

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 05/21/09; Decision Issued: 06/08/09; Agency: DFS; AHO: John V. Robinson, Esq.; Case No. 9071; Outcome: No Relief – Agency Upheld in Full; **Administrative Review**: EDR Ruling Request received 06/18/09; EDR Ruling #2009-2350 issued 09/01/09; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 06/17/09; DHRM Ruling issued 06/22/09; Outcome: AHO's decision affirmed.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9071

Hearing Officer Appointment: April 14, 2009

Hearing Date: May 21, 2009

Decision Issued: June 8, 2009

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued on December 23, 2008 by Management of the Department of Forensic Science (the “Department” or “Agency”), as described in the Grievance Form A dated January 21, 2009.

The hearing officer was appointed on April 14, 2009. The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on April 17, 2009. The Grievant’s attorney (the “Attorney”), the Department’s advocate (the “Advocate”) and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by counsel, confirmed that he is challenging the issuance of the Group II Written Notice for the reasons provided in his Grievance Form A and is seeking the relief requested in his Grievance Form A, including expungement of the disciplinary action, with restoration of all salary and benefits.

The parties moved for a relatively short continuance due to the parties’ unavailability for prior commitments and the hearing officer found just cause for a continuance, as reflected in the Scheduling Order entered April 21, 2009, 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 Agency was represented by the Advocate and 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 all

exhibits in the Agency's binder, Exhibits 1 through 7 and all documents in the Grievant's binder, Exhibits I through VII.¹

APPEARANCES

Representative for Agency
One Additional Witness for Agency
Grievant

FINDINGS OF FACT

1. The Grievant is a Forensic Evidence Specialist employed by the Agency. AE 4.
2. Seven (7) employees in the Department (five full-time and two part-time employees) report to the Forensic Evidence Manager (the "Manager") for the Department.
3. The Department provides crime laboratory services for the Commonwealth, having a laboratory in Richmond and three (3) additional regional laboratories.
4. The Commonwealth's law enforcement agents visit the laboratories regularly to bring materials to the laboratories so that the laboratories can process the materials and conduct scientific investigations concerning crime scenes.
5. Five (5) of the employees in the Grievant's laboratory (the "Laboratory") are on a weekly rotational call to respond to fire and/or intrusion alarms at the subject Laboratory during non-business hours.
6. The Grievant was the Department's assigned person on call to respond to alarms on December 16, 2008 when the security company (the "Security Company") monitoring the Laboratory called the Grievant (who was at home some distance from the Laboratory) at 7:03 a.m. to notify the Grievant of an internal intrusion alarm at the Laboratory.
7. The applicable Agency written policy concerning this type of alarm at this Laboratory requires, in part, that "the on-call person will respond to the building to ensure that the area occupied by the Department is secure." AE 1 and 3.

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

8. The Grievant told the Security Company that someone would be coming to the Laboratory.
9. The Security Company dispatched the local police to the Laboratory at 7:04 a.m. on December 16, 2008. The police arrived at the Laboratory at 7:10 a.m. and after looking around outside the building the police left because no Agency staff person met them to let them in the building.
10. The Manager and another employee arrived on December 16, 2008 to begin work at the Laboratory at their scheduled start-time of 7:30 a.m. and the Manager could tell from the alarm control panel that the alarm system had been activated but the control panel does not provide much more detail such as when the alarm was activated, etc.
11. When the Grievant arrived at work at 8:30 a.m. on December 16, 2008 (his scheduled start-time), the Manager asked the Grievant when he was notified of the alarm and the Grievant responded at 7:03 a.m. The Manager then asked the Grievant whether he responded to the alarm and the Grievant admitted to the Manager that he did not because the Grievant assumed that the Evidence Receiving staff scheduled to start at 7:30 a.m. would address the alarm. However, when the staff arrived at 7:30 a.m. the alarm was no longer sounding and they did not respond.
12. Despite his admission to the Manager that he did not respond to the alarm because he assumed that the Evidence Receiving staff scheduled to arrive at work at 7:30 a.m. would address it, the Grievant argues that he did respond to the alarm in a reasonable time. The Grievant argues that the weather conditions that morning, his long drive, the traffic, etc. delayed his arrival at work any sooner and that his arrival at work at his scheduled start-time was merely coincidental and not due to any lack of haste or effort on the part of the Grievant.
13. The Grievant has received warnings and reminders concerning the importance of responding to alarms in accordance with the Agency's applicable written policy. In this instance he was required to respond to the building within a reasonable time. When he was asked on cross-examination why he did not call in given the alleged delay due to traffic, etc., the Grievant said it slipped his mind and the Grievant also admitted during the hearing that it would have been a good idea to call. The Grievant had called into the Laboratory on previous occasions when the alarm system had been triggered.
14. In his Grievance Form A, the Grievant alleged that others on call have not responded to the building under identical circumstances.
15. However, the Director of the Laboratory conducted his own comprehensive review of about 72 alarm reports over the preceding fourteen (14) months and

found this allegation unfounded, finding that the only two (2) infractions involved the Grievant; first, the alarm at issue in this proceeding and, second, a different fire alarm on September 28, 2008 (the "Fire Alarm"), for which the Grievant previously received a counseling memo from the Manager.

16. The hearing officer finds no merit in the Grievant's claims that he was harassed by the Manager when she simply asked him to provide more details concerning his response to the alarm at issue here. The Manager, reasonably exercising her prerogative as the Grievant's direct supervisor, requested the additional information to ensure that the reports were complete and accurately reflected the actions taken so as to give her a complete picture of what had transpired.
17. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
18. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
19. The testimony of the Agency witnesses 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.

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).

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 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.

Consistent with the Standards of Conduct Policy, the Grievant's infraction can clearly constitute a Group II offense: Examples: Failure to follow supervisor's instructions or comply with written policy. SOC Attachment A.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline 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.*

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 Grievant argues that the Agency's punishment was too severe for a first offense and should be reduced. 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 Agency only suspended the Grievant for three (3) of a possible ten (10) days, the Grievant did not present anything advancing mitigation to the Director when the Director requested this, the

training the Grievant received and the prior counseling memorandum, the importance of security at the Laboratory and the Grievant's apparent failure to understand and accept the seriousness of his violations of Agency policy and procedures preclude a lesser sanction.

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, Main Street Centre, 600 East Main Street, Suite 301, 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, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

June 22, 2009

RE: **Grievance of Grievant v. Department of Forensic Science**
Case No. 9071

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, the issues you raised in your request do not rise to the level of being inconsistent with any such policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley
Assistant Director, Office of
Equal Employment Services