

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 09/09/09;  
Decision Issued: 09/14/09; Agency: VPI&SU; AHO: Thomas J. McCarthy, Jr., Esq.;  
Case No. 9154; Outcome: No Relief – Agency Upheld in Full.

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Number 9154**

**Hearing Date: September 9, 2009**

**Decision Issued: September 14, 2009**

**APPEARANCES**

Grievant  
Agency Counsel  
Agency Representative  
2 Witnesses for Grievant  
1 Witness for Agency

**ISSUE**

“Was a Group II Written Notice for failure to follow Supervisors’ instructions and perform assigned work proper?”

**FINDINGS OF FACTS**

Grievant had been instructed by his supervisor personally to look into and eradicate bees that were coming into a dormitory room inhabited by a student who was allergic to bee stings.

Grievant sent his staff member and a bee exterminator, neither of whom found bees.

Grievant lived approximately 1 hour from his job site.

Grievant admitted he had been verbally counseled by his supervisor to respond to serious residency hall maintenance problems and emergencies when they occurred.

Grievant did not respond to a frozen pipe emergency. Grievant’s supervisor did and cut the water off saving a water damage problem.

Grievant did not personally respond to a power outage. He instructed a staff member to reset the breaker and increase its amperage. The staff member complied and the breaker blew again. Grievant did not come to the job site to supervise the remedying of the breaker problems until the next morning. Approximately 400 students were without significant power, although Grievant maintained they had heat and emergency lights. Students were endangered by his actions.

Grievant told his staff about his supervisor's seeking participation in an asbestos remediation training project, but spoke against it.

There were no written documentations of Grievant's failure to follow his supervisor's instructions, or written confirmations of any verbal counseling about such failures.

Grievant admitted that he had been verbally counseled.

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth's grievance procedure and provides, in 2.2-3000A:

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 Section 2.2-3001.

Commonwealth of Virginia Standards of Conduct Policy 1.60, effective April 6, 2008, sets the disciplinary process agencies must follow to address unacceptable behavior.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.

Grievant's due process rights were observed and adhered to by conferences with his supervisor about his failure to follow instructions. He was given ample opportunity to respond to his failures by the agency.

### DECISION

While this case does show a lack of documentation of verbal corrective counseling, Grievant admits he was told by his supervisor that he had not followed the supervisor's instructions on more than one occasion. Grievant passes off his failure to comply with his supervisor's instructions as an "oversight", compounded by lack of documented counseling. He does admit that he did not carry out instructions given to him. The agency showed by a

preponderance of the evidence that the disciplinary actions were warranted and appropriate under the circumstances.

Certainly, the Group II Written Notice penalty is a strong statement from which he can correct his future actions. By not following instructions, Grievant put the residents of the facilities he supervised the maintenance for in jeopardy.

The Group II was proper. The Grievant did not meet the burden of showing it was improper for any reason. The Group II Written Notice is sustained.

### 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. 14<sup>th</sup> Street, 12<sup>th</sup> 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, Suite 301, Richmond, Virginia, 23219 or faxes 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.

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Thomas J. McCarthy, Jr., Esquire  
Hearing Officer