

Issue: Group III Written Notice with Termination (coercion); Hearing Date: 03/24/14;
Decision Issued: 04/22/14; Agency: DOC; AHO: John R. Hooe, III, Esq.;
Case No. 10290; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 10290

Hearing Date: March 24, 2014
Decision Issued: April 22, 2014

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective February 24, 2014, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on Wednesday, February 26, 2014 at 9:00 a.m. The telephone pre-hearing conference was conducted with the Grievant and Agency representative. At that time, the grievance hearing was scheduled to be conducted on Monday, March 24, 2014 commencing at 9:00 a.m.

In accordance with the discussion during the telephone pre-hearing conference, the Hearing Officer mailed a letter notice of hearing dated March 5, 2014 to both parties. Later the Hearing Officer was advised that the Grievant would be represented at the hearing.

APPEARANCES

Grievant
Grievant's Representative
Representative for Agency

ISSUES

1. Did the Grievant offer the Grievant's immediate supervisor something of value in exchange for the supervisor granting the Grievant preferential treatment? If so, was the Grievant's behavior a violation of the Standards of Conduct?
2. If so, did the Grievant's conduct constitute a Group III Offense?
3. If Grievant's conduct was a Group III Offense, was termination from employment an appropriate discipline?
4. Were mitigating factors considered? If not, why were mitigating factors not considered?

EXHIBITS

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

1. - Written Notice dated January 15, 2014
2. - Grievance Form A
3. - Standards of Conduct, Operating Procedure No. 135.1
4. - 90 day re-evaluation
5. - Notice of improvement needed dated 11/5/2013
6. - Statement of Sargent N.S. dated 12/13/2013
7. - Statement of Captain S.S. dated 12/13/2013
8. - Internal incident report dated 12/13/2013
9. - Group II Written Notice dated September 9, 2013

The Grievant did not offer any exhibits.

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group III Written Notice issued on January 15, 2014 with an offense date of December 13, 2013. The Written Notice describes the offense as offering "your supervisor a \$75 gift card in exchange for....preferential treatment.", a Group III Code 73 "threats or coercion".

The disciplinary action taken was the issuance of a Group III Written Notice with termination effective January 15, 2014.

Agency witness Sargent S. testified that he supervised the Grievant since February of 2013. He testified that on December 13, 2013, prior to taking shift, the Grievant approached him and offered him the Grievant's Wal-Mart gift card if he (Sargent S.) would let the Grievant stay in the booth rather than work the floor. The typed statement of Sargent S. is Agency Exhibit 6 and includes his statement that after the Grievant made the offer Sargent S. told the Grievant that he cannot offer him bribes, walked away from the Grievant and upon completion of shift notified Lieutenant P. regarding the incident. Sargent S. further testified that he has never received a gift from any co-worker under his supervision. He stated that he had received a baby shower gift from a nurse.

The Grievant testified that he did not offer his gift card as a bribe. Grievant's written statement contained in Grievant's Form A dated January 28, 2014 (Agency Exhibit 2) states:

I offered a baby gift to a supervisor, which has been done before as (the facility) has had baby showers to which the recipients subordinates have attended and presented gifts...I walked up to Sargent S. in the parking lot...I offered Sargent S. a gift card which never exchanged hands...The purpose was to give Sargent S. a gift for his new baby. This was stated to Sargent S. when I offered the gift card to him. His response was thanks but I couldn't accept that....

Agency witness Captain S., testified and set forth in his written statement dated December 13, 2013 (Agency Exhibit 7) that after receiving a report from Sargent S., he interviewed the Grievant regarding the incident. He stated that the Grievant admitted that he had offered Sargent S. the gift card if Sargent S. would continue to "look out for him by letting him work the booth as much as possible." He testified that the Grievant never mentioned anything about the gift card being offered as a baby gift or shower gift. Captain S. further testified that co-workers have never given him any gifts.

Agency Exhibit 8 is the written report of the incident given to Captain S. by the Grievant on December 13, 2013. The Grievant in his written statement made no mention of a baby gift. The Grievant stated that "I told Sargent S. he could just have the card for helping me...was trying to be nice for helping me."

Warden W. testified that when he issued the Group III Written Notice he decided on termination of employment after considering the mitigating circumstance that the Grievant had an active Group II Written Notice and that he considered the offense as one of such a serious nature that a first occurrence normally should warrant removal (Agency Exhibit 3 Standards of Conduct).

The Grievant testified that he had been employed at the facility for fourteen years and had never been suspended or terminated. He testified that he had knee problems and had been out on short term disability and had returned to work in August 2013. The Grievant further

testified that after the incident he met with the warden three times before the Group III Written Notice was issued. However, Warden W. testified that during his meetings with the Grievant the Grievant never mentioned a baby gift and first saw that mentioned in Grievant's Form A.

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, Operating Procedure No. 135.1. 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.

Agency Exhibit 5 Operating Procedure No. 135.1 includes a list of Group III Offenses described as "acts and behaviors of such a serious nature that a first occurrence normally should warrant removal. Included in the list is D.2.1. "Threatening or coercing persons associated with any state agency, including but not limited to employees, supervisors, patients, visitors, and students."

DECISION

The disciplinary action of the Agency is upheld.

The Agency proved by a preponderance of the evidence that the Grievant was guilty of the Group III Offense alleged.

Sargent S., Captain S. and Warden W. all testified that the Grievant never mentioned the gift card being offered as a baby gift. Further, the Grievant didn't mention the gift card being a baby gift when he wrote his written statement at the time of the incident. Warden W. considered the serious nature of the alleged offense together with the mitigating circumstance of the Grievant having an active Group II Written Notice before reaching the decision to terminate the Grievant's employment. The Grievant's otherwise good work record did not mitigate in Grievant's favor.

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, 12th 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, 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 ben 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