

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 12/22/08;
Decision Issued: 12/22/08; Agency: DMHMRSAS; AHO: Cecil H. Creasey, Jr.,
Esq.; Case No. 8978; 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. 8978

Hearing Date: December 22, 2008
Decision Issued: December 22, 2008

PROCEDURAL HISTORY

On July 2, 2008, Grievant was issued a Group II Written Notice of disciplinary action without suspension. The offense was failing to follow supervisor's instructions. 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 he requested a hearing. On November 5, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on November 17, 2008. The hearing was scheduled at the first date available between the parties and the hearing officer, December 22, 2008. Because of the scheduling availability, for good cause shown, the time for conducting the grievance hearing was extended. The grievance hearing was held on December 22, 2008, at the Agency's regional office.

The Agency submitted an exhibit notebook with numbered exhibits that were, without objection from the Grievant, admitted into the grievance record and will be referred to as Agency's Exhibits, numbered respectively. The Grievant did not submit any documents beyond the Agency's submission. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Five witness for Grievant (including Grievant)
Advocate for Agency
Representative for Agency
One witness 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 or reduction of the Group II Written Notice.

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 his 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.

Department of Human Resource Management ("DHRM") Policy 1.60, Standards of Conduct, defines Group II offenses to include acts and behavior of a more serious nature (than Group I) that significantly impact agency operations, such as failure to follow supervisor's instructions or comply with written policy. A second such offense normally results in discharge. Agency Exhibit 5.

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 a rehab technician since 2005. The Agency's representative and supervisor over the Grievant, testified that the Grievant progressed slowly in his department, and the Grievant was weak on welding skills. The Grievant's probationary period was extended to allow opportunity to improve. Agency Exh. 4. The Grievant's job requires welding skills (Agency Exh. 3), and the Grievant did not have welding skills when he came to the Agency. At the supervisor's direction, the Grievant took welding classes. Otherwise, Grievant enjoys a work record without formal discipline.

Prior to the issuance of this Group II Written Notice, the Grievant's supervisor, on May 6, 2008, noticed the Grievant's welding repair to a wheelchair footrest. The repair was poor quality and broke off when the supervisor tried to open the footrest. The supervisor instructed the Grievant on the safety implications and risks to the Agency's clients of inadequate welding repairs of wheelchairs. As part of this verbal counseling session and to insure the safety for the Agency's clients, the supervisor directed the Grievant to have all of his welding repairs inspected before returning the items for use. On May 14, 2008, the Grievant repaired another wheelchair footrest. The supervisor found this repair inadequate and gave further instruction on repair methods for the Grievant to complete. Agency Exh. 1, 2.

On June 12, 2008, pursuant to a work order, the Grievant welded a wheelchair armrest bracket and returned the chair to the user. On the following day, while reviewing the work order, the supervisor discovered the repair. The Grievant had not had his welding repair reviewed as specifically instructed. The Grievant testified that having his welding work reviewed just "slipped his mind" this time. The supervisor testified to the safety risk involved. Agency Exh. 1, 2.

Since the offense issued in July 2008, the Grievant has been temporarily assigned to the physical plant services department, serving as a carpenter. Four witnesses testified from the physical plant services department regarding the good character, good work performance, and lack of any problems with the Grievant or his work performance while there.

The supervisor testified that he issued the Group II written notice because he considered the Grievant's conduct and subject matter a serious issue. The supervisor testified that, after considering the circumstances of safety and the fact that this would be the first formal Written Notice for the Grievant, he elected to impose no suspension with the Group II notice.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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 admitted conduct in failing to have his welding work reviewed on June 12, 2008, was a violation of his supervisor’s instruction. The proper welding repair of a client’s wheelchair is an important safety issue, and the supervisor’s instruction on having welding repair reviewed before delivering the chair to a client is a reasonable supervisory instruction. The Agency demonstrated a reasonable, measured response to the Grievant’s need for welding improvement. The Grievant was aware of the instruction. While the Grievant testified that his failure to have his work reviewed was an oversight, and it slipped his mind, the violation presented a safety risk. Although there was no evidence of an intentional disregard of his supervisor’s instruction, the violation, nevertheless, occurred. Violation of supervisor’s instructions is appropriately considered a Group II offense under the Standards of Conduct. For this reason, I find the Agency has met its burden of proof.

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.

Suspension up to ten days is the normal disciplinary action for 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.

Since the agency has already mitigated the discipline to a sanction without suspension, the agency has already exhibited a measured disciplinary response. With the agency already having mitigated the discipline, it would take extenuating circumstances to show mitigation sufficient to reduce the level of discipline further. Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

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 a Group II Written Notice without suspension is within the limits of reasonableness. While the hearing officer finds that this Grievant has a good record overall of being a sincere contributor to the agency, 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.

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, 600 East Main Street, Suite 301, 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.

Cecil H. Creasey, Jr.
Hearing Officer