

Issue: Group I Written Notice (unsatisfactory performance and disruptive behavior);  
Hearing Date: 03/14/13; Decision Issued: 04/01/13; Agency: DARS; AHO:  
John Hooe, Esq.; Case No. 2013-9948; Outcome: Full Relief.

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

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER**

**In the matter of : Case No. 9948**

Hearing Date: March 14, 2013  
Decision Issued: April 1, 2013

**PRELIMINARY MATTERS**

On November 8, 2012 the Hearing Officer scheduled a telephone pre-hearing conference to be conducted on November 26, 2012. During the telephone pre-hearing conference, the Grievant requested that the hearing be scheduled on January 17, 2013. Accordingly, the Hearing Officer sent out a letter notice dated November 29, 2012.

Due to the unavailability of two witnesses and at the request of the Grievant, the hearing was postponed from January 17, 2013 to March 14, 2013.

Prior to the hearing scheduled for March 14, 2013, it was learned that a witness was unavailable. Prior to the hearing, the Grievant and the Agency agreed to conduct the hearing on March 14, 2013 despite the absence of the witness.

**APPEARANCES**

Grievant  
Representative for Agency  
Agency Advocate  
Four witnesses for Agency  
Two witnesses for Grievant

## **ISSUES**

1. Did the Grievant inaccurately relay information that negatively impacted the working relationship between the Fiscal and PPS departments at the Agency?
2. Did the Grievant's actions cause a significant disruption to the Agency operation?
3. Did either of the aforementioned actions constitute a violation of the Standards of Conduct Group I Offense for unsatisfactory performance and disruptive behavior?
4. Were mitigating factors considered? If so, did consideration of the mitigating factors result in less severe discipline than could have otherwise been imposed?

## **EXHIBITS**

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

- A - Letter to Grievant from supervisor dated July 19, 2012
- B - Letter from Grievant to supervisor dated July 27, 2012
- C - Written notice for a Group II violation issued August 16, 2012
- D - Grievant's appeal of Group II notice dated August 27, 2012
- E - Grievant's Form A
- F - Memo of witness B.P.S. dated August 21, 2012
- G - Management step response dated September 17, 2012 reducing to Group I offense for "unsatisfactory performance and disruptive behavior".
- H - Written notice issued September 24, 2012 for Group I offense
- I - Memo from Grievant to human resources dated September 27, 2012
- J - Standards of Conduct Policy 1.60
- K - Series of emails between Grievant and supervisor dated July 28, 2011, August 17, 2011, September 8, 2011 and September 13, 2011

The Grievant's Exhibits admitted into evidence included a cover page and the following contents:

- A - Letter to the Grievant from supervisor dated July 19, 2012
- B - Letter from Grievant to supervisor dated July 27, 2012
- C - Written notice Group II issued August 16, 2012
- D - Appeal of Group II notice dated August 27, 2012
- E - Grievant's Form A
- F - Memo of witness B.P.S. dated August 21, 2012

- G - Management step response dated September 17, 2012 and written notice Group I issued September 24, 2012
- H - Memo from Grievant to human resources dated September 27, 2012
- I - Series of emails between Grievant and supervisor dated September 8, 2011, September 9, 2011 and September 13, 2011

### **FINDINGS OF FACT**

The Grievant filed a timely appeal from a Group I Written Notice issued on September 24, 2012 with an offense date of May 17, 2012. The Written Notice (Agency Exhibit H) describes the offense as "Group I 11, 37". The written notice describes the offense as "Employee inaccurately relayed information that negatively impacted the working relationship between Fiscal and PPS departments...The employee actions also caused a significant disruption to the Agency operation."

The disciplinary action taken was the issuance of a Group I Written Notice without further discipline.

The Agency did not include in its exhibits or in the testimony of its witnesses any explanation as to the meaning of the numbers "11, 37" following the designation Group I.

Agency Exhibit J, Standards of Conduct, Policy 1.60 sets out at page 8 the following:

a. Group I Offense

Offenses in this category include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention.

· See attachment A for examples of Group I Offenses.

The Agency did not introduce into evidence a copy of attachment A for examples of Group I Offenses.

The Grievant's supervisor testified that she had been supervising the Grievant since the Fall of 2011, that the Grievant is not used to supervision and that their relationship was difficult from the beginning. She testified that the Grievant had received no formal counseling as a result of any prior alleged misconduct by the Grievant but that the Grievant had been notified verbally and by email.

The supervisor testified that she met with the Grievant and a co-worker of the Grievant on May 16, 2012 at which time certain procedures and policies were discussed. She testified that she expressly told the Grievant and the co-worker that the information was confidential and not to share the information with anyone. She testified that she was simply seeking input from them and asked them to consider alternatives and report back to her.

