

Issues: Group II Written Notice (failure to follow instructions/policy) and Termination (due to accumulation); Hearing Date: 06/03/13; Decision Issued: 06/21/13; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No.10088; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10088

Hearing Officer Appointment: April 29, 2013

Hearing Date: June 3, 2013

Decision Issued: June 21, 2013

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of his employment effective March 12, 2013, pursuant to a Group II Written Notice issued on March 12, 2013 by Management of the Department of Juvenile Justice (the "Department" or "Agency"), as described in the Grievance Form A dated April 10, 2013. The Grievant was terminated because of his accumulation of two (2) active Group II Written Notices. AE 3¹.

The hearing officer was appointed on April 29, 2013. The hearing officer scheduled a pre-hearing telephone conference call at 2:00 p.m. on May 7, 2013. The Grievant, the Agency's advocate (the "Advocate"), and the hearing officer participated in the pre-hearing conference call. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on May 15, 2013 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Agency was represented by its advocate and the Grievant represented himself. 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 Agency exhibits 1-16 in the Agency's binder.

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. Of course, the Grievant bears the burden of proof concerning his affirmative claim of harassment.

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

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was a Rehabilitation Counselor Supervisor, previously employed by the Agency at a juvenile detention facility (the "Facility") before the termination of his employment by the Agency.
2. The Grievant's core responsibilities included supervising and monitoring the delivery of case management services by the counselors , including monitoring development of treatment plans, preparation of release packets and major offender and serious offender review packets, ensuring that appropriate documentation is completed on each resident with 100% compliance. Timely processing of documents at the Facility, including filing of documents, is important to the smooth and efficient operation of the correctional facility. The Superintendent of the Facility testified credibly and consistently that failure to follow Agency document policies and procedures would have a significant adverse impact on the operations of the correctional facility.
3. On April 7, 2009 the Grievant was issued a Notice of Improvement Needed/Substandard Performance for deficiencies in timely complying with Agency policies concerning certain documentation. AE 8-1.
4. On August 15, 2012, the Grievant was issued a second Notice of Improvement Needed/Substandard Performance for items including timely compliance with Agency policies concerning documentation. AE 7-1.
5. On December 19, 2012, the Grievant received a Group II Written Notice for "a significant number (54) of correspondence/documentations that had not been either opened or filed. All dealt with important residential information that should have been included in the residents' files". AE 4-1.
6. In his most recent Performance Evaluation by Management of October 9, 2012, the Grievant was warned: "[Grievant] has done a marginal job of monitoring the delivery of case management services by counselors and demonstrated by the fact that several of his staff cases were found to be considerably out of compliance in regards to the timely submission/processing of reports, BADGE entries, service plan development/reviews and case transfers. . ." AE 9-1.

7. Concerning the disciplinary infraction which is the subject of this proceeding the Assistant Superintendent for Treatment entered the Grievant's office on February 15, 2013 to look for documents which the Assistant Superintendent believed might be needed for an audit scheduled for February 19, 2013.
8. The Assistant Superintendent found 115 documents in the drawer of a file cabinet and 7 documents on the Grievant's desk. These documents should have been included in the residents' files.
9. Documents numbered 1 - 115 in AE 3-3 to 3-5 included certain original documents addressed to the Grievant. Documents numbered 116 - 122 which were found on the Grievant's desk included certain original Family/CSU follow-up notifications of Serious Incident which had not been timely processed even though applicable policy requires action within 24 hours.
10. The Grievant did have access to an office services assistant ("OSA") at the facility to help with filing.
11. The testimony of the Agency witnesses was credible and consistent. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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 "SOC"). AE 5. 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 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 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).

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.*

Pursuant to the SOC, the Grievant's infraction could clearly constitute a Group II offense, as asserted by the Department.

b. Group II Offense:

Offenses in this category 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 neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures or laws.

AE 5-8.

The Standards of Conduct provide that a second active Group II Notice normally should result in termination. AE 5-9. The hearing officer agrees with the Agency's assertion that the repetitive nature of the Grievant's offense concerning timely processing of important documents and specifically the accumulation of two (2) Group II Written Notices for this offense warrants termination of the Grievant's employment in this case.

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 Grievant admits that six of the seven documents which the Department asserts were left on the Grievant's desk were in fact left on the desk. 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 II offense. Additionally, the cumulation of the two active Group II Notices warrant termination.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The Grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

The Grievant raised harassment in his response to the Written Notice but did not develop this assertion during the hearing and certainly did not satisfy his burden of persuasion or burden of production in this regard.

DECISION

The hearing officer upholds the Group II Written Notice issued by the Agency against the Grievant, the Agency having sustained its burden of proof in this regard. The hearing officer also upholds the termination of the Grievant's employment because of his accumulation of two active Group II Written Notices.

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: 6 / 21 / 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)).