

Issues: Arbitrary/Capricious Performance Evaluation, and Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 06/10/14; Decision Issued: 06/18/14; Agency: VDH; AHO: Frank G. Aschmann, Esq.; Case No. 10359, 10360; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF HUMAN RESOURCE MANAGEMENT**  
**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**  
**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case Nos. 10359 & 10360

Hearing Date: June 12, 2014  
Decision Issued: June 18, 2014

**PROCEDURAL ISSUE**

No procedural issues were raised.

**APPEARANCES**

Grievant  
Three Grievant Witnesses  
Agency Representative  
Four Agency Witnesses

**ISSUES**

- 1) Did the Grievant violate Agency policy by failing to perform his duties satisfactorily such as to warrant the issuance of a Group II Written Notice with employment suspension for five days?
  
- 2) Did the Agency issue the Grievant a performance evaluation rating of "below contributor" improperly?

**FINDINGS OF FACT**

The Grievant was employed by the Agency as a Environmental Health Specialist (hereafter EHS) and has worked for the Agency for approximately twenty-one years. EHS inspect restaurants and other facilities which serve food to the public. The Grievant is black and was born in Nigeria. The Grievant was given a rating of "below contributor" on his 2013 performance evaluation. The evaluation is dated 9/24/13. The Grievant was presented with the evaluation and wrote, "no comments" in the section for self evaluation on 10/1/13. The Grievant's immediate supervisor is white. The Grievant's second line supervisor holds the title of Environmental Health Manager and is black. The Grievant's supervisor and manager both reviewed and concurred on the Grievant's 2013 performance evaluation rating. The Grievant's 2012 performance evaluation noted deficiencies in performance which had not been remedied as of the 2013 rating period. The Grievant was issued a Notice of Improvement Needed which is

dated 9/25/13. The Grievant was issued a Group II Written Notice on 10/15/13 for unsatisfactory performance. The Grievant was given a Due Process Memorandum, dated August 30, 2013, which gave him notice of possible formal disciplinary action. Agency exhibit number 2 contains a copy of this document which notes the Grievant refused to sign the document on 9/10/13, the date it was issued to him. The grievant responded to the memorandum on September 12, 2013. The Grievant initiated a grievance and the matter was reviewed by his manager. The manager upheld the disciplinary action with a written decision on November 7, 2013. The Grievant requested a Due Process Hearing.

In 2006, the Agency began a program to “standardize” its employees. This program is intended to have Agency employees meet federal standards for training and qualifications as outlined by the FDA. New employees are put through an initial training program and all veteran employees, even those with many years of service, were expected to take the required training as it came available. Employees must re-qualify for “standardization” every three years to stay current with developments in the profession. The Grievant was certified on June 30, 2009 with an expiration date of June 30, 2012. Training courses were offered at different locations throughout the state. Complete training requires multiple sessions covering six subject areas. Some of the courses require prerequisites such as an on-line pre-test. The courses qualify for college credits through the Southside Virginia Community College. Registration must be completed for the courses to track participation and qualify for college credits. The courses are often full and, at times, have waiting lists. Training sessions were held in Warrenton, Virginia, part of the northern region, in September 2012. Training sessions were held in Spotsylvania, Virginia, part of the northern region, in March 2013. Training sessions were held in Richmond, Virginia, part of the central region, in August 2013.

A component of the “standardizing” process is a review of selected inspections done by the EHS. In November 2011, deficiencies were found in some of the Grievant’s inspections and training was recommended by the standardization officer. In June 2012, deficiencies were found in some of the Grievant’s inspections and training was recommended by Agency management.

In 2010, management noted that the Grievant had not taken all of the updated training. Agency management recommended that he do so. On May 21, 2010, the Grievant was directed by his supervisor at the time, now his manager, to register and take training being held in Warrenton, Virginia in August 2010. The Grievant was directed, by his supervisor, to take the training in Richmond in September 2011. In 2012, the Grievant’s supervisor was promoted to manager and the Grievant’s current supervisor took her position. In succession, the Grievant’s supervisor directed him to take the training sessions offered in Warrenton, Spotsylvania and Richmond from 2012 to 2013. The Grievant did not take any of the training sessions. The Grievant has made various excuses for failing to take the training including, that it was not needed, it was difficult to register, it would place a hardship on his family, racial discrimination and national origin discrimination. The Grievant’s supervisor became frustrated with the Grievant and took the disciplinary actions noted above. A white EHS failed to complete the standardization training. This employee primarily performed rabies inspections and retired.

The Grievant’s supervisor has a small mailbox where files are turned into her by EHS. The mailbox is often full. The Grievant did not turn in reports and files for review because his

supervisor's box was full. The Grievant's supervisor performs field work in addition to her management duties. At times the Grievant's supervisor tele-commutes to work. The Grievant's supervisor frequently communicates via email. At times, Agency computer equipment has failed. The Agency uses a system called Venis to report inspection results. EHS are required to update calendars through an outlook program so that management can track their location when they are in the field. The Grievant is married and his wife is employed but does not drive. Several of the EHS were disgruntled by the new standardization requirements.

#### APPLICABLE LAW AND OPINION

1) The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2). In all other actions the Grievant must prove his claim by a preponderance of the evidence. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (3).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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 Standards of Conduct define a Group I violation as offenses which have a relatively minor impact on Agency business operations but still require management intervention and includes unsatisfactory performance as an example. The Standards of Conduct define a Group II violation as acts of misconduct of a more serious nature that significantly impact Agency operations. An employee failing to follow a supervisor's instructions or comply with written policy are examples of Group II offenses.

The Grievant has raised a defense of racial and national origin discrimination. The burden to establish this defense is on the Grievant. St. Mary's Honor Ctr. V. Hicks, 509 US 502 (1993); Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

The Agency introduced witness and documentary evidence in support of its disciplinary action, the issuance of a Group II Written Notice to the Grievant. The Agency's evidence showed that the Grievant was instructed numerous times to take training. The training manager, the Grievant's manager and the Grievant's supervisor all testified that they had recommended and directed the Grievant to take training. Their testimony was candid, consistent and credible. The testimony was corroborated by documents in the Agency exhibits which show email communications, training schedules and notes of meetings where the Grievant was informed of training and directed to go. The Grievant did not attend any of the training he was directed to attend over an extended period of time and thus failed to follow his supervisor's instructions.

The notice identifies the Grievant's failure as "unsatisfactory performance," however, the body of the text describes a failure to follow supervisor's instructions; the central issue being the Grievant's failure to take training as directed by his supervisor. While unsatisfactory performance is generally considered a Group I Written Notice offense in this instance the Agency has given justification for the higher level disciplinary action. The Grievant's failure to take training persisted over an extended time period, approximately eighteen months, the Grievant's failure to take training reflected willful disregard for the supervisor's directives and authority and a failure to follow a supervisor's instructions is generally considered a Group II Written Notice offense. The actions of the Grievant had a significant impact on Agency operations because they required extensive intervention by management and threatened to render the Grievant and the Agency out of compliance with the FDA standards which it needed to meet.

The Grievant makes no claim that he attended the training as directed by his supervisor. The Grievant relies on a defense of racial and national origin discrimination and, alternatively, a claim of family hardship. The burden is on the Grievant to prove these defenses and he has failed to do so. While, the Grievant alleges discrimination by his supervisor, the evidence shows that she made extraordinary efforts to get him to enroll in training and even advocