

Issues: Group II Written Notice (disruptive behavior and insubordination) and Suspension; Hearing Date: 07/17/08; Decision Issued: 07/31/08; Agency: VEC; AHO: John V. Robinson, Esq.; Case No. 8894; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8894

Hearing Officer Appointment: June 26, 2008

Hearing Date: July 17, 2008

Decision Issued: July 31, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued on April 1, 2008 by Management of the Virginia Employment Commission (the "Department" or "Agency"), as described in the Grievance Form A dated April 1, 2008.

The hearing officer was appointed on June 26, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 11:00 a.m. on June 30, 2008. The Grievant's attorney (the "Attorney"), the legal advocate for the Agency (the "Advocate") and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by counsel, confirmed and clarified that she is challenging the issuance of the Group II Written Notice for the reasons provided in her Grievance Form A and is seeking the following relief: the Group II written notice rescinded, the five (5) days suspension reinstated with concomitant restoration of any lost pay and benefits and attorney's fees.

Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on June 30, 2008, which is incorporated herein by this reference.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Advocate represented the Agency. The Attorney represented the Grievant. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency exhibits 1-14 and Grievant's exhibits 1-12.¹

¹ References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

There were no issues concerning non-attendance of witnesses or non-production of documents.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant has been employed by the Agency for approximately seven (7) years. The Grievant has been employed in the Agency's Trade Act Unit (the "Unit") as a Program Support Technician for about 1 ½ years.
2. On March 12, 2008, the Grievant's direct supervisor was the Trade Act Program Manager (the "Manager").
3. During the morning of March 12, 2008, the Manager came into work at the Unit early because her assistant manager was on an assignment out of town temporarily.
4. After opening her computer and getting settled, the Manager went into the vacant cubicle of one of the Unit's employees to go through certain data validation files.
5. While the Manager was there, another employee came to the Manager and talked about all of the invoices she had recently received.
6. The Manager had previously asked this employee to do something for her and the employee said she could use some help with the invoices.
7. In response, the Manager asked the employee to give her a specific invoice and said she would give it to the Grievant so that the employee could follow up on the item that the Manager needed done and which the Manager had previously assigned to the employee.
8. The Manager went to the Grievant who was talking and laughing on a personal phone call, which the Grievant had been engaged in for a good while.
9. The Manager walked up, laid the invoice down on the Grievant's desk and said she needed the Grievant to review the invoice.

10. The Grievant became very angry with the Manager and responded yelling loudly and angrily to the Manager, words to the effect that could the Manager not see the Grievant was on the phone and the Grievant insisted that the Manager say “excuse me” when she approached the Grievant.
11. The Manager was stunned and the Manager surmised that the person on the phone to whom the Grievant was speaking must have said something because the Grievant turned around and said words to the effect that, “No, she will learn to say ‘excuse me’ when she walks up to my desk.”
12. The Manager stood in place for a few minutes then turned around and, as the Manager started out, the Manager said words to the effect that “Work comes first.”
13. At least one (1) witness in the Unit which is housed in Room 308 of the facility, often referred to as the “Maze” (the “Maze”), heard the Grievant’s outburst. AE 1 and GE 11.
14. Before the Grievant transferred to the Unit, the Grievant had filed a criminal complaint against a former manager in a different unit of the Agency for alleged unwanted physical contact administered to the Grievant by this former manager. This criminal complaint caused the arrest and criminal prosecution of the former manager. The Judge ultimately dismissed the criminal case finding the accused not guilty. After three investigations, the Agency took no disciplinary action against the former manager finding no sound basis for any such disciplinary action, to Grievant’s obvious annoyance.
15. Later on March 12, 2008, around noon, while the Manager was working on a letter, the Grievant entered the Manager’s cubicle laying the completed bill on the Manager’s desk very heavily and, standing right next to the Manager, the Grievant proceeded to berate the Manager that the Manager was exhibiting behavior like her last supervisor and it would not be tolerated by the Grievant and, again, that when the Manager wanted to enter the Grievant’s cubicle, the Manager was to say “excuse me” before entering.
16. The Manager felt intimidated by the Grievant’s aggressive behavior.
17. When the Grievant turned to walk away, the Manager stood up and said the Grievant’s behavior would not be tolerated any longer and the Grievant responded that she had said everything she had to say.
18. The Grievant went back to her work area, down the hallway a couple of cubicles from the Manager’s cubicle and the Grievant started to pull things around within her cubicle and then proceeded to slam the back door as she exited.

