

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 04/15/10; Decision Issued: 04/27/10; Agency: VDEM; AHO: John V. Robinson, Esq.; Case No. 9263; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9263

Hearing Officer Appointment: January 12, 2010

Hearing Date: April 15, 2010

Decision Issued: April 27, 2010

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment, pursuant to a written notice, issued October 6, 2009 by Management of Department of Emergency Management (the “Department” or “Agency”), as described in the Grievance Form A dated November 5, 2009.

The parties participated in a second pre-hearing conference call scheduled by the hearing officer on April 2, 2010 at 3:00 p.m. The Grievant, the attorney for the Agency (the “Attorney”) and the hearing officer participated in the call. The Grievant is presently seeking the relief requested in her Grievance Form A.

During the proceeding, the Grievant represented herself and the Agency was represented by the Attorney. In this proceeding the agency bears the burden of proving by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances. The Grievant bears the burden of proving her affirmative claims of retaliation, hostile work environment and racial discrimination.

At the hearing, 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 Agency Exhibits 1 through 18 in the Agency’s binder and all of the exhibits in the Grievant’s binder.¹

APPEARANCES

Representative for Agency

¹ References to the Grievant’s exhibits will be designated GE followed by the fax page number. References to the agency’s exhibits will be designated AE followed by the exhibit number.

Witnesses
Grievant

FINDINGS OF FACT

1. The Grievant was an Accounting Manager, previously employed by the Agency in the Finance Division.
2. The Grievant has an active Group II Written Notice issued October 29, 2008, for failure to follow a supervisor's instructions.
3. The purpose of the Grievant's position was:

To manage a team of professionals in Accounting to ensure accuracy & timeliness of processes and compliance with state and federal regulations and generally accepted accounting principles. Develop policies and procedures for all areas of responsibility.

AE 8.

4. The Grievant reports to the Supervisor who reports to the Deputy of Administration. The Deputy of Administration reports to the State Coordinator. AE 16-17.
5. The Grievant was hired, in part, because of her experience with converting financial systems. The Agency was in the process of converting its files to the Financial Management System (FMS). In addition, the Agency was in the process of adopting the Agency Risk Management & Internal Control Standards (ARMICS) initiative of the Department of Accounts.
6. The Agency's job description for which the Grievant successfully applied provided, in part, as follows:

Our Finance Office is seeking an individual to manage daily accounting operations, supervise account staff ensuring accuracy and timeliness of processes and compliance with state and federal regulations and generally accepted accounting principles. Develop accounting policies and procedures. Perform additional disaster duties as assigned.

Considerable knowledge of fiscal and accounting operations, generally accepted accounting principles

(GAAP), and internal records. Demonstrated ability to gather and analyze complex data, prepare reports, and make effective recommendations. Considerable knowledge and use of spreadsheet and word processing software applications, and ability to use and extract financial data from automated systems. Demonstrated leadership, management and supervisory skills. Strong organizational skills, detail orientation, ability to prioritize and make decisions. Excellent oral and written communication skills. Demonstrated customer service experience both internally and externally. Ability to lead and motivate a team. . .

AE 10 (Emphasis supplied.)

7. The Grievant's resume qualifications provided to the Agency in 2007 when she applied for the job provided, in part, as follows:
 - Highly motivated with strong organizational, analytical, and problem solving skills . . .
 - Known for initiative and willingness to accept responsibility. Demonstrated business acumen and ability to meet deadline commitments with professional accuracy and discretion . . .

AE 12.

