

Issues: Group II Written Notice (failure to follow instructions/policy) and Retaliation;
Hearing Date: 01/22/08; Decision Issued: 02/04/08; Agency: Taxation; AHO:
John R. Hooe, III, Esq.; Case No. 8771; 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. 8771

Hearing Date: January 22, 2008
Decision Issued: February 4, 2008

PRELIMINARY MATTERS

During the telephone pre-hearing conference conducted on December 18, 2007, it was agreed by the parties that the hearing in this matter would be conducted on Tuesday, January 22, 2008 commencing at 1:00 p.m. at the offices of the Virginia Employment Commission, Conference Room. It was further agreed that a copy of all exhibits a party intends to introduce at the hearing would be provided to the Hearing Officer and to the other party no later than January 16, 2008 at 5:00 p.m.

The Grievant requested the Hearing Officer to order the Agency to produce certain salary records and other records related to the Grievant's co-workers. During a telephone conference call conducted on January 14, 2008, the Hearing Officer ruled that the documents requested are not relevant to the grievance and declined to order the Agency to produce the requested records.

APPEARANCES

Grievant
Representative for Agency
Agency Advocate
Two Witnesses for Agency

ISSUES

1. Did the Grievant violate the Virginia Department of Human Resource Management Policy No. 1.60 (13) failure to follow instructions and/or policy? If so, what was the appropriate level of disciplinary action?
2. Should mitigating factors result in less severe discipline?

EXHIBITS

The Agency Exhibits admitted into evidence were contained in a single notebook with the following contents:

- Tab 1 - Grievant's Form A with attachments
- Tab 2 - DHRM Policy No. 1.60 Standards of Conduct
- Tab 3 - Written Notice and Offense Codes
- Tab 4 - Emails
- Tab 5 - Organizational Chart
- Tab 6 - Grievant's employee work profile

The Grievant introduced one Exhibit, namely a copy of an achievement award for the month of December 2006.

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group II Written Notice issued on July 18, 2007 for violation of Policy 1.60 (13) Failure to Follow Instructions and/or Policy with offense dates of May 14, 2007, May 21, 2007, May 23, 2007 and June 21, 2007. No disciplinary action was taken in addition to issuing the written notice. The grievance, not having been resolved, was qualified for a hearing.

The Grievant's direct supervisor testified that the Grievant was advised on several occasions to stop emailing the head of the Agency regarding certain complaints the Grievant has regarding performance evaluations. The Grievant's supervisor testified that the Grievant was aware of the organizational chart of the Agency and the expected protocol (although unwritten) for pursuing complaints. The witness further testified that despite the Grievant's direct supervisor and the head of the Agency instructing the Grievant not to contact the head of the Agency regarding these matters, the Grievant continued to email the head of the Agency.

The witnesses for the Agency indicated that no mitigating factors were considered when the decision was made to issue the Written Notice since no additional penalty was imposed.

The Grievant indicated on Grievant's Form A that his actions which are the basis of the written notice are protected free speech under the U.S. Constitution. In this regard two cases were submitted for the Hearing Officer's consideration: Gil Garcetti, et al, Petitioners v. Richard Ceballos, 547 U.S. 410, decided by the U.S. Supreme Court on May 30, 2006 and Connick, District Attorney v. Myers, 461 U.S. 138, decided April 20, 1983.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et. seq., establishing the procedures and policies applicable to employment within 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, 656 (1989).

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.....

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 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 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 to provide appropriate corrective action.

DHRM Policy No. 1.60-Standards of Conduct provides that failure to follow a supervisor's instructions is a Group II offense.

The Grievant does not dispute that he copied his emails to the head of the Agency after being told not to do so. The Grievant, however, asserted that he can do so because his emails are protected as "free speech."

DECISION

The disciplinary action of the Agency is affirmed. The Group II Written Notice issued to the Grievant on July 18, 2007 is **AFFIRMED**. The Grievant's communications in this case are as an employee of the Agency, are not protected free speech and are not exempt from the corrective action taken for the Grievant's failure to follow a supervisor's instructions.

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 Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (8-4) 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 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **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.

John R. Hooe, III
Hearing Officer