

Issues: Group II Written Notice (failure to follow instructions and unprofessional behavior), and Termination (due to accumulation); Hearing Date: 11/18/08; Decision Issued: 11/19/08; Agency: VDOT; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8968; 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. 8968

Hearing Date: November 18, 2008  
Decision Issued: November 19, 2008

PROCEDURAL HISTORY

On June 2, 2008, Grievant was issued a Group II Written Notice of disciplinary action with termination from employment, based on the accumulation of two active Group II offenses. The offense was failure to follow instructions and failure to demonstrate professional behavior. Grievant timely filed a grievance to challenge the Agency's action. The Grievant asserted that her termination was unfounded and essentially an act of discrimination based on her national origin, race and gender. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 14, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on October 15, 2008. The hearing was scheduled at the first date available between the parties and the hearing officer, November 18, 2008. The grievance hearing was held on November 18, 2008, at the Agency's regional office.

Both sides submitted exhibit notebooks with numbered exhibits that were, without objection from either side, admitted into the grievance record, and will be referred to as Agency's or Grievant's Exhibits, numbered respectively. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant  
Two Co-advocates for Grievant  
Three witness for Grievant (including 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? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the grievant discriminated against?

The Grievant requests rescission or reduction of the Group II Written Notice, reversal of the termination and reinstatement.

## BURDEN OF PROOF

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 her evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

The Agency relies on DHRM's Policy 1.60, Standards of Conduct, which defines Group II offenses to include acts of misconduct of a more serious nature that significantly impact

agency operations. Examples include failure to follow supervisor's instructions or comply with written policy; violation of a safety rule or rules (where no threat of bodily harm exists), leaving work without permission, failure to report to work without proper notice; unauthorized use or misuse of state property; refusal to work overtime. Agency Exhibit 6.

### The Offense

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

The Agency employed Grievant as an associate civil engineer in the agency's Engineer Trainee Program. Agency Exhibit 8. The Grievant has been employed in the training program since 2002. The Grievant's work record contains an active Group II Written Notice issued April 21, 2008. The Agency issued the Grievant a counseling memorandum on December 17, 2007, concerning the Grievant's unprofessional conduct over time, including three specific meetings. Agency Exhibit 2. Additionally, the supervisor issued a Notice of Improvement Needed on March 19, 2008. Agency Exhibit 3.

The supervisor over the Engineer Trainee Program testified that she directly witnessed some of the Grievant's unprofessional conduct during meetings in December 2007. The Grievant's supervisor and two co-workers in her department testified to the Grievant's most recent pattern of conduct beginning April 29, 2008, and continuing over the course of a specific project with a May 9, 2008, deadline. The assigned project required mapping and field reviews. *See* Grievant's Exhibits 10, 11, 12 and 13. The Agency's witnesses testified to instances during this project of unprofessional conduct by the Grievant when given assignments. The Grievant was confrontational and repeatedly questioned or declined responsibility. According to the Grievant's testimony, she was frustrated over what she considered inequitable assignments in her department. The Grievant, however, testified that her actions, statements, and conduct were simply expressing her questions, limitations, time constraints, and valid disagreement over how the assignments were being made. Ultimately, the Grievant objected to doing the field review alone, without co-worker assistance (the co-worker planning to join her in the field review was called away for a family emergency). The Grievant also relied on rainy weather and limited time available as justification of her objection. The supervisor, with the Grievant unwilling to do the field review, devised an approach to respond to the project deadline with less than complete information.

The supervisor testified that he issued the Group II written notice because he considered the Grievant's conduct warranted the discipline and that the Grievant never acknowledged the behavior as misconduct. The supervisor testified to the progressive discipline used for the Grievant, including a counseling memorandum, a notice of improvement needed, and a first Group II Written Notice. The supervisor testified that he elected to impose the normal consequence of termination for a second Group II offense, after inviting the Grievant to present her position and any additional information on mitigation. The supervisor considered mitigating circumstances, including the impact on his department of the Grievant's pattern of unacceptable behavior and the Grievant's failure to accept responsibility. The Grievant spoke of frustration at

being still in the trainee program after more than five years, with no permanent assignment, but she denied that frustration affected her work performance. The Grievant submits that her conduct was misconstrued and that her actions and words were misunderstood. Accordingly, the Grievant requests that the Group II Written Notice be reversed or, at least, reduced to a Group I offense.

A former supervisor from a previous assignment in a different department in the Agency testified on the claimant's behalf. He testified that he was impressed and satisfied with the Grievant's work performance, and he did not experience unprofessional conduct. Also, a representative from the central office testified of professional conduct during his interaction with the Grievant on a project assignment.

An employee may demonstrate discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact. Grievant has not presented evidence of any specific remarks or practices, statistical evidence, or evidence of disparate impact, as asserted during earlier stages of this grievance. Grievant has not offered any circumstantial evidence or shown any disparate impact that would suggest a racial component to the discipline. She has failed to show any basis to support her allegation of racial discrimination. Therefore, it is concluded that the agency did not discriminate against grievant on basis of her national origin, race or gender.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the Grievant's employment was warranted and appropriate under the circumstances. I find the Agency met its burden of proof.

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.*

I find that the Grievant's conduct, which was largely confirmed by the Grievant, albeit characterized as misconstrued or misunderstood, was appropriately deemed unprofessional, and therefore misconduct, by the Agency. Further, the Grievant's actions were at least tantamount to refusing supervisory instruction. Over the course of several months, her conduct was repeatedly addressed verbally and in writing, and the Grievant's recurring unwillingness to accept

assignments cannot all be explained simply by miscommunication and misunderstanding. The Grievant expressed a sincere belief on her part that her conduct was mostly justified. However, while the Grievant's conduct was not malevolent, it was unprofessional and the Grievant had multiple notices from the Agency concerning this deficiency and multiple opportunities to respond positively.

### Mitigation

The agency has proved (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. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Termination is the normal disciplinary action for an accumulation of two Group II Written Notices unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

As stated above, 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 action of imposing termination is within the limits of reasonableness. While the Agency had the discretion to impose a lesser discipline, in light of the applicable standards, the Hearing Officer finds no evidence that warrants any further mitigation to reduce or rescind the disciplinary action.

### DECISION

For the reasons stated herein, I uphold the Agency's Group II Written Notice with termination, based on the accumulation of two active group II Written Notices.

## 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. 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 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:

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.

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Cecil H. Creasey, Jr.  
Hearing Officer