

Issues: Group I Written Notice (unsatisfactory performance) and Assignment of Duties;  
Hearing Date: 12/07/07; Decision Issued: 12/15/07; Agency: Va. Community  
College System; AHO: Jane E. Schroeder, Esq.; Case No. 8753; Outcome: Partial  
Relief – Group I Written Notice rescinded, Assignment of Duties – No Relief.

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

In the matter of Case Number 8753

Hearing Date: December 7, 2007  
Decision Issued: December 15, 2007

PROCEDURAL ISSUES

One telephonic pre-hearing conference was held on November 29, 2007.

APPEARANCES

Grievant  
Counsel for Grievant  
Counsel for Agency  
Witnesses for Agency: Chief of Police for the Agency  
Witnesses for Grievant: none

ISSUE

- 1.a. Whether the drafting of a report on March 28, 2007 by the Grievant to the Police Chief that was so seriously misleading and inaccurate that it triggered a formal internal investigation, and reports to the State are sustainable as a Group I violation?
- 1.b. Also at issue is whether the Grievant was given a Written Notice for this Group I violation.
2. Whether the Grievant was removed from the positions he held for disciplinary reasons.

FINDINGS OF FACT

On March 28, 2007, a series of events took place that resulted in disciplinary action against the Grievant. The facts as to what actually happened on that date are not relevant to this decision, and testimony regarding these facts was not given.

On June 20, 2007, Grievant was issued a Group II Written Notice for violation of offense codes 56, 13, and 11, and was suspended for one day.<sup>1</sup> On July 18, 2007, the Grievant filed a grievance. In the First Resolution Step, no relief was granted.

On September 13, 2007, in the Second Resolution Step, the Second Step Respondent issued an order with 4 parts:

1. The Group II Written Notice for offense codes 56, 13, and 11 shall be rescinded.
2. A Group I Written Notice for offense code 11, Unsatisfactory Performance, shall take its place. This unsatisfactory performance is the drafting of a report to the Police Chief that was so seriously misleading and inaccurate that it triggered a

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<sup>1</sup>Written notice issued 6/20/07.

formal internal investigation, reports to the State Police, and the discipline that is the subject of this grievance.

3. The one-day suspension shall be rescinded, and the lost pay restored.

4. The responsibilities as TAC officer and as fire arms officer are at the discretion of Chief \_\_\_\_, who has the authority and responsibility to assign them to the person the Chief believes is the best qualified officer. I will not substitute my judgment for his in the assignment of work among available police personnel.<sup>2</sup>

On September 20, 2007, in the Third Resolution Step, the President of the Agency agreed with the judgment of the Second Step Respondent in the previous step.<sup>3</sup>

The parties agree that Order #1 and #3 in the Second Resolution Step above shall stand. At issue in this case at this time are Order #2 and #4.

As to #2, at issue is whether the actions of Grievant on March 28, 2007 are sustainable as a Group I violation. Also at issue is whether the actions of the Grievant described in #2 above are the same actions for which he was given a Written Notice. As to #2, the facts in the case are not in dispute. The opinion below is based on the law and the due process rights of the Grievant.

As to #4, at issue is whether the Grievant was removed from the position he held for disciplinary reasons. As to #4, one fact was in dispute. The Grievant alleged that he was removed from two positions for disciplinary reasons. The Chief of Police testified that the transfer of the Grievant from two of the positions he held in addition to his position as a supervisor was done because of problems the Grievant was having as a supervisor. The administrative transfer, not punitive transfer, was done to allow the grievant to be successful in his supervisory role. The Grievant was not properly producing a schedule and he was not approving leaves or reports in a timely manner. Based on the testimony of the Chief of Police, I find that the Grievant was removed from the positions he held for administrative reasons, and not for punitive reasons.

#### 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 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:

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<sup>2</sup>Hearing Officer Exhibit 15.1: Step Two Grievance Order

<sup>3</sup>Hearing Officer Exhibit 15.2: Step Three Grievance Finding

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.1.d. provides that Group I offenses include “inadequate or unsatisfactory work performance.”<sup>4</sup>

Section V.B.2 provides for offenses which include acts and behaviors that are more severe in nature than Group I offenses.

In this case, the Chief of Police issued a Group II Written Notice to the Grievant naming three Group II Offense Codes: 56, 13, 11.<sup>5</sup> Since the Group II Written Notice was rescinded by the Second Step Respondent, there is no issue before this hearing officer as to the Group II Written Notice.

The Second Step Respondent order that a Group I Written Notice should take the place of the Group II Written Notice. The Grievant argued that the Group I was a new offense. The Grievant must be given the due process right to react to this new charge through all steps of the grievance procedure. The agency argued that this new charge was a lesser included charge in the Group II offenses so the Grievant had notice of this charge when he was given the Written Notice. The description of the offenses was as follows:

Group II: Failure to comply with the lawful order from a superior officer. Lt. \_\_\_\_\_ advised you to immediately notify the Chief of Police of your intent to advise the State Police that you believed that a VCIN violation had taken place. In your zeal to advise the State Police of this alleged violation you provided the wrong name and date for the matter and failed establish any evidence that a violation actually

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<sup>4</sup>Standards of Conduct, p.6.

<sup>5</sup>Hearing Officer Exhibit 8: Written Notice Offense Codes. Code 56: Insubordination; 11: Unsatisfactory Performance; 13: Fail to follow instructions and/or policy

occurred. In addition you failed to comply with established written policy when you went outside your chain of command when reporting violations.<sup>6</sup>

The report discussed in the explanation is a report allegedly written by the Grievant to the State Police. The misinformation of wrong name and date alleged in this description is referring that report. In fact, according to the Second Step Respondent, no such report was written.<sup>7</sup>

The Group I offense ordered by the Second Step Respondent was as follows:

A Group I Written Notice for offense code 11, Unsatisfactory Performance, shall take its place. This unsatisfactory performance is the drafting of a report to the Police Chief that was so seriously misleading and inaccurate that it triggered a formal internal investigation, reports to the State Police, and the discipline that is the subject of this grievance.<sup>8</sup>

The agency was unable to identify any portion of the Group II Written Notice explanation that the report cited in the Group I Written Notice was unsatisfactory. The report cited by Second Step Respondent is the memo written by the Grievant to the Police Chief, an entirely different report. The agency referred to the Group I offense as a “new offense,” a “different offense,” and finally a “replacement offense.”<sup>9</sup> The new charge is not a lesser included offense from the Group II offenses. The Grievant did not have Written Notice that his report to the chief was unsatisfactory. Since it is a new offense, the Grievant must be given a new notice of this new offense. Since I find that the Grievant was not given Written Notice for this Group I violation, I will not decide if this violation is sustainable as a Group I violation.

As to the second issue, since the Grievant was removed from the positions he held for administrative reasons, and not for punitive reasons, he is not entitled to reinstatement to those posts.

#### DECISION

The Group II Written Notice issued on June 6, 2007 was **RESCINDED** by the Second Step Respondent.

The Group I Written Notice ordered by the Second Step Respondent is **DISMISSED**, due to the lack of Written Notice of this alleged violation.

The request by the grievant for reinstatement in his previous position is **DENIED**.

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<sup>6</sup>Hearing Officer Exhibit 7: Written Notice.

<sup>7</sup>Hearing Officer Exhibit 15.1: Step Two Grievance, page 4.

<sup>8</sup>Hearing Officer Exhibit 15.1: Step Two Grievance, page 5.

<sup>9</sup>Tape side one.

## 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 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. 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, 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.

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Jane E. Schroeder, Esq.  
Hearing Officer