8. Great demands are placed on all personnel within the Agency which is charged with responding to and managing all types of emergencies and disasters within the Commonwealth. The Finance Department is charged, amongst other things, with administering and managing various federal and state grants integral to the operations of the Agency and timely compliance with deadlines is of particular significance, with attendant serious consequences for any failures or delays.
9. As the Accounting Manager within the Finance Department, the Grievant managed a team of four (4) persons at the time of the termination of her employment. AE 17.
10. One of the Grievant's primary responsibilities was to ensure that all applicable deadlines were met. The Grievant has authority and was required to delegate duties and responsibilities to those employees under her supervision to meet deadlines within the Finance Department. However, as Grievant has admitted, ultimately the responsibility for meeting the deadlines under her charge lay with the Grievant, as supervisor of the Accounting team. *See, e.g.,* AE 4 at 2.

11. When the Grievant was hired by the Agency in March 2007, Management clearly informed the Grievant and the Grievant understood the importance of deadlines and her responsibility for ensuring compliance in this regard. The Grievant never complained to the Supervisor that the Grievant could not be responsible because the Grievant's supervised accounting staff did not listen to her.
12. Management has tried to assist the Grievant with meeting deadlines by putting her on notice concerning the issue and by offering and providing training and instruction. In her last performance evaluation from Management the Grievant received a "Marginal Contributor" rating from the Agency concerning the core responsibility category "Project Management – Organizational Planning":

[Grievant] does not always follow through on assignments she is assigned and has missed some important deadlines during this performance cycle. At times, she has waited until the last minute to ask staff for assistance. Two of the major projects that were assigned to [Grievant] were ARMICS and FMS. [Grievant] has not been engaged in the FMS project during this performance cycle.

AE 14 at 1.

13. After several issues arose between Management and the Grievant, as part of the resolution, on June 11, 2009, Management issued to the Grievant a Notice of Improvement Needed/Substandard Performance. Amongst other things, the improvement plan provided the following summarized recommendations to the Grievant:
 1. When issues are brought to your attention and you do not know the answer, you need to take time to research the issues before providing an answer.
 2. When you are asked to perform tasks, they need to be conducted in a timely manner and you need to keep your supervisor informed.
 3. You need to carefully review your work product before passing it along to your supervisor or staff.
 4. You need to take the time to ensure the grant spreadsheets, CARS Reports, FINDS download and federal balances are accurate.
 5. Each Monday please provide me with a status report of accomplishments from the prior week.
 6. You need to stop being insubordinate and refrain from raising your voice to your supervisor and show professional courtesy to all employees at VDEM.

7. Until further notice, you will not be allowed to telework. Your telework request will be re-evaluated in the future.

AE 1 at 3 (Emphasis supplied.)

14. On September 23, 2009, the Supervisor issued a Due Process Notification to the Grievant concerning the Grievant's failure to comply with various duties assigned to the Grievant per the Supervisor's instructions.
15. On September 23, 2009, the Supervisor issued to the grievant a Due Process Notification (the "Notification"). AE 5. The Supervisor asked the Grievant to submit a written response to six questions by noon September 28, 2009. AE 5.
16. After receiving the Grievant's response (AE 6), Management reasonably concluded that the Grievant had failed to follow the Supervisor's instructions and issued a Group II Written Notice and related termination effective October 8, 2009:

Nature of Offense and Evidence: Failure to Follow Supervisor's Instructions

[The Grievant] failed to resolve the July 2009 submission of the HMEP request for additional information from U.S.D.O.T. after repeated requests from her supervisor. [The Grievant] failed to follow through on the timely submission of the August 2009 HMEP request for federal funds which was under her supervision. [The Grievant] did not certify the monthly CARS certification prior to 5 p.m. on August 31, 2009 and did not complete the timely request from APA on the Single Audit Reports after several electronic reminders.

A Due Process Notification Memorandum (attached) was issued to [the Grievant] on September 23, 2009, by her supervisor which outlined the issues and the dates of requests. [The Grievant] was given an opportunity to respond to the issues of concerns but failed to address the reasons why she did not follow her supervisor's instructions.

Additional information is attached to support the Group II Notice.

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 each of the Agency's witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of each of the Agency witnesses at the hearing was candid and forthright.