19. At least one (1) other person witnessed this tirade by the Grievant.
20. The Manager promptly sent an e-mail communication to her boss, the Chief of Employment Services and Special Programs (the "Chief"), informing him of what had happened. AE 1.
21. The Chief and his boss, the Assistant Director of Operations (the "Assistant Director") were already preoccupied with another matter concerning the Grievant. AE 9 and AE 10. Previously, on March 7, 2008, six (6) employees of the Program Support Unit of the Agency each signed and asserted to Management a Workplace Violence Complaint against the Grievant, seeking relief "from the situation that has developed over the past year as the result of the addition of [Grievant] to the Program Support Unit." AE 9.
22. The six (6) complainants asserted that initially they had welcomed the Grievant and made her feel at home. AE 9.
23. However, the complainants asserted, amongst other things, that over the past year, the Grievant's "behavior, demeanor and treatment of her co-workers and her manager has become such that she is creating a hostile work environment for staff located in room 308." AE 9.
24. The complainants also stated, in part, as follows:

Hence, [Grievant's] behaviors, such as shouting, slamming doors, displaying intimidating body language and outright defiance constitutes workplace violence and her volatile demeanor has created reasonable fear of injury or retaliation to any employee within the unit who may cross her. . . .

[Grievant] has been observed on numerous occasions being very disrespectful toward her manager, . . . She has been overheard raising her voice, speaking in a very condescending manner and refusing to abide by work directives given to her. She exhibits abrasive behavior whenever she does not receive a positive response to her requests or demands. As a result, employees do not wish to become engaged in interactions with her. This type of behavior demonstrates defiance of management's authority, and has a very negative impact on other employees, especially in regard to teamwork and a positive work environment.

Consequently, the stressful and, at times, hostile environment that [Grievant] has created has had noticeable negative effects upon her manager . . . We, as a group, feel that [Manager] is a

competent manager who is doing a wonderful job with the Trade Program. We can see that the ongoing, day-to-day struggles with [Grievant] are having adverse effects on [Manager's] health and her once positive attitude has become subdued, at best. We further feel that, if the issue is not rectified, [Manager] would be justified in her decision to pursue other employment opportunities. This would be a significant detriment to the Trade Program and to the Program Support Services unit as a whole. . .

In conclusion, the Program Support Unit worked well together before the arrival of [Grievant]. If the agency continues to allow such conduct and fails to adequately deal with [Grievant], whose conduct can be deemed as workplace violence and harassment, we are of the opinion that the agency should be considered complacent. Hence, the agency can be considered to be fostering a hostile work environment. Therefore, we request relief of this situation and urge the agency to address it in an expedited manner by whatever means are deemed appropriate.

AE 9.

25. On March 14, 2008, the Assistant Director submitted the complaint signed by the six (6) employees to the Assistant Commissioner, Field Operations and the Director, Human Resources for appropriate investigation and resolution. AE 10.
26. During her short time in the Unit, Grievant has gone out of her way to be a disruptive force, impeding the operations of the Unit and troubling its workforce and managers.
27. For example, on September 6, 2007, the Grievant received a counseling memorandum from the Chief for totally different disruptive behavior and insubordination. AE 11.
28. In this counseling memorandum, the Chief cautioned the Grievant as follows:

The above-described behavior conduct was inappropriate. Not only did you fail to follow a supervisor's instruction, but also your behavior and actions were disruptive and insubordinate in nature. If similar behavior is exhibited in the future, management will address the event through the appropriate Standards of Conduct guidelines and policy. It is my sincere hope that this will not occur and your working relationship and corresponding actions with management will improve and become positive and productive.

AE 11.

