

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 09/21/09;
Decision Issued: 09/22/09; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case
No. 9168; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:**
DHRM Ruling Request received 10/07/09; DHRM Ruling issued 11/05/09;
Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9168

Hearing Date: September 21, 2009
Decision Issued: September 22, 2009

PROCEDURAL HISTORY

On January 14, 2009, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 28, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on September 3, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, Monday, September 21, 2009, on which date the grievance hearing was held, at the Agency's regional facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant also submitted documents that were admitted, some over objection by the Agency. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Representative/Advocate for Agency
Witnesses

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 (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
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?

The Grievant requests rescission of the Group I Written Notice.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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).

Code § 2.2-3000 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.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group I offenses to include types of behavior less severe in nature, but requiring correction in the interest of maintaining a productive and well-managed work force. Group I offenses include specifically inadequate or unsatisfactory job performance. Agency Exh. 10.

The Offense

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

The Agency employed Grievant as a program support technician in the Agency's recruiting department, with no active disciplinary actions indicated. The Agency established that the Grievant's most recent annual evaluation rated the Grievant as a contributor overall. The Grievant was rated below contributor for processing employment applications according to policy and procedure.

The Agency's representative, the agency's compensation manager, testified that the Grievant was disciplined for repeated lapses in attention to detail and sending erroneous correspondence regarding submitted employment applications. Testimony from the Grievant's direct supervisor corroborated the bases for the Group I Written Notice, being repeated discussions of the need for the Grievant to pay closer attention to detail. In addition to the 2008 annual Performance Evaluation, discussions were had with the Grievant on 4/22/08, 5/16/08 and 7/11/08. Prior to the Group I Written Notice in January 2009, the Grievant was issued a Notice of Needed Improvement/Substandard Performance on 8/6/08.

The Grievant testified that the Agency was holding her accountable and responsible for mistakes being made during a training process time. The Grievant expressed dissatisfaction with her training by co-workers. However, the Agency witnesses credibly testified that the cross-training issues were not the bases of the discipline; it was a demonstrated pattern of lack of attention to detail in the Grievant's work.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that the Grievant was

responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet. The Agency has shown a repeated pattern of deficiencies by the Grievant in her attention to detail and quality of work product.

Grievant contends her disciplinary action was not progressive discipline and that she has received disparate treatment for her failings. Grievant contends that the Agency did not apply DHRM Policy 1.60 properly because it failed to apply the principle of progressive discipline. Although State Agencies are encouraged to use progressive discipline, DHRM Policy 1.60 does not require progressive discipline as a condition precedent to issuing Written Notices. The Hearing Officer is not a “super personnel officer” who can substitute his opinion as to when an agency should use progressive discipline. However, the Agency did so in this case by giving Grievant warnings and a written notice of improvement needed/substandard performance

Grievant also contends the disciplinary action was unfair and unwarranted. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Grievant was aware of her performance issues and failed to make satisfactory progress toward improvement. While the Grievant proffered explanations for many of her errors, she conceded the errors were made. The extent of the record of errors belies the Grievant’s contentions that her performance deficiencies were caused by inadequate training. Many of the errors in the grievance record are simply repeated inattention to detail—not policy or procedure mistakes. While the Grievant presented a sincere belief that the discipline was not justified, the accumulation of her continuing lapses justifies the Agency’s discipline. The Agency’s action falls well within its discretionary management function and obligation to promote a well-managed workforce.

Grievant documented during the earlier stages of the grievance allegations of a hostile work environment and disciplinary retaliation. No credible evidence was presented at the grievance hearing to support these assertions. However, Grievant was not able to identify any individual instances of inconsistent application of policy or present evidence as to misapplication or non-consistent application.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...” Va. Code § 2.2-3005. Under the Rules for Conducting Grievance Hearings, “[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. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the claimant engaged in the described conduct which the Agency appropriately characterized as misconduct. The Agency's discipline was consistent with law and policy, and no mitigating circumstances exist to reduce the disciplinary action. Accordingly, the Agency's discipline of the Group I Written Notice for unsatisfactory job performance is upheld.

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, 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 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

November 5, 2009

RE: **Grievant v. Department of Corrections**
Case No. 9168

Dear Grievant:

The Agency head, Ms. Sara Wilson, has asked that I respond to your request for a review of the hearing officer's decision in the above referenced case. Please note that a party to the grievance may file an administrative review request within 15 calendar days from the date the decision was issued if any of the following applies:

1. A request to reconsider a decision or to reopen a hearing is made to the hearing officer. This request must state the basis for such request. This request must be based on new evidence that could not have been discovered before the hearing, or if it is believed the decision contains an incorrect legal conclusion.
2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resource Management. The challenge must include the specific policy and an explanation of why it is believed the decision is inconsistent with that policy.
3. A challenge that the hearing decision does not comply with the grievance procedure is made to the Director of the Department of Employment Dispute Resolution. The challenge must state the specific portion of the grievance procedure with which it is believed the decision does not comply.

Our records show that you fully met the requirement of filing your request for an administrative review in a timely manner. While you indicated that you submitted your request because you feel the hearing officer did not address the violation of DHRM policy by your agency when you were issued a Group I Written Notice, you did not enumerate how the policy was violated. It appears that the issues you raised are related to how the hearing officer assessed the evidence and the weight he placed on that evidence in making his decision. This Agency is authorized to review only the interpretation and application of policy and has no authority to

address the issues you raised. We must therefore respectfully decline to honor your request to conduct an administrative review.

Sincerely,

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