

Issues: Group II Written Notice (unsatisfactory performance) and Termination (due to accumulation); Hearing Date: 07/09/09; Decision Issued: 07/10/09; Agency: ABC; AHO: Frank G. Aschmann, Esq.; Case No. 9116; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 07/27/09; Reconsideration Decision issued 07/28/09; Outcome: Original decision affirmed; Judicial Review: Appealed to the Fairfax County Circuit Court on 08/27/09; Outcome pending.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 9116

Hearing Date: July 9, 2009
Decision Issued: July 10, 2009

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Agency Presenter
Agency Representative
Two Agency Witnesses
Grievant
Grievant's Counsel
Grievant's Translator

ISSUES

Did the Grievant fail to perform his duties satisfactorily, on January 28, 2009 such as to warrant disciplinary action under the Standards of Conduct?

FINDINGS OF FACT

The Grievant was on duty working for the Agency on January 28, 2009. Grievant was acting in a management capacity and gave the other employee on duty a fifteen minute break. While operating the facility alone the Grievant received a telephone call from a customer. The Grievant was assisting other customers on-site as well. The caller posed a question which the Grievant could not answer immediately. The customer was directed to call back later. The customer hung up the telephone abruptly and appeared at the facility approximately one hour later. The customer produced an expired identification and was refused a sale.

The customer filed a complaint with upper management. The complaint was received by a Division Director who referred the matter to a Regional Director for investigation. The voice mail complaint received by the Division Director reflected a frustrated customer who indicated he did not get the service he expected and that the Grievant was rude to him.

The Regional Director contacted the customer and spoke with him twice during the period prior to issuing disciplinary action to the Grievant. The customer was consistent in his version of the events each time he communicated it. The customer's perception was that he had

been treated rudely by the Grievant and not received the service he expected. The Regional Director contacted the Grievant by email and asked for his version of the events. The Grievant submitted his version several times and consistently denied being rude to the customer. The Grievant concedes that he instructed the customer to call back in fifteen minutes. The major discrepancy between the two versions of what was said is that the customer states the Grievant said he did not have time to answer his question and to call back. Whereas the Grievant states that he told the customer he was alone and busy and to call back.

The Grievant's Supervisor was directed by the Regional Director to investigate the incident. The Supervisor spoke with the customer and the Grievant. Both related the same information provided to the Regional Director. The Supervisor referred the matter back to upper management for appropriate action.

The Grievant has numerous prior personnel actions in his file. Grievant has a counseling letter and notice of substandard performance notice from May 2005 for an incident involving customer service. Grievant has a counseling letter and notice of substandard performance from August 2005 for an incident involving employee relations. Grievant has a Group I Written Notice for unsatisfactory performance from November 17, 2007 involving employee relations. Grievant has a warning letter from December 2007 involving customer service. Grievant has a Group II Written Notice from August 7, 2008 involving employee relations. Grievant has a serious warning letter from November 2008 involving customer service. All the Agency witness agree that the Grievant is a hard worker with good knowledge of policy, procedure and his duties. Management, however, finds his repeated failure to deal with customers and employees properly is unacceptable.

The Regional Director recommended a Group II Written Notice be issued and further recommended employment termination because of accumulation of Written Notices. The Grievant's employment with the Agency was terminated. The Group II Written Notice is the subject of this hearing.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 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. The Agency uses these policies for its Standards of Conduct.

The Agency presented evidence that the Grievant was involved in an incident in which a customer of the Agency was dissatisfied with the service he received and filed a complaint. The Standards of Conduct for the Agency list code 11, "unsatisfactory performance," as a violation of policy which qualifies for a Written Group I Notice. Multiple infractions of the same violation may increase the level of a Group I offense to a Group II offense under the Standards of Conduct section B.2.a. The Agency presented evidence of similar prior offenses which included two Written Group Notices thus the Agency was permitted to categorize the offense as a Group II level offense despite the minor impact on business operations of the particular event. Under the Standards of Conduct section B.2.b. a second active Written Group II Notice should warrant termination of employment.

The issue at hand is whether the Grievant, in fact, acted in an unsatisfactory manner in the performance of his duties such as to warrant issuance of the Written Notice. Any issuance of a Written Notice made the Grievant subject to termination because of his prior offenses. Thus the severity of the sanction is not in question only if the Written Notice itself was justified.

