁵ This statement is of little probative value, as it was written at a time that Co-Worker B claims little memory of April 11 of this year.

Therefore, this Hearing Officer finds that the facts about the events of the morning of April 11, 2007 in this case are as testified to by the Grievant and the Captain.

³Agency Exhibits 1 and 2.

⁴Grievant Exhibit 19.

⁵Agency Exhibit 6.

Both the Grievant and Co-Worker B testified that, since they had resumed their romantic relationship and so much time had passed since the order of November, 2005, they did not believe that order was still in effect on April 11, 2007. On October 12, 2007, Co-Worker B was sent a memo by the Assistance Chief counseling him that the order of November 1, 2005 was still in effect.⁶ The Assistant Chief testified that it was his understanding that the order remained in effect through the April 11th incident, is in effect presently, and will be in effect until one of the co-workers leave the department.

The Assistant Chief knew that the coworkers had renewed their romantic relationship after the order of November 12, 2005. Nothing in the order forbids *wanted* contact. The Assistant chief had not discussed the order with either co-worker after it was signed until after April 11, 2007. Neither co-worker reported any unwanted non-official contact to him, as specified in the order.

The Assistant Chief is the one who gave the Grievant the Group II Written Notice. He testified that when writing the Group II Written Notice, he took into consideration the prior disciplinary history of the Grievant. The Second Step Response by the Chief clearly states that the Group II Written Notice was “appropriate to (in the context of progressive discipline) issue a Group II Written Notice at this time.” The Chief refers to Group I notices on 8/01/02, 5/7/03 and 6/30/05 “To clarify (and to justify this Group II Notice).”⁷

One other facet of this case is the discipline of the Grievant with a Group II Written Notice and the decision by the Assistant Chief not to discipline Co-Worker B. In April, 2007 both co-workers were given notice of the Assistant Chief’s intention to issue a Group II Written Notice.⁸ In July, the Assistant Chief informed Co-Worker B that the Assistant Chief had withdrawn his intent to take disciplinary action against the Co-Worker B. The Assistant Chief testified that he had withdrawn the action against Co-Worker B since Co-Worker B had not initiated any calls that day to the Grievant. When asked about the e-mail the Grievant had sent to the Captain that day complaining about the Co-Worker telling her to shoot herself, the Assistant Chief testified that he had been shown the e-mail by the Captain, and that he should have done an investigation follow-up on that contact. The Assistant Chief also testified that he was unaware of the e-mails that Co-Worker B had sent to the Grievant on April 11, 2007, but considered those e-mails to be *wanted* contact. This hearing officer found that the Assistant Chief was an honest and credible witness.

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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

⁶Agency Exhibit 11.

⁷Grievant Exhibit 4.

⁸Agency Exhibits 4 and 9.

grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60: Standards of Conduct provides a set of rules governing the professional 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.2.a. provides that Group II offenses include “failure to follow a supervisor’s instructions, perform assigned, or otherwise comply with established written policy.”⁹

The Assistant Chief issued a Group II Written Notice to the Grievant based the numerous phone calls by the Grievant to Co-Worker B on April 11, 2007.

The issue in this case revolves around the contact between the Grievant and Co-Worker B on April 11, 2005, and whether that contact was contrary to the written order of 2005.

In this case, the Grievant made several phone calls to Co Worker B on April 11, 2007. There were several *wanted* phone calls and emails between the coworkers on that morning. When CoWorker B then cancelled the lunch date, the Grievant continued to call him at work. The next two to three phone calls initiated by the Grievant are the ones that were *unwanted*.

Section VII.B.2. states “The active life of a Written Notice The severity of a Written Notice depends upon the type of offense for which it is issued, and is measured by the period for which it is “active”, as set forth below.

a. A Written Notice for a Group I offense is active for two years from its date of

⁹Grievant Exhibit 16, p.6.

- issuance to the employee. . . .
- e. Written Notices that are no longer active shall not be considered in an employee's accumulation of Written Notices, or in determining the appropriate disciplinary action for a new offense."¹⁰

In this case, the Agency has violated the Standards of Conduct by using previous Group I offenses no longer active in determining the appropriate disciplinary action for a new offense. The Assistant Chief testified that he took the previous disciplinary actions into consideration. The Chief, in his The Second Step Response clearly states that the Group II Written Notice was "appropriate to (in the context of progressive discipline) issue a Group II Written Notice at this time." The Chief refers to Group I Notices on 8/01/02, 5/7/03 and 6/30/05 "To clarify (and to justify this Group II Notice)." Two of those Group I Notices were no longer active and should not been taken into consideration under the Standards of Conduct.

This Hearing Officer finds that the Grievant did make phone calls that were undesired non-official calls and that this was a violation of the order given by supervision. Therefore the Agency had demonstrated by a preponderance of evidence, that the Grievant did violate an order of supervision a Group II offense.

This Hearing officer further finds mitigating circumstances in this case. The agency's discipline is inconsistent with law and policy, in that the Agency clearly violated the Standards of Conduct by considering previous inactive Group I Notices when determining the appropriate discipline in this case.

DECISION

The Group II Written Notice issued on May 24, 2007 is hereby RESCINDED.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject 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

¹⁰Grievant Exhibit 16, p. 11.

authority is limited to ordering the hearing office to revise the decision to conform it to written policy. Requests should be made to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th 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, 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.

Jane E. Schroeder, Esq.
Hearing Officer