

Issues: Group I Written Notice (failure to follow instructions), Retaliation and Discrimination; Hearing Date: 04/07/09; Decision Issued: 04/17/09; Agency: DSS; AHO: Lorin A. Costanzo, Esq.; Case No. 9046; Outcome: No Relief – Agency Upheld in Full.

**COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF SOCIAL SERVICES**

**DECISION OF HEARING OFFICER**

In the matter of: Grievance Case No. 9046

Hearing Date: April 07, 2009  
Decision Issued: April 17, 2009

***PROCEDURAL HISTORY***

On November 4, 2008 Grievant was issued a Group I Written Notice for failure to follow supervisor's instructions. On November 14, 2008, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to Grievant and on February 6, 2009, Grievant requested a hearing. The matter was qualified for hearing by Agency Head on February 11, 2009. Undersigned was appointed hearing officer on March 17, 2009. Hearing was held on April 7, 2009, at the Agency's regional office.

***APPEARANCES***

Grievant (who also testified as witness)  
Grievant's Counsel  
Agency Presenter  
Agency Party Representative (Regional Director - who also testified as a witness)  
Manager (who testified by speakerphone)  
Administrative Manager

***ISSUES:***

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

***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.

A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.<sup>1</sup>

### ***FINDINGS OF FACT:***

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

Grievant has approximately 18 years employment with the Commonwealth and is currently employed with Agency as a Regional Administrative Manager. He has worked with Agency at the Regional Office since September of 2007.<sup>2</sup>

Grievant was given a Notice of Intent to Issue a Group II Offense (dated October 30, 2008) for failure to follow supervisor's instructions.<sup>3</sup> The Group II was reduced by Agency to a Group I and Grievant received a Group I Written Notice (Offense date of 10/7/08; Issuance date of 11/4/08) for failure to follow supervisor's instructions.<sup>4</sup>

Grievant filed a timely grievance from a Group I Written Notice issued for failure to follow instructions and/or policy. Following the failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>5</sup>

Grievant's supervisor is Regional Director. On October 6, 2008, Grievant showed an e-mail he had drafted to Regional Director for her approval prior to his sending the e-mail to a local agency. The proposed e-mail was seeking information and contained seven specific requests/questions. Regional Director told Grievant he was not to send the e-mail. Grievant was instructed to deal with the matter addressed in the proposed e-mail in a more informal manner. He was told to talk with the local agency over the telephone. Additionally, Grievant was told that he should not be using a copy of something in an e-mail that was written as part of a confidential report.<sup>6</sup>

On October 7, 2008, Grievant added additional information to the e-mail his supervisor had instructed him not to send and Grievant sent the e-mail to a local agency. The e-mail Grievant sent contained the seven requests/questions and also contained the excerpt from a confidential report which he was told by his supervisor should not be used in an e-mail.<sup>7</sup>

On October 7, 2008, Grievant sent a different e-mail in which he stated he prepared a "beautiful e-mail", showed the e-mail to Regional Director, and she advised against sending the e-mail as she felt it would put the local agency on the defensive. The e-mail also stated she directed Grievant to call the local agency by telephone.<sup>8</sup>

The Counseling Memorandum of July 22, 2008 documents counseling meetings held on 7/3/08 and on 7/14/08. Matters were addressed in the memorandum concerning Grievant being

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<sup>1</sup> Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

<sup>2</sup> Agency Exhibit 4 and Testimony of Grievant.

<sup>3</sup> Agency Exhibit 3.

<sup>4</sup> Agency Exhibit 1.

<sup>5</sup> Agency Exhibit 1, Written Notice and Agency Exhibit 2, Grievance Form A.

<sup>6</sup> Agency Exhibit 3.

<sup>7</sup> Agency Exhibit 3.

<sup>8</sup> Grievant's Exhibit C.

instructed on 7/14/08 to contact an individual immediately to coordinate dates for training and this was not done as of the 7/22/08 Memorandum.<sup>9</sup>

### **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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*. 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 of Conduct* 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.

Section B. 2. of Policy No. 1.60, effective April 16, 2008, provides, "To assist management in the assessment of the appropriate correction action, offenses are organized into three groups according to the severity of the misconduct or behavior."

Group I Offenses include acts of minor misconduct that require formal disciplinary action.

Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.

Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.

The *Standards of Conduct* also provide that the examples of offenses are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted.<sup>10</sup>

"Failure to follow supervisor's instructions" is a Group II Offense and is so set forth in Attachment A to Policy 1.60 (Effective Date: April 16, 2008).<sup>11</sup>

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<sup>9</sup> Agency Exhibit 6, Counseling Memorandum dated 7/22/08.

<sup>10</sup> Agency Exhibit 9, Policy No. 1.60 - Standards of Conduct.

<sup>11</sup> Agency Exhibit 9, Policy No. 1.60 - Standards of Conduct.

