

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 02/03/17; Decision Issued: 02/08/17; Agency: DSS; AHO: Cecil H. Ceasey, Jr.; Case No. 10891; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 10891

Hearing Date: February 3, 2017
Decision Issued: February 8, 2017

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective October 27, 2016, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on November 7, 2016 at 2:00 p.m. The telephone pre-hearing conference was conducted with the Grievant's attorney and Agency advocate. During the telephone pre-hearing conference, it was agreed that the grievance hearing was to be conducted on Monday, December 5, 2016 beginning at 9:30 a.m. at the Virginia Department of Social Services in [city]. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and the other party no later than Tuesday, November 29, 2016 at 5:00 p.m.

By agreement, the hearing scheduled for December 5, 2016 was rescheduled. The Hearing Officer arranged a telephone conference conducted on November 22, 2016 with the Grievant's attorney and Agency advocate. It was agreed the hearing would be conducted on January 9, 2017 beginning at 9:30 a.m. at the [Agency's facility]. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and the other party no later than Monday, January 2, 2017 at 5:00 p.m., if not already provided.

The hearing scheduled for January 9, 2017 was postponed due to inclement weather. It was agreed the hearing would be conducted on Friday, February 3, 2017 beginning at 9:30 a.m. at the [Agency's facility].

APPEARANCES

Grievant
Counsel for Grievant

Agency Representative [and Witness]
Agency Advocate

ISSUES

1. Did the Grievant fail to follow her supervisor's instructions and policy as it relates to the Agency's Code of Ethics (as alleged in the Written Notice issued May 5, 2016)?

2. If so, was such failure to follow her supervisor's instructions and policy as alleged a Group II violation of the Agency's Standards of Conduct?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

A	Written Notice
B-1	Code of Ethics
B-2,3	Notice of intent dated 4-27-16
B-4,5,6	Thread of emails 4-15-16 to 4-18-16
B-7	Counseling Memorandum dated 7-31-15
B-8,9	Notice of intent dated 7-21-15
B-10	Response to notice of intent dated 5-3-16
C1 to C-9	Grievant's forms and attachments
D-1 to D-9	Grievant's attachments and responses
E-1 to E-3	Email thread from 7-6-15 to 7-7-15
F-1 to F-3	Email thread from 2-3-16 to 2-24-16
G	Management chart
H	Not admitted by agreement of the parties
I	Standards of Conduct

The Grievant's Exhibits admitted into evidence were contained in a single notebook as follows:

1	Notice of intent dated 4-27-16 with related email thread from 4-15-16 to 4-18-16
2	Grievant response to notice of intent dated 5-3-16

FINDINGS OF FACT

The Agency's representative was the Agency's only witness.

[The representative] testified that he has been employed by the Agency since 1987 and in the capacity of a manager since 2008. He testified that during that period he worked with the Grievant for thirteen to fourteen years and as the Grievant's manager since 2008.

Referring to Agency Exhibit B-1, he testified that the Grievant as an employee of the Agency is bound by the Code of Ethics, one item of which states "Treat all persons as you would like to be treated, in an even handed, respectful and courteous manner."

[The representative] testified that the Grievant's email directed to him dated April 18, 2016 at 9:44 a.m. violated the Code of Ethics by including the statement "Your interaction with me has been aggressively hateful and hostile... Your ongoing aggressive verbal reprimands to me are demeaning and show the degree of disrespect you have for me." He further testified that the Group II Written Notice was issued because the Grievant provided a response to the Notice of Intent dated May 3, 2016 and continued "the tone of communication that she has been asked to discontinue."

[The representative] testified that since 2014 the Grievant has been aggressive and hostile towards other employees within the unit, that the Grievant was given a counseling memo in 2014 and that since 2014 the Grievant has filed multiple grievances regarding him and other staff members.

[The representative] testified that after he issued the notice of intent to the Grievant she stated to him that he was "arrogant" and "you hate my guts."

Upon cross examination, when [the representative] was asked if the Grievant had the right to express herself as she did in staff meetings and through email he responded that she did not.

