

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 06/18/08;
Decision Issued: 06/20/08; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case
No. 8853; 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 Nos. 8853

Hearing Date: June 18, 2008
Decision Issued: June 20, 2008

PROCEDURAL HISTORY

On January 29, 2008, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 14, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution. On June 18, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency
Representative for Agency
Five witnesses for Agency (including Representative)

ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests rescission of the Group I Written Notice

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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 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. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹

The Agency follows the Department of Human Resource Management Policies and Procedures Manual, Policy 1.60, Standards of Conduct (Eff. Date 9/16/1993). The types of offenses are organized into three groups according to the severity of the behavior, with Group I being the least severe. Examples of Group I offenses include unsatisfactory attendance or excessive tardiness, use of obscene or abusive language, and inadequate or unsatisfactory work performance. The offenses set forth are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted.

¹ § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

The Offense

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings:

The grievant was the human resources manager for the Department of Juvenile Justice's regional facility, reporting directly to the superintendent of the facility. The Grievant started this position in March 2006 and left the position in April 2008. The Group I Written Notice, issued by the superintendent, specifically set forth the offense:

Unsatisfactory job performance in that you continue to show resistance to accepting work assignments after having received formal counseling regarding this. On 1/17/08, you demonstrated disrespect and unprofessional conduct through negative body language and a failure to initially respond when asked if you could complete the given assignment. When addressed a second time, you responded by making a nonverbal sound.

The superintendent testified to the events of the meeting on January 17, 2008, as well as the history of her experience with the Grievant's recalcitrant attitude. The superintendent testified to occasions in which she informally and formally counseled the Grievant on her need to improve certain aspects of her expected duties, specifically having more initiative.

In an interim evaluation of the Grievant on May 16, 2007, the superintendent noted

- Planning/Analytical Skills/Decision Making-Needs to improve in the gathering of information, determining the validity of information, developing and executing a plan of action independent of directives from supervisor.
Example: resolution of recruitment issues.
- Needs to demonstrate improved initiative and leadership skills in addressing daily operational issues. Example, establishment of interview panels, incomplete planning for job fair (flyer distribution, diverse radio ad placement, under utilization of resources for day of interviews.)

Agency Exhibit 10. The superintendent also commended certain aspects of the Grievant's job performance.

In a formal counseling memorandum dated October 20, 2007, the superintendent documented her September 20, 2007, meeting with the Grievant. Among the issues covered in the memorandum, the superintendent noted the Grievant's need for increased initiative and not to respond to questions with "whatever." The Grievant was counseled to improve her ability to accept constructive criticism and to maintain a professional and respectful tone with others in the workplace. Agency Exhibit 7.

In the Grievant's annual performance evaluation in October 2007, the superintendent noted the Grievant

- Has not satisfactorily demonstrated the initiative and skills to independently address the day to day human resource related issues involving employee concerns and operational issues; to include

the research and gathering of information, determination of validity, and execution of a plan for resolution. These issues were addressed at the time of the interim evaluation May 16th and again on September 20th.

In the same evaluation, the superintendent wrote that the Grievant

has done an outstanding job organizing the duties and functions of the newly established HR unit. Performance accuracy for the unit has improved significantly with the establishment of computerized tracking systems. She continues to make progress understanding the state system and applicable procedures.

Agency Exhibit 8. Part of the Grievant's work description and expectation includes establishing effective working relationships when dealing with supervisors, co-workers, etc.; effectively expressing ideas orally or in writing; and having initiative. Agency Exhibit 8 [Employee Work Profile ("EWP")]. Initiative is not defined in the EWP, but it is defined as

1. an introductory act or step; leading action: *to take the initiative in making friends.*
2. readiness and ability in initiating action; enterprise: *to lack initiative.*
3. one's personal, responsible decision: *to act on one's own initiative.*

"Initiative." *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. 19 Jun. 2008.

In the opinion of the superintendent, rather than professionally responding to and addressing the superintendent during a staff meeting on January 17, 2008, Grievant showed disrespect to the superintendent's authority when asked a direct question. The superintendent asked the Grievant if she could plan and execute a training program for staff. According to the superintendent, and corroborated by witnesses who were also present at the meeting, the Grievant looked away from the superintendent and did not respond to her until asked the question a second time. After the second inquiry, the Grievant uttered a "nonverbal" sound, expressed by witnesses at the hearing in a manner that I will characterize as a mumble. One witness present at the meeting noted that, in response to the superintendent's question, the claimant "rolled her eyes." The superintendent considered the Grievant's response to her inquiry unprofessional and a continuation of the Grievant's lack of initiative. When asked whether Grievant's behavior might have been deemed "insubordinate," the superintendent preferred not to label the Grievant in that manner.

The Grievant testified that she intended no disrespect to the superintendent, and her delay in responding was just her personality, and that she was thinking about how to accomplish the task before answering. The Grievant later apologized to the superintendent for her conduct. By all accounts, the Grievant undertook and accomplished the assigned training for staff. The Grievant testified that her office was located in a different building than the superintendent's office, and she was not specifically mentored in the culture of the facility management that she described as paramilitary.

There is necessarily a subjective element to any supervisor's determination that a subordinate employee has not acted professionally and as directed or expected. Here, there is

ample evidence of a history of counseling by the superintendent of similar and related performance and conduct issues, concerning the Grievant's acceptance of direction, authority, criticism, and initiative. The requested training required a measure of initiative by the Grievant, and her initial response, during a staff meeting, was considered unprofessional by the superintendent.

On the evidence presented, I find the Agency has shown that the employee engaged in the behavior described in the Written Notice, and that the behavior constituted misconduct. While the Grievant's conduct may be on the more subtle end of the range of unprofessional behavior, there is no requirement that conduct must be particularly overt or extreme before it may be disciplined.

Mitigation

If the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B. Management is reserved the exclusive right to manage the affairs and operations of state government. The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.

The normal disciplinary action for a Group I offense is a Written Notice. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, Grievant does not have long state service and her work performance, while generally satisfactory, has lacked in the area of professionalism. Recognizing these factors, the agency elected to impose the least severe formal discipline. (An assertion of insubordination, which was affirmatively avoided by the superintendent, is often deemed a more severe disciplinary issue.)

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's actions in finding that the Grievant demonstrated disrespect and unprofessional conduct are consistent with law and policy. The Agency's action of imposing the least severe formal discipline is a reasonable mitigation by the Agency, consistent with law and policy. In light of the applicable standards, the Hearing Officer finds no evidence that warrants any further mitigation to reduce or rescind the disciplinary action. Based on the totality of the evidence, the hearing officer concludes that the agency's disciplinary action was within the tolerable limits of reasonableness.²

² Cf. *Davis v. Dept. of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best

DECISION

For the reasons stated herein, I uphold the Agency's Group I Written Notice.

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 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:

penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer