

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 03/01/13;
Decision Issued: 03/13/13; Agency: VDFP; AHO: John V. Robinson, Esq.; Case
No. 10016; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
Office of Employment Dispute Resolution**

DIVISION OF HEARINGS

In the matter of: Case No. 10016

Hearing Officer Appointment: February 4, 2013

Hearing Date: March 1, 2013

Decision Issued: March 13, 2013

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice issued by Management of the Department of Fire Programs as described in the Grievance Form A dated November 20, 2012.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on February 14, 2013 at 3:30 p.m. [The Grievant], [the Agency's attorney] and the hearing officer participated in the call. The Grievant, by counsel, confirmed she is seeking the relief requested in her Grievance Form A. Following the conference call, the hearing officer issued a Scheduling Order entered February 15, 2013, which is incorporated herein by this reference.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency was represented by its attorney and the Grievant was represented by her advocate.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency's binder, Exhibits 1 through 11 and all documents in the Grievant's binder, Exhibits 1-30.1. Upon objection by the Grievant, the hearing officer declined to admit the Agency's amended Exhibit 9 as this document was not timely exchanged pursuant to the Scheduling Order.¹

¹ References to the Agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits will be designated GE followed by the exhibit number.

APPEARANCES

Representative for Agency
Witnesses
Grievant

FINDINGS OF FACT

1. The Grievant is an Accountant employed by the Agency in the Fiscal Services Division of the Finance Branch. AE 4.
2. Fiscal Services must comply with the Commonwealth's Prompt Pay Act under which bills from vendors must be processed and paid within thirty (30) days.
3. This function was only moved back to the Agency in 2008 and failure to comply with the Act could cause the Department to lose Fiscal Services again. Accordingly, the Finance Branch Director considers it imperative that the Fiscal Services have suitable staff coverage Monday through Friday for risk management controls, including to handle unexpected accounts payable issues and other matters which might arise.
4. On September 21, 2012, the Grievant e-mailed the Director of Finance requesting permission to be off on Friday, October 12, 2012 and in this request the Grievant stated, "I will coordinate with [the Fiscal Tech] so that he will be here to cover deposits that day." AE 5.
5. The Director of Finance granted permission for the Grievant to take off Friday, October 12, 2012 subject to the condition precedent that the Fiscal Tech work from 8:30 a.m. - 1:30 p.m. that Friday to provide what the Director considered adequate risk management coverage within the Fiscal Services Division.
6. The Director's instruction to the Grievant that the Fiscal Tech work Friday, October 12, 2012 was made amply clear to the Grievant, including when the Director left to take her annual leave in the mountains of West Virginia, in a preceding Finance Branch meeting on September 25, 2012 and in the minutes of such meeting. Tape; AE 6.
7. Both the Fiscal Tech and the Grants and Local Aid Manager clearly understood the Director's instruction and during the hearing even the Grievant appeared to admit on cross-examination that she breached a command her manager gave her. Tape.

8. Nevertheless, and despite her admissions that she did get it that the Fiscal Tech needed to come in that day and that she did not have authority to give the Fiscal Tech the day off, the Grievant called the Fiscal Tech late on October 11, 2012 to tell him he did not need to come in the next day.
9. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

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).

Va. 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct (the "SOC") provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

Consistent with the SOC Policy, the Grievant's infraction can clearly constitute a Group II offense: Examples: Failure to follow supervisor's instructions or comply with written policy. SOC Attachment A. AE 3.

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Grievant argues that the Agency's punishment was too severe for a first offense and should be reduced. The Agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The Agency reduced the discipline to a Group I offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's attorney that the Grievant's disciplinary infractions justified the discipline by Management concerning the infraction. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group I offense after giving effect to the Director's mitigation.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant and in fact mitigated the discipline.

While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's service to the Agency;
2. the fact that the Grievant received an overall rating of "Major Contributor" in her most recent performance evaluation (AE 9) and overall ratings of "Contributor" in the preceding two (2) annual evaluations (GE 11 and GE 13.2); and
3. the often difficult and stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.* In this case, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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).

In her Form A, the Grievant raised various affirmative defenses such as retaliation. These affirmative defenses were not pursued or fully developed at the hearing and, in any event, the hearing officer finds there is insufficient evidence in the record to even begin to decide that the Grievant has met her evidentiary burden of proof in this regard.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the Group I Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant in this proceeding is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

- 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. 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 or e-mailed.
- 2. A challenge that the hearing decision does not comply with grievance procedure** 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 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 should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

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 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 EDR before filing a notice of appeal.

ENTER: 3 / 13 / 2013

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Rules for Conducting Grievance Hearings*, § V(C)).