***Discrimination and/or Retaliation:***

Grievant's Grievance Form A., indicated that, *"The Group I Offense dated November 4, 2008, in my opinion, is in retaliation for my response to a Counseling Memorandum dated July 22, 2008 (copy attached). Based on the instructions below, along with advice provided by VDSS DHRM (copy attached), I will submit my grievance to the next level supervisor, who is \_\_\_\_\_, (the name and title provided in Grievance Form A is redacted in this decision)."*<sup>12</sup>

On page 2 of Grievance Form A, in response to "Check if you decided not to present this to your immediate supervisor because (check one):" Grievant checked the box indicating "Discrimination or Retaliation by Immediate Supervisor".

"*Discrimination*" is defined in §9 of the Grievance Procedure Manual as "Different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex." Grievant did not present issues of "discrimination" and did not offer any evidence to support any allegation of discrimination.

"*Retaliation*" is defined in §9 of the Grievance Procedure Manual as "Adverse employment actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. "whistleblowing")."

Grievant testified that, "When I said retaliation that only refers to the first respondent process in the grievant process". He also testified that, "I did not include or say anywhere that the offense was in retaliation only that I had the right to proceed to the second level because since my supervisor was the one who wrote the offense. HR advised me that I should proceed to the second level and in order to do that I had to put on the form that I believed it was in retaliation. But it had nothing to do with the offense whatsoever; only the process."

Grievant did not present any evidence to support any allegation of retaliation. Grievant indicated at hearing retaliation is no longer a consideration.

No evidence was presented by Grievant as to retaliation or discrimination. Grievant did not pursue these issues during the hearing and there is no evidence to support allegations of retaliation or discrimination. It is therefore concluded Agency retaliation is not found and that the Agency did not discriminate against the Grievant.

***Failure to follow supervisor's instructions:***

The DSS on a local level are supervised by the state but they are administered by their local government. The supervision by the state and being administered by local government is described as a "delicate balance". Regional Director was tasked with building collaboration in the region as this has been perceived as lacking in the past. Regional Director was concerned with this when she tasked Grievant with making an initial inquiry as to whether certain local agency programs/facilities utilized state funds. She wanted matters handled with care. She was aware of the sensitive nature of matters with the local DSS and was particularly concerned with matters being handled by Grievant in a sensitive and collaborative manner.<sup>13</sup>

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<sup>12</sup> Agency Exhibit 2, Grievance Form A.

<sup>13</sup> Testimony of Regional Director.

Grievant was aware of Regional Director's concerns and Grievant was told to handle matters with care. He later presented Regional Director with an e-mail he wanted her approval of prior to sending to local agency. Regional Director told Grievant not to send the proposed e-mail as she felt it would automatically place the local agency on the defense. Additionally, she indicated to Grievant that the e-mail contained excerpts from a confidential report Regional Director had written and she did not want anything she had written in a confidential report to go out anytime to a local agency.

Grievant was told to make a telephone call and ask whether state moneys were involved. He was instructed to ask just this one question. Grievant was to then come back to Regional Director and not go any further until he and Regional Director had talked about how to proceed. No deadline was given to Grievant as to this information.

Grievant testified he was told by his supervisor that the e-mail was too lengthy, too detailed, and his supervisor discussed that the need to treat the local agency delicately especially as the local agency had a particularly tenuous relationship with the regional office. Grievant said he was told to trash the e-mail and call up the local office manager and handle it with a phone call.

Grievant testified he did call Administrative Manager. He discussed what was being asked for and Administrative Manager said she needed it in writing to do the research.<sup>14</sup>

On October 7, 2008, Grievant sent an e-mail essentially containing the contents of the e-mail he was told not to send plus some additional information. The October 7th e-mail contained the below seven requests/questions which were contained in the proposed e-mail his supervisor told him not to send:

1. An organizational chart for each of these facilities/programs.
2. The annual operating budgets....
3. Are there any \_\_\_\_\_ (*name redacted in this decision*) assets and/or personal used in the operations and or support of these facilities/programs?
4. If the answer to # 3 is "Yes", are they operated within any specific DSS program ....?
5. Are any non-DSS employees at these facilities/programs entered in LETS?
6. Is the funding for any of these operations run through LASER (including salaries)?  
If so, please give Budget Lines and Cost Centers that are used for reporting purposes.
7. If the answer to #6 is yes, how do you ensure that DSS funds are not co-mingled with other types of funding sources (grants, donations, etc.)?

Grievant's October 7, 2008 e-mail also contained excerpts from the confidential report his supervisor told him not to use.<sup>15</sup>

Administrative Manager received the e-mail Grievant sent on October 7, 2008 and it was eventually given to the local agency director. Grievant also told Administrative Manager that he was instructed by his supervisor not to send the e-mail.<sup>16</sup>

Grievant's supervisor told Grievant her concerns as to why she wanted things done a certain way and gave Grievant specific instructions as to what to do and not to do. Grievant was told not to send the proposed e-mail with the seven requests/questions and the excerpt from the confidential report. She told Grievant to speak with local agency by telephone and have an

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<sup>14</sup> Testimony of Grievant.