The actions of the Grievant which occurred in the store may well have been what caused the customer to ultimately file his complaint but in this regard the Grievant acted properly denying a sale to a customer who produced an expired identification. This action conformed to the law and Agency policy.

The telephone call which preceded the visit is thus the action which must be scrutinized for a violation. The exact words used in the conversation by the Grievant are in dispute. The Grievant denies being rude. The Grievant undoubtedly did not intend to be rude. The Grievant most likely did not intend to be rude in his prior offenses either. The Grievant is a hard worker and a conscientious worker. The Grievant's problems with his communication skills seem more a function of his mannerism and personality rather than any willful intent to offend. His tendency to get excited and not communicate well under pressure appears to have contributed to this situation as well as prior offenses.

The discrepancy between his version of his statement to the customer and the customer's version are not decisive in this matter. It is clear that the Grievant told the customer to call back later. Whether it was because he was alone and busy or did not have time to deal with the customer does not really matter in this decision. The testimony of the Regional Director was persuasive in regard to this issue. The customer perceived that the Grievant was rude to him and

it was the Grievant's responsibility to handle the customer in a different manner such as to avoid this perception. The grievant could have offered to call the customer back or at least explained his situation more thoroughly to avoid the perception of rudeness. The Grievant had training and experience in the area of customer service and should have known what to do by this point in his career. Thus the Grievant failed to perform his duties in a satisfactory manner when handling the customer call.

If this was an isolated incident further training would be appropriate, however, the Grievant has received multiple opportunities to change his behavior and has been unable to do so. This inability to change reflects that the core problem is the Grievant's personality and mannerisms are unsuited to the type of customer service the Agency expects and demands from employees in the Grievant's position. Thus the Agency's decision to terminate the employment of the Grievant after many attempts to get him to change is appropriate.

DECISION

The disciplinary action of the Agency is affirmed.

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, VA 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 contrary 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.

Frank G. Aschmann
Hearing Officer

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 9116

Hearing Date: July 9, 2009

Decision Issued: July 10, 2009

Reconsideration Decision: July 28, 2009

DECISION

On July 27, 2009, this Hearing Officer received a Request For Reconsideration in the above styled matter. Grievant argues that the Agency failed to meet its burden of proof because it presented no evidence. Grievant submits that the testimony of the Agency's witnesses does not constitute evidence.

Black's Law Dictionary defines evidence as, "Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention." Witness testimony is the most common form of evidence in the hearing system. The Grievant did not object to having witness testimony at the hearing and gave testimony himself. The Grievant's contention that the Agency witness testimony does not constitute evidence is without merit.

The relevant inquiry is whether the Agency's evidence was sufficient to meet its burden of proof. In this regard, this Hearing Officer found the testimony of the Regional Director persuasive and credible. The Regional Director spoke to the customer on more than one occasion and simply could not remember his full name. The Regional Director related the complaint he had directly received and believed the customer to be genuinely upset. Grievant argues there was insufficient evidence to show that there was any customer at all. Not only did the Regional Director speak directly with the complaining customer the Grievant himself acknowledges that there was a customer who was upset with him. The Grievant's failure to handle this customer as his superiors expected lead them to terminate his employment. The Grievant's accumulation of Written Notices made the sanction appropriate. The Agency produced sufficient evidence to meet its burden.

Grievant argues he did not get to face his accuser. The Agency did not bring forth the customer. The Agency had no obligation to summon the customer. Even in criminal trials the victim is not always present. This is a circumstance which can be argued but is not dispositive of the issue. Ultimately, it was the Agency which terminated the employment of the Grievant.

The Agency was entitled to present its case as it saw fit. There are obvious reasons why the Agency would not want to compel a customer to appear before an employee that has just been dismissed as a result of that customer's complaint. The Grievant did not raise this issue in pretrial, discovery or subpoena the customer. The Grievant was given a full opportunity to present his case and was not denied due process. The evidence of the Agency was sufficient to show the Grievant had failed to interact in an acceptable manner with customers and other employees on numerous occasions.

ORDER

Grievant's Request For Reconsideration is denied for the above stated reasons.

Hearing Officer