

Issue: Two Group II Written Notices (unsatisfactory performance); Hearing Date: 07/19/11; Decision Issued: 07/26/11; Agency: VDOT; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9634, 9635; Outcome: No Relief – Agency Upheld.

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Numbers 9634 & 9635**

**Hearing Date: July 19, 2011**

**Decision Issued: July 26, 2011**

**APPEARANCES**

Grievant  
Grievant's Counsel  
Department Representative  
2 Witnesses for Department  
1 Witness for Grievant – the Grievant

**ISSUE**

“Were the two (2) Group I Written Notices issued to Grievant and consolidated for hearing proper?”

**FINDINGS OF FACTS**

1. Grievant was formerly employed at the Department's [redacted] District office and subsequently transferred to the [redacted] District Office upon the new “Blue Print” reorganization for the Department.
2. Grievant's reassigned position placed her in areas new to her and she required and received training for her new duties.
3. Grievant has been diagnosed as having multiple sclerosis, which her doctor says affects focus on tasks. Although her overall cognition is intact, she did not inform the Department of her condition until she was in the grievance process.
4. Grievant received two (2) Group I Written Notices for “unsatisfactory performance”, failure to follow instructions and/or policy abuse of state time and computer/internet misuse. Evidence was presented that Grievant did not submit paperwork as she was trained to do, ate her lunch during work time and then took a lunch break, had many personal phone calls and used the internet for non-department matters.

5. The Department witnesses testified that she was informally counseled on these matters. Grievant's second Written Notice was for failure to accurately and timely order snow removal equipment by duplicating the order to the manufacturer and by delaying the corrected order. The duplication of the order could have cost the Department over \$200,000.00. The lack of timely submission of these orders caused the Department to not have the requested snow removal agreement for the winter of 2010-2011.

6. Grievant testified to problems with the financial management of the Department, which were corrected in time to timely procure the equipment. Grievant notified her supervisor of the problem.

7. Department witnesses testified that the Written Notices were not an attempt to get Grievant fired, but to help her to do her jobs correctly for her own benefit and the good of the Department.

8. The second Group I Written Notice was mitigated from a Group II to a Group I.

9. Grievant's job performance greatly improved after her "improvement plan" and the Written Notices were issued. Her error rate dropped to zero (-0-).

#### **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 (4<sup>th</sup> Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> 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.

During the time in question the Department was adapting to its new "Blue Print", which caused Grievant's transfer from [District] to [District] and required her to undertake new duties. Before learning of her multiple sclerosis condition, Grievant's supervisors had attempted to accommodate her with training and very informal counseling culminating in the Written Notices, one of which was mitigated from a Group II to a Group I. This Hearings Officer's impression was that the Department, through Grievant's supervisors, tried to improve Grievant's work performance to keep her as an employee.

#### **DECISION**

The Written Notices were proper and have resulted in Grievant maintaining her employment.

## 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 Department policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Department 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 Department shall request and receive prior approval of the Director before filing a notice of appeal.

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**Thomas J. McCarthy, Jr.**  
**Hearing Officer**