29. On November 2, 2007, the Grievant received a memorandum from the Manager addressing additional unacceptable behavior by the Grievant in the workplace.
30. In this memorandum, the Manager also cautioned the Grievant as follows:

If this is the situation it is unacceptable behavior in the workplace and could lead to formal disciplinary action covered by the Standards of Conduct. The VEC is committed to a workplace that is free of threat, intimidation or hostility. . .

Thank you,
[Manager]

AE 11.

31. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.
32. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
33. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
34. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. By contrast, the Grievant's testimony was not credible. The Grievant was evasive on cross-examination when questioned about one of her exhibits (GE 11) involving statements the Grievant had made in an interview conducted on March 12, 2008, by the Assistant Commissioner, Field Operations and the Director, Human Resources about the incidents with the Manager which gave rise to the disciplinary action. Tape 4, Side B. Further elements of this finding are discussed below.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances 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 (the "SOC") 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 and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infractions can constitute a Group II offense, as asserted by the Department.

The disciplinary offenses for which Grievant was cited in the Department's Written Notice were disruptive behavior and insubordination. The Grievant, by counsel, argued that disruptive behavior is specifically listed in the SOC under Group I offenses and that Management has overreached by issuing a Group II Written Notice citing Grievant also for insubordination, where Grievant ultimately completed the task assigned to the Grievant by the Manager.

The SOC provide in part as follows:

The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

Grouped according to severity

The offenses listed below are organized into three groups according to the severity of the behavior, with Group I being the least severe. See section Disciplinary actions for specific offenses for related disciplinary action.

Group I

...

- Inadequate or unsatisfactory work performance
- Disruptive behavior

Group II

These offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. See section VII(D)(2) for related disciplinary actions. . .

Group III

These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.

Management argued that the level of disruptive behavior and insubordination exhibited by Grievant warranted a Group II Written Notice. Management also clearly asserted its position that insubordination can occur even where a Grievant ultimately performs the task assigned. Of course, a contrary position would lead to the absurd result that a subordinate could never be guilty of insubordination if the assigned task was ultimately completed even though the subordinate called a superior within the hearing of other subordinates untellable names, screamed, yelled, threw things around, etc., etc.

Management's position is in keeping with the plain, ordinary meaning of the word "insubordination." For example, Webster's Online Dictionary ("Webster's") defines insubordination as "(1) Not submissive to authority; 'a history of insubordinate behavior'; 'insubordinate boys'; (2) Disposed to or engaged in defiance of established authority." <http://www.websters-online-dictionary.com/definition/insubordinate>. Webster's gives as synonyms for insubordination "resistant" and "resistive".

The hearing officer agrees with Management that under the facts and circumstances of this case, especially in the context of many prior warnings to Grievant, the level of disruptive behavior and insubordination exhibited by Grievant could constitute a Group II offense. This decision was made by Management in a carefully considered, collaborative, coordinated

determination. In short, in making this determination, the hearing officer finds that Management has not in the least overreached, as was argued by Grievant.

The Grievant also argued that Management of the Agency was soliciting its employees to complain about the Grievant. The Grievant admitted that the employees were not conspiring against her but rather taking their positions to uphold Management vendettas against the Grievant. However, the evidence is clear that the workplace violence complaint signed by the six (6) co-workers predated the infraction for which the Grievant is being disciplined in this proceeding and was unsolicited by Management.

Similarly, Grievant's other general assertion of retaliation or vendettas because of the arrest of her former supervisor are meritless. Grievant was moved to the Unit by Management of the Agency precisely to avoid any retaliation and Senior Management took great pains not to inform Grievant's direct supervisors in the Unit about this incident so as not to cause any unwarranted predispositions against Grievant in the Unit.

The supervisors became aware or were reminded by Grievant of the matter generally when, for example, Grievant herself raised it in her grievances (AE 13 & 14) and when Grievant, in a not very veiled threat, told the Manager on March 12, 2008, that the Manager was exhibiting behavior like her last supervisor and it would not be tolerated by the Grievant.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The grievant's apparent refusal to recognize and accept the seriousness of her violations of Agency policy and procedures

and all of the previous warnings to Grievant concerning her insubordination and disruptive behavior preclude a lesser sanction. The hearing officer agrees.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the Group II Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 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 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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).