The Grievant's co-worker who was in the meeting with the supervisor testified that the supervisor told them that information was confidential. The co-worker further testified that she later heard the Grievant discuss the matter with other employees. The co-worker confirmed that the following day she and the Grievant met with the supervisor who was "very upset" and that the supervisor said "we're putting this matter to bed." The co-worker further testified that she (the co-worker) was not disciplined regarding this matter.

Another witness whose notes titled "...Meeting with PPS 5-17-12" are at Agency Exhibit C stated that the Grievant said that her supervisor had sent her to PPS to meet with them to deliver three messages that were effective immediately. He further testified that after the Grievant delivered the three messages, she also said that the supervisor instructed her to issue an email to the supervisor summarizing the discussions. He further testified that the co-worker who was with the Grievant in the meeting with the supervisor joined in the discussion and never told them the information was confidential or attempted to stop the Grievant on the basis that the information was confidential. He further testified that he was not aware of any bad motives on the part of the Grievant in sharing the information.

The supervisor testified that she believed that the Grievant shared the information intending to cause the supervisor personal difficulties.

Another Agency employee was called as a witness by the Grievant. She stated that she was at the meeting where the employees were called together by the Grievant to share the information. She said that the information was shared in a normal professional manner by the Grievant. She also stated that she was not aware of any bad motives on the part of the Grievant in sharing the information. In addition, she testified that the Grievant's co-worker who was in the meeting with the supervisor never interrupted the Grievant or stated that the information was confidential and not to be shared.

Another employee called as a witness by the Grievant testified that he was at the gathering where the information was shared by the Grievant. He confirmed that the information was presented by the Grievant in a professional manner and questions that anyone was upset by the fact that the Grievant shared the information.

The Grievant through the written documents introduced as exhibits explained her version of what occurred. She also testified that as they were returning from the meeting with the supervisor the co-worker who was in the meeting with the supervisor discussed with the Grievant how to best present the information to the other employees.

It is undisputed that the Grievant has been a good employee of the Commonwealth of

Virginia for almost eighteen years without receiving a Written Notice prior to the one in question. It is noted that the alleged offense occurred on May 16, 2012 but the initial Written Notice for Group II insubordination was not issued until August 16, 2012. The supervisor testified that there were no further problems with the Grievant's behavior between May 16 and August 16 and that the delay was due to the supervisor's other demands.

It is noted that in Agency Exhibit G, Management Step Response, the following conclusions were reached:

1. There was apparent confusion and/or misunderstanding regarding the confidentiality of the items discussed at the meeting.
2. The Grievant erroneously disclosed the content of the meeting to the PPS staff.
3. By relaying inaccurate information to the PPS staff, the Grievant caused unnecessary additional tension between the Fiscal and PPS staffs as well as significant disruption to the Agency operation and work environment.
4. The Management Step Response goes on to say "for the above stated reasons, I have decided to reduce the level of disciplinary action in the Written Notice from a Group II for insubordination to Group I for unsatisfactory performance and disruptive behavior.

### **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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.

To establish procedures on Standards of Conduct and Performance 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 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 to provide appropriate corrective action.

Although the Management Step Response describes the Group I offense as unsatisfactory performance and disruptive behavior, Agency Exhibit J Standards of Conduct did not include the attachment A listing examples of Group I offenses. Accordingly, the only evidence before the Hearing Officer is the Standards of Conduct general description of a Group I offense, namely, acts of minor misconduct that require formal disciplinary action. Specifically, the Standards of Conduct state that this level is appropriate for “repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention.” The Agency itself in its Management Step Response (Agency Exhibit J) concluded that Grievant did not intentionally disclose information that was meant to be confidential but that the Grievant relayed inaccurate information causing significant disruption to the work environment.

## **DECISION**

The disciplinary action of the Agency is reversed. The Hearing Officer does not find that the Agency proved by preponderance of the evidence that the Grievant inaccurately replayed information, that the Grievant’s behavior was disruptive or that the Grievant’s behavior caused significant disruption to the Agency operation. The Agency did not prove by a preponderance of the evidence that the Grievant’s behavior was a violation of the Standards of Conduct. Further, if the Grievant’s action was a violation of the Standards of Conduct, the Agency did not prove by preponderance of the evidence that the Grievant violated the Standards of Conduct after having received correction from the Grievant’s superiors or that the Grievant’s actions constituted a first offense that had a minor impact on business operations and required formal intervention.

The Agency action of Group I Written Notice is reversed.

## **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. "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, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-371-7401 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, 12<sup>th</sup> 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.

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John R. Hooe, III  
Hearing Officer