

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 05/05/10;
Decision Issued: 05/14/10; Agency: VDOT; AHO: Thomas J. McCarthy, Jr.,
Esq.; Case No. 9316; Outcome: No Relief – Agency Upheld.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9316

Hearing Date: May 5, 2010
Decision Issued: May 14, 2010

APPEARANCES

Grievant
Agency Representative
2 Witnesses for Agency
1 Witnesses for Grievant, the Grievant

ISSUE

“Was the Group I Written Notice issued to Grievant on December 18, 2009, for disruptive behavior proper?”

FINDINGS OF FACTS

1. Grievant, a 23 year employee of the agency was issued a Group I Written Notice for Offense Category 37, disruptive behavior, after his Supervisor asked him why he had been seen in the Supervisor’s office while the Supervisor was not there.
2. In response to the above question, Grievant asked “Who told this?”. He then went to the area of the person who told (also a Supervisor) and appeared to be taking a picture of this Assistant Supervisor with his cell phone.
3. Grievant adamantly denies he took the above picture(s) with his cell phone camera and maintained he was checking on the time because he had forgotten his watch.
4. Grievant’s actions disrupted the section to the point the Supervisor was asked if Grievant had enough to do.
5. Grievant maintains he did not receive due process because he was not formally counseled on the above situation before the Group I was issued.
6. Grievant was informally counseled on his actions and had been previousl informally counseled on like actions.

7. Grievant testified that this written notice and the preceding events leading up to it were blown out of proportion as retaliation due to his testimony in a previous grievance (not his grievance) hearing.

8. Grievant's actions were disruptive to his section.

9. Grievant raised issues of noncompliance by the Agency: timing and arbitrary and capricious issue of the Group I Written Notice. The timing issue was not valid. Errors in reference to previous Group I Written Notices were corrected and explained.

10. Grievant was given opportunities to respond to the allegations of his actions.

11. Grievant was afforded full Due Process.

APPLICABLE LAW OR POLICY AND OPINION

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Standards of Conduct, Policy 1.60 applies to all sections covered by the Virginia Personnel Act and sets the criteria for Employee Standards of Conduct.

DECISION

From the evidence presented, the Written Notice dated December 18, 2009, was neither arbitrary nor capricious. Grievant's actions disrupted a busy agency section.

Evidence was presented that previous Written Notices which were corrected did not affect the December 18, 2009, Written Notice. (Agency I, Tab 2, Page 9.)

From the evidence, Grievant, by his actions, did not demonstrate respect for the Agency, Co-workers and Supervisors. He demonstrated contempt for Co-workers and Supervisors. He did not professionally try to resolve work-related issues among him and his Co-workers. His actions were disruptive and did not support the mission of the Agency.

From the evidence presented, the December 18, 2009, Group I Written Notice was neither arbitrary, nor capricious. The Group I Written Notice under Standards of Conduct Policy 1.60 was proper and is hereby 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. 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, 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.

Thomas J. McCarthy, Jr.
Hearing Officer