

Issue: Group II Written Notice with Suspension (neglect of duty); Hearing Date: 01/25/13; Decision Issued: 01/28/13; Agency: DCR; AHO: Cecil H. Creasey, Jr., Esq.; Case No.10002; Outcome: Full Relief.

COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution
Department of Human Resource Management

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 10002

Hearing Date: January 25, 2013

Decision Issued: January 28, 2013

PROCEDURAL HISTORY

Grievant is an environmental specialist (soil and water conservation district liaison) with the Department of Conservation & Recreation (“the Agency”), with over five years of service with the Agency as of the offense date. On August 2, 2012, the Grievant was charged with a Group II Written Notice, with ten days suspension, for neglect of duty, *i.e.*, unauthorized use of the Agency Director’s electronic signature on June 28, 2012. The Grievant had no prior, active disciplinary notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On December 19, 2012, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. Through pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, January 25, 2013, on which date the grievance hearing was held at the Agency’s facility. Accordingly, for good cause, the time for completing the grievance has been extended.

Both parties submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency’s or Grievant’s Exhibits.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The Grievant requests rescission or reduction of the Group II Written Notice and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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 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.

The Agency relied on its *Standards of Conduct*, DHRM Policy 1.60, which defines Group II offenses to include acts of misconduct of a more serious and/or repeat nature that

require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute a neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures or laws. Agency Exh. 7. Examples of a Group II offense include: failure to follow supervisor's instructions or comply with written policy; violation of a safety rule or rules (where no threat of bodily harm exists); leaving work without permission; failure to report to work without proper notice; unauthorized use or misuse of state property; refusal to work overtime.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

On June 28, 2012, the Board of the Water and Soil Conservation District Association met and finalized the annual contract with the Agency that takes effect July 1. This meeting was conducted later than typical and put the Agency under a time pressure to finalize the executed contracts by July 1, 2012, a commitment made by the Agency personnel, including the Director. Following the June 28, 2012, meeting, the Grievant had the responsibility to implement the contract modifications for at least 47 districts, which included multiple grant agreements for each district.

The Grievant worked into the evening of June 28 to complete the project, and she inserted the Agency Director's electronic signature on the agreements. The Grievant testified that she had access to the electronic signature that was transferred from predecessor staff members' computer files, and she produced copies of the electronic signature's file properties showing the Director's assistant as the author of the electronic signature. Gr. Exh. 3. After the project was completed on June 28, the Grievant received an email from the conservation programs manager advising that permission must be obtained from the Director before his signature could be inserted or applied to the agreements. Gr. Exh. 4; Agency Exh. 4. The Grievant later in the evening replied by email to the conservation programs manager, with a copy to the program manager for stormwater (the Grievant's direct supervisor) that she had already completed the agreements and inserted the Director's electronic signature. The various grant agreements with the Director's electronic signature were awaiting review and finalization and were not released from the Agency.

The Director testified that he has never authorized any Agency personnel to insert his signature on any document or agreement without first giving his specific authorization. The Director testified that his signature is document specific, and that his administrative assistant is the only staff member authorized to retain and use his electronic signature. The Director also testified that the division director was aware of the Director's electronic signature control.

The Director's administrative assistant testified that she has never given the Director's electronic signature to anyone, and that she is the sole keeper of the electronic signature. The assistant testified that she, and she alone, inserts the Director's electronic signature on any Agency documents—and only after the Director's specific authorization. She insisted that the Director likes to review everything with his signature. She testified that she was made aware on the morning of June 29 that the grant agreements were produced with the Director's electronic

signature; she asked the Director whether he authorized his signature; and, upon learning that the signature was unauthorized retrieved the contracts and had them destroyed. The administrative assistant testified that the Grievant obtained the Director's electronic signature in an unauthorized manner by "plucking" it from another electronic document.

The Agency's chief deputy director testified that he specifically gave the conservation programs manager permission to place his electronic signature on the grant agreements, but cautioned to obtain the Director's authorization. The chief deputy director did not communicate directly with the Grievant on this subject.

The Agency's program manager for stormwater division (the Grievant's direct supervisor) testified that when she learned that the Grievant had inserted the Director's electronic signature, she tried, unsuccessfully, to reach the Grievant and her immediate supervisor, the conservation programs manager. The program manager for stormwater then advised the Director's administrative assistant. The program manager for stormwater testified that the conservation programs manager specifically told both the Grievant and her on June 27 not to use the Director's electronic signature without express permission from the Director. However, the program manager for stormwater does not consider the Grievant's actions, in using the Director's electronic signature, had any malevolent intent.

Testifying for the Grievant, the Agency's former chief deputy director (and one-time acting director) testified that it was common to use the Agency director's electronic signature for grant agreements and similar instances because it was time efficient and avoided the physical discomfort of signing hundreds of documents at a time. He testified that the Grievant was a good, conscientious employee.

The conservation programs manager testified, contrary to the testimony of the program manager for stormwater, that he did not recall a conversation with them on June 27 about obtaining the Director's express permission before using his electronic signature. The conservation programs manager was the Agency's employee of the year for 2011. He testified that the Grievant was a conscientious, dedicated and outstanding employee. He testified that there was historical precedent for the process the Grievant followed, and he does not believe the Grievant is guilty of any offense related to her use of the electronic signature.

The Agency's retired division director for soil and conservation testified that when the Director was appointed, the Director's administrative assistant emailed the Director's electronic signature to him and his staff, and it did not come with any documentation for use, restrictions, or limitations. He also testified that both the conservation programs manager and the Grievant were credible and reliable employees.

The Grievant testified that she did not "pluck" the Director's electronic signature from a previously executed document. Contrary to the Director's administrative assistant's insistence, the Grievant testified that her predecessor staff members had among their computer files the Director's electronic signature file, which was handed over to the Grievant. The Grievant produced computer screen shots of the file properties of the signature document, showing the Director's administrative assistant as the author. The Grievant credibly testified that she was never instructed not to use the Director's electronic signature without his express consent each time. The Grievant testified that she could not have had a conversation on June 27 about the use

of electronic signatures because other meetings that day otherwise occupied her. During the Agency's rebuttal evidence, the administrative assistant testified to a prior conversation with the Grievant in which this topic was discussed. The Grievant, on surrebuttal, testified that she never had such a conversation with the administrative assistant.

The Group II Written Notice charges the Grievant with neglect of duty and, essentially, direct disobedience of instruction—unauthorized use of the Director's electronic signature. I find that the Agency has failed to meet its burden of proof establishing the duty specifically placed on the Grievant. The Grievant, and other witnesses, testified credibly that the Agency's historic practices, even with this current Director, is for the placement of his electronic signature on documents such as these grant agreements. The grant agreements at issue were not sent out without the Director's approval, as the Director's administrative assistant retrieved them and destroyed them. The placement of the Director's electronic signature was a transparent, open and obvious step by the Grievant, in accord with her understanding of Agency practice, and not one that could be viewed as evasive, concealing, or fraudulent.

All the witnesses testified that the timing of completing these agreements for final execution before July 1 placed the project on a rather urgent basis. The Director and his administrative assistant insist that the administrative assistant is the only staff person who is authorized to place his electronic signature on documents. However, that assertion is not consistent with the alleged directive to staff members that presumes they have access to use the Director's electronic signature with authorization. In fact, the evidence preponderates in showing that the Director's electronic signature had been legitimately within the realm of other staff members. The signature control was not, in practice and actuality, as the Director apparently desired. Regardless, the Grievant testified credibly that she was in possession, via her Agency computer, of the Director's electronic signature, and that it had been used before by predecessor staff members (other than the Director's administrative assistant) legitimately for Agency purposes. Her use of the electronic signature was consistent with her prior experience.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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). However, the hearing officer must consider all the evidence *de novo* (afresh and independently, as if no determinations had yet been made) and make a factual determination of whether the offense occurred.

The Agency argues, reasonably, that the Director is fully entitled to control the use and implementation of his signature. The Director is within his authority to restrict access to and the use of his electronic signature. However, in this instance, the Agency has not shown, by a preponderance of the evidence, any specific communication to the Grievant of the Director's instruction not to place his electronic signature on the grant agreements produced June 29. The Grievant acted consistently with her experience of actual Agency practice, as supported by not just her testimony but also that of senior Agency officials. The email to her after the fact on June 29 cannot serve as a basis to impart the duty charged as neglect. Without such prior communication to the Grievant, the charge of neglect of duty must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice is **reversed** in all respects.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written over a horizontal line.

Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.