APPLICABLE POLICY AND LAW, ANALYSIS,
ADDITIONAL FINDINGS AND DECISION

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 her 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. In all other actions, such as the Grievant's claims of retaliation and racial discrimination in this proceeding, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. See EDR Grievance Procedure Manual § 5.8; see also EDR Decision #9080. A preponderance of evidence is evidence which shows that what is sought to be proved is more probable than not. See EDR Grievance Procedure Manual § 9; see also EDR Decision #9080.

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. The Standards of Conduct Policy No. 1.60 provides that a second Group II Notice normally should warrant removal from employment.

The Grievant's failure to follow supervisor's instructions was appropriately considered by management to be a Group II offense in this proceeding. AE 6. The normal sanction for two Group II violations is termination.

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064, 2006-1169 and 2006-1283* and (3) a causal link exists between the adverse action² and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561 and 1587, page 5* (June 25, 2007). This is addressed in greater detail below.

To prevail on his claim of retaliation at hearing, the Grievant bears the burden of proving, by a preponderance of the evidence, that (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a casual link exists between the materially adverse action and the protected activity; in other words, that Management took a materially adverse action because she engaged in the protected activity.

The hearing officer finds that the Grievant engaged in protected activities when she complained to the Deputy Administrator about the Supervisor (including complaints made in 2009) and when she filed her EEOC claim. The Grievant suffered a materially adverse action. However, the hearing officer finds and decides that the Grievant has not borne her burden of proving by a preponderance of the evidence that a causal link exists between the termination and the protected activity. As the Attorney argued, the Grievant has not presented material evidence that the Grievant was discriminated against because of her race and similarly has not presented material evidence concerning any other affirmative claim.

In *Va. Polytechnic Instit. and State Univ. v. Quesenberry* (2009), which involved the university's anti-discrimination and harassment prevention policy, the Virginia Supreme Court

² On July 19, 2005, in Ruling #2005-1064, 2006-1169 and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which might well have dissuaded a reasonable worker from engaging in a protected activity.

emphasized that the Court of Appeals had strayed from *Barton*, which constituted “the proper review process” and had erred in applying an analysis grounded on “sexual harassment” claims brought under Title VII. The Court emphasized that the focus must be the state agency’s “exclusive right” to manage its affairs and operations, as provided by Va. Code § 2.2-3004(B).

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 has specifically asserted in her Form A that the Department failed to properly consider mitigating circumstances. The Grievant did not raise or address this issue in more detail during the hearing. DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007. *See also, Jacobs v. VEC*, 69 Va.Cir 66 (2005), which held that the agency’s consideration of mitigating factors is permissive not a mandate.

However, this DHRM ruling does not negatively impact the Grievant’s situation under the facts and circumstances of this proceeding because under Va. Code § 2.2-3005, this hearing officer is charged with the duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution”. EDR’s *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are “mitigating circumstances” such as “conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee’s long service, or otherwise satisfactory work

performance.” 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating and aggravating factors in disciplining the Grievant.

Accordingly, because the Department assessed mitigating and aggravating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department’s discipline exceeded the limits of reasonableness.

While the Grievant might not have specified all of the mitigating factors below, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. The Grievant’s overall rating as “Contributor” in the 2007 and 2008 periods. AE 13 and 14;
2. The stress of the Grievant’s position;
3. The illnesses, injuries and medical condition which the Grievant suffered during the relevant period; and
4. The Grievant’s heavy workload.

The offense here was serious. EDR has previously ruled that it will be an extraordinary case in which an employee’s length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; EDR Ruling 2010-2368. The weight of an employee’s length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee’s service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

The hearing officer decides for each offense specified in the Written Notice that the Agency has proven by a preponderance of the evidence that (i) the Grievant engaged in the

behavior described in the Written Notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

As the agency argued in this proceeding, the policy requires dismissal. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the Grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the Grievant from her employment 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 E. 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 Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).