Upon completion of the testimony of [the representative], the Agency's only witness, the Grievant testified.

The Grievant testified that prior to [the representative] becoming her manager, they were co-managers. She testified that from the time [the representative] became her manager in 2008 until approximately 2013, the working relationship between them was "ideal." The Grievant denied that she told [the representative] that he was "arrogant" or that she stated "you hate my guts."

At the conclusion of the evidence, the Agency's advocate made a closing statement as did the Grievant's attorney. The Grievant's attorney argued that the actions of [the representative] are retaliation prohibited under Section 2.2-3000 of the Code of Virginia, as amended, and that the conduct alleged to constitute a Group II written offense is protected conduct. Grievant's attorney provided a copy of the opinion of Judge Melvin R. Hughes, Jr. dated April 17, 2009 in the matter of Commonwealth Ex Parte Science Museum of Virginia v. James Mahone, CL09-1351 together with the Order implementing the decision.

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 (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.

Standards of Conduct (Policy 1.60) apply to the Agency and to the Grievant as an employee of the Agency. The Standards of Conduct states as follows:

Group II Offense:

Offenses in this category include acts of misconduct or a more serious and/or repeat nature that require a formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violation of policies, procedures, or laws. (Agency Exhibit I)

DECISION

The Written Notice issued May 5, 2016 alleges a "failure to follow supervisor instructions and policy as it relates to the ... Code of Ethics... when communicating with others, as requested by her manager." The Written Notice goes on to say that the Grievant was "...directed to adhere to the ... Code of Ethics in her communication with staff/management" but that her comments included in her email to [the representative] dated April 18, 2016 violated the Code of Ethics and thus violated her supervisor's instructions and policy.

The Hearing Officer finds that Grievant's counsel correctly characterized the Grievant's conduct as protected under Section 2.2-3000 of the Code of Virginia wherein it is stated that "...employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and managers."

Quoting from the Mahone decision:

Both the Virginia General Assembly and the Virginia Department of Employment Dispute Resolution have expanded upon what constitutes "protected activities." Specifically, "protective activities" include "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

While not expressly argued by the Agency advocate, by implication the Agency asked the Hearing Officer to conclude that the language used by the Grievant in the Grievant's email is not "protected activity" because the Grievant's manager does not like the words, tone or both used by the Grievant and had instructed the Grievant to refrain from using such words and tones. The Hearing Officer disagrees.

The Agency refers to the Code of Ethics language that states "treat all persons as you would like to be treated, in an even handed, respectful and courteous manner," as the specific policy violated. The Hearing Officer finds that the Grievant's communication with her manager was within the scope of allowed expression and protected activity in the context of an employee's grievance.

In that the Hearing Officer concludes that the email written by the Grievant constituted a protected activity, that the Agency issued the Group II Written Notice, and that the language contained in the email was the reason for the issuance of the Group II Written Notice, a prima facie case of retaliation had been made by the Grievant. The burden of refuting the retaliation claim then fell to the Agency.

To refute the retaliation claim, the Agency needed to proffer a legitimate business reason to justify the issuance of the Group II Written Notice. The Agency failed to do so. The testimony of the Agency's only witness, [the representative], demonstrated that the only reason he issued the Written Notice was because he personally did not like the Grievant's words and tone used to describe him. No other evidence was offered by the Agency to show that the words of the April 18, 2016 email in any way interfered with the business of the Agency.

The Hearing Officer finds that the Agency did not meet its burden to show by a preponderance of the evidence that the conduct of the Grievant constituted a Group II violation of Standards of Conduct as alleged by the Agency. The Group II Written Notice shall be removed from the Grievant's employee records.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A 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 administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. A Received by@ means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

1. **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 refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director=s authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-1606 or emailed.

2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, as well as a request to present newly discovered evidence, is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR=s authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer=s original decision becomes a final hearing decision, with no further possibility of 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:** Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR=s approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency=s request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer