

Issue: Group II Written Notice (threatening, coercive behavior); Hearing Date: 06/21/11; Decision Issued: 06/21/11; Agency: DMV; AHO: Frank G. Aschmann, Esq.; Case No. 9607; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 9607

Hearing Date: June 21, 2011
Decision Issued: June 21, 2011

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Agency Presenter
Agency Representative
Agency Witnesses

ISSUE

Did the Grievant violate Agency policy by leaving a threatening or coercive telephone message on his supervisor's personal telephone on December 31, 2010, such as to warrant the issuance of a Group II Written Notice?

FINDINGS OF FACT

The Grievant is employed by the Agency as a Customer Services Generalist-Senior. One of the Grievant's responsibilities is to open the facility. He is identified as a "key holder." On December 29, 2010, the Grievant called in sick after over sleeping from use of pain killers. His call in was late. The call should have been made approximately one hour before the facility was to open at 7:30am but came approximately five minutes after that time. The Grievant's supervisor told the Grievant he expected him to call earlier in the future in these circumstances. The Grievant's supervisor was very busy the next day and did not pay much attention to the Grievant. The Grievant perceived a bad attitude by his supervisor. On December 31, 2010, the Grievant made three calls to his supervisor's private telephone, leaving a message which contained language indicating he would file complaints with various government officials to protect his job. The Grievant noted an attitude problem with his supervisor and requested his supervisor to be sensitive to his medical condition. The Grievant's message also includes a happy New Year wish and a request to remain friends. The Grievant's supervisor reported the message to his superiors. Management considered the situation and asked for an explanation. The Grievant responded that he had made the calls simply as a holiday greeting. The Agency management found that

explanation disingenuous and as a result, the Grievant was issued a Group II Written Notice on January 15, 2011. A suspension was contemplated but because of the Grievant's length of service no suspension was made. The Grievant requested a due process hearing on the Group II Written Notice.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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 Agency uses these policies for its Standards of Conduct.

The plain text of the message the Grievant left on the telephone of his supervisor reveals that the message is more than simply a holiday greeting. The meaning of the message is not masked by the pleasantries which are included. The message refers to the incident at work and makes a complaint about the behavior of the supervisor. The message is clearly an attempt to intimidate the supervisor and coerce the supervisor into behaving in a certain way towards the Grievant. This is done with threats of reporting the supervisor to government officials and causing him trouble with his employment. This behavior undermines the authority of the supervisor. Threatening and coercing a supervisor is a violation of the Code of Conduct for state employees. The Agency was justified in taking disciplinary action when the Grievant left the message for his supervisor.

DECISION

The disciplinary action of the Agency is affirmed.

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, VA 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) 786-0100.

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 contrary 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.

Frank G. Aschmann
Hearing Officer