<sup>15</sup> Testimony of Regional Director.

<sup>16</sup> Testimony of Administrative Manager.

informal conversation. He was instructed to ask only if there were there any state moneys involved in certain programs/facilities. This was the only thing he was instructed to ask. This was the only information Grievant was directed to obtain at that time. He was to get back with his supervisor and talk with her before getting into other matters. He was to check with his supervisor before proceeding any further after the initial telephone call. Grievant's supervisor indicated there was no hurry for this information and no deadline was established.<sup>17</sup>

The local agency director telephoned Grievant's supervisor on October 14, 2008 and was very upset over matters related to the contents of the e-mail Grievant sent on October 7, 2008. It was as a result of this telephone call on October 14, 2008, that Regional Director learned the e-mail she instructed Grievant on October 6, 2008, not to send was sent by Grievant on October 7, 2008.

Grievant had added additional information but the October 7, 2008 e-mail contained the seven requests/questions and the excerpt from confidential report that Grievant was instructed not to use. The October 7, 2008, e-mail had not been shown to Grievant's supervisor for approval or copied to her prior to or on sending.

In an e-mail to another individual Grievant discussed his October 6, 2008 meeting with his supervisor and indicated he had a "beautiful e-mail" he prepared to send and he showed it to his supervisor, Regional Director, who advised against starting out with an e-mail, as she felt it would put the local agency on the defensive. He also acknowledged Regional Director directed him to call local agency by telephone. He stated in this e-mail that "I'm not totally convinced that the phone call route is the best (for documentation purposes), but since that's what I was told to do, that's what I'll do."<sup>18</sup>

Grievant was aware of the instructions given him by his supervisor. Regional Director specifically told Grievant to not send the e-mail he showed her as she felt the e-mail would be inflammatory. Grievant was told to handle the matter by telephone on an informal basis and directed not to include an excerpt, which had been taken from a confidential report, in any e-mail going to a local agency. He was instructed to get back with his supervisor and talk with her before getting into other matters and he was to check with her before proceeding any further after the initial telephone call.

Grievant contends that his supervisor gave him the assignment on Monday, October 6 and she was out of the office until the following Monday. However, testimony indicated that his supervisor could have been contacted. Employees can and do routinely contact Regional Director when she is out of the office as she has accessibility through a personal assistant who can reach her, she has accessibility through her personal cell phone, and she has accessibility through a blackberry which is a cell phone and which receives e-mail.<sup>19</sup>

Grievant indicated that it was never his intent to disobey any direction that Regional Director gave him.<sup>20</sup>

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<sup>17</sup> Testimony of Regional Director.

<sup>18</sup> Grievant's Exhibit C.

<sup>19</sup> Testimony of Regional Director.

<sup>20</sup> Grievant Exhibits, Timeline of Events.

As discussed above, Grievant received instructions from his supervisor on October 6, 2008 and he failed to follow such instructions when he sent the e-mail on October 7, 2008 to local agency.

**Mitigation:**

On October 30, 2008 Grievant was given a Notice of Intent to Issue a Group II Offense for failure to follow supervisor's instructions. After meeting with Grievant and taking into consideration the actions of Grievant, Grievant's response, Grievant's work history, and other matters Grievant's supervisor reduced the Group II Offense to a Group I Offense.<sup>21</sup>

Section VI.B.1., of the Rules for Conducting Grievance Hearings provides, "The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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.

Agency consideration was given to the Counseling Memorandum which was issued and concerned Grievant's not following directions and other matters.<sup>22</sup> Additionally, the Agency did give consideration to mitigating circumstances as is evidenced by the Agency's decision to reduce the Group II to a Group I. The agency's discipline does not exceed the limits of reasonableness.

**Conclusion:**

The Agency has met their burden of proof.

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy. *and*
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

**DECISION**

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group I Written Notice was warranted and appropriate under the circumstances and Agency's discipline does not exceed the limits of reasonableness. The Agency's issuance of a Group I Written Notice on November 4, 2008, is **UPHELD**.

**APPEAL RIGHTS**

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is

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<sup>21</sup> Agency Exhibit 3 and testimony.

<sup>22</sup> Agency Exhibit 6, Counseling Memorandum of 7/22/08.



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 are the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state policy 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:

Director, Department of Human Resources Management  
101 N. 14th Street, 12th Floor  
Richmond, Virginia 23219

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:

Director, Department of Employment Dispute Resolution  
600 East Main St., Suite 301  
Richmond, VA 23219.

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 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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Lorin A. Costanzo, Hearing Officer