

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 08/05/09; Decision Issued: 09/09/09; Agency: VPI&SU; AHO: Sondra K. Alan, Esq.; Case No. 9134; Outcome: Partial Relief.

## DECISION OF HEARING OFFICER

In RE: Case 9134

Hearing Date: August 5, 2009  
Decision Issued: September 9, 2009

### PROCEDURAL ISSUES

The Grievant filed a request for hearing after she had exhausted a first step (4-29-09), a second step (5-8-09) and a third step (5-28-09) Grievance procedure. The Agency qualified the matter for hearing on June 10, 2009. The matter was scheduled for hearing during a pre-hearing telephone conference on July 7, 2009 at which time the case was set for August 5, 2009 at 10:30 a.m. at the location of Grievant's employment. Grievant was represented *pro-se* and Agency was represented by an attorney, both of whom were present at the hearing. Testimony was taken in person. Each witness was sworn and the matter was completed on the August 5<sup>th</sup> date.

### SPECIAL CIRCUMSTANCES

Grievant stated she had certain speech disabilities and requested her husband speak for her as to events where she was present. The Agency had no objection and the request was granted.

## APPEARANCES

Grievant  
Two (2) witnesses for Grievant  
Agent  
Agent legal representative

## ISSUE

Was Grievant unfairly given a a Group II notice after she discharges her student worker for his break on a time not designated by management for breaks?

## FACTS

Grievant has worked for the Commonwealth of Virginia for 3 1/2 years. She was currently employed as a food service technician. Each location for food services at the university had a posted schedule regarding when employees should take breaks.<sup>1</sup> Designated times for break regarding this particular issue would have been 12:45 to 1:15 and 1:40 to 2:10.

On March 23, 2009, Grievant learned she was to have a training session at 3:00 o'clock that day. On February 12, Grievant had been given a P142<sup>2</sup> warning for permitting a student worker to take his break outside of designated break time. On the day in question, Grievant did again release an employee outside the perimeter for break times. The student employee was out of the food service stand from 2:19 to 2:45 that day. The particular day was the first warm day of spring and the food shop was very busy.

A supervisor happened by the shop and noticed Grievant was the only employee in the shop.

<sup>1</sup>Grievant Exhibit 3 and 7

<sup>2</sup> Grievant Exhibit 10

Grievant was given a Group II notice with no time off attached. Grievant filed a timely grievance on May 26, 2009. She proceeded to first step resolution on April 29, 2009, which upheld that Agency's decision., second step on May 8, 2009, which upheld the Agency's decision and a third step on May 28, 2009, which also upheld the agency's decision. The matter was set for hearing before a hearing officer at the pre-hearing conference held on July 7, 2009. The hearing was set for August 5, 2009.

#### APPLICABLE LAW

The State Employee Policies and Procedures Manuel effective September 16, 1993 is relevant to this case. Policy number 1.60 states the standards of conduct. "Employees are expected to abide by all policies promulgated by the Department of Human Resource Management and their agencies". The Group II under which Grievant was disciplined states "Group II - failure to follow a supervisor's instruction... comply with established written policy". It is clear that Grievant should have known and should have followed the above directives.

#### OPINION

Grievant was given wide latitude in presenting her case as she felt she had been a good employee who had been too harshly treated. The number of times she had been warned about the behavior in question was in controversy. However, a written a P142 was in evidence of at least one warning prior to her Group II write-up. Grievant, herself stated she had warned other employees about how seriously management was taking the break issue after she received the P142.

Indeed the day in question did offer challenges as Grievant only knew as of

noon on the day in question that there would be a training session at 3:00 pm that day. According to the posted schedule, only two (2) break periods remained between noon and 3:00 o'clock. Grievant left from 12:45 to 1:16 when another employee covered her absence. Further, it was the first warm day of spring and the cafe was very busy. Grievant may have actually made the best choice given all the circumstances that day in relieving the student worker when she did. However, the point was that she was to follow the posted schedule, which her superiors had determined to be the best time for breaks to be taken.

Agency did state Grievant was a valuable employee and hoped she would continue her services to the facility. Agency could have given Grievant more notice of the interruption in her schedule for the training and could have chosen a less busy day for the interruption. Grievant did have only one opportunity to comply with the scheduled break for the student worker at 1:40 to 2:10. It is hoped Grievant will understand company policy is a directive, not a suggestion. Agency's Group II action was not unwarranted. There do, however, appear to be enough mitigating circumstances to reduce the Group II action to a Group I.

#### DECISION

The Hearing Officer believes the discipline should be reduced to a Group I discipline.

#### APPEAL RIGHTS

You may file an administrative review request 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 to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director  
Department of Human Resource Management  
101 N. 14<sup>th</sup> St, 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E. Main Street, Suite 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>1</sup> You must file a notice of appeal with the clerk of the circuit court in the

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<sup>1</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation, or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>2</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.

### Judicial Review of Final Hearing Decision

Within thirty (30) 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.

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Sondra K. Alan, Hearing Officer

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<sup>2</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.