

Issues: Group II Written Notice (failure to follow policy); Hearing Date: 01/14/08;
Decision Issued: 02/14/08; Agency: DCE; AHO: Thomas J. McCarthy, Jr.,
Esq; Case No. 8729; Outcome: Full Relief.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8729

Hearing Date: January 14, 2008
Decision Issued: February 14, 2008

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative and Counsel
3 Witnesses for Agency
3 Witnesses for Grievant

ISSUES

The parties, by counsel agreed in the pre-hearing conference on November 29, 2007, that the issue for this hearing is: "Did Grievant violate Commonwealth Conflict of Interest policies between December, 2006 and January, 2007?" and "If so, was a Group II Written Notice with mitigation of penalty dated May 24, 2007 proper?"

FINDINGS OF FACTS

Grievant is, and at all times material to this matter, was a regional principal with the Department of Correctional Education. He supervises correctional education programs in three Department of Corrections institutions.

One of Grievant's secretaries owned stock in a company that became a SWaM (small, women-oriented and minority owned) certified vendor.

Governor Kaine issued Executive Order 33 (2006) on August 10, 2006, setting "... the goal of the Commonwealth that 40% of its purchases be made from small businesses." DCE's director issued a memo that 100% of DCE purchases be from small business vendors and that supervisory personnel would be evaluated on the attainment of this goal.

Grievant attended a training session entitled "Unraveling the Mysteries of Purchasing" in which Grievant was taught that SWaM procurement was emphasized as the state and agency way to purchase supplies. Attendees were told that state employees would be penalized on evaluations if they did otherwise.

Grievant's secretary attempted to resign because of her stock ownership in a SWaM company from which supplies were being bought.

Grievant discouraged her resignation suggesting further research into "conflicts of interest", stating that other DCE personnel had interests in SWaM vendors from which purchases were made. These were treated as innocent mistakes.

Grievant did not understand that the secretary's ownership and actions were a conflict of interest.

Purchasing supplies was difficult because of the scarcity of SWaM qualified vendors in Southwest Virginia. In January, 2007, over \$14,000 in supplies were purchased from the company in which Grievant's secretary had an interest.

Grievant's secretary resigned. She was not disciplined for purchases from the SWaM company in which she had an interest.

Grievant received no monetary or in-kind benefits from the purchases in question.

Grievant was issued a Group II written notice for allowing his support staff to purchase goods from a business in which a DCE employee had an interest. There was no disciplinary action beyond the issuance of the Group II written notice.

Grievant had 17+ years of satisfactory service without disciplinary actions with DCE and 30+ years of service in education matters in West Virginia.

The Director of the DCE's Office of Legal and Internal Affairs, investigated the allegations against Grievant, authored the Report of Investigation, recommended the sanction, and represented the DCE at the grievance hearing.

The testimony was uncontroverted that the said Director was much feared throughout the Department.

The Director of Legal and Internal Affairs had investigated a previous allegation against Grievant and represented DCE at a previous grievance hearing on that matter which the Circuit Court of Buchanan County, Virginia, dismissed.

Retaliation was not an issue mentioned in the pre-hearing conference. The allegation was raised during the hearing and was not rebutted.

APPLICABLE LAW, POLICY AND PROCEDURES

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the polices and procedures promulgated by DHRM. [DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93)]. Section VI of DHRM Policy No. 1.60 deals with corrective action.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The following policy was admitted and considered as an exhibit:

- DHRM Policy No. 1.68, Standards of Conduct, effective 9/16/93.

CONCLUSIONS OF LAW

After hearing the evidence from both sides, I have seen a Grievant caught between Executive Order 33 (2006) in which Governor Kaine mandates a "...goal of the Commonwealth that 40% of its purchases be made from small businesses." A directive from his Department Head that 100% of the department's purchase be made from SWaM qualified entities. A scarcity of SWaM certified Southwest Virginia vendors from which to buy. A good employee he did not want to lose for the good of the department. Unclear directions on how to comply with the Governor's and the department head's mandates. An investigative department representative with whom Grievant had had a previous issue resolved in Grievant's favor by a Circuit Court, and uncontroverted testimony alleging retaliation.

With the testimony that the investigator, who recommended the sanction and then presented the case being the subject of un rebutted testimony that he was widely feared throughout the department, had lost a previous grievance matter against the Grievant, and the evidence that Grievant's actions to retain a good secretary resulted in no benefit to him, but rather benefit to the Department, I conclude this matter could and should have been handled by Grievant's supervisors counseling him on conflict of interest to provide guidance beyond answering his questions in training sessions.

DECISION

The Group II even with no disciplinary action was not reasonable nor proper and is ordered rescinded. The matter should be resolved by counseling.

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, 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 faxes 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.

Thomas J. McCarthy, Jr.
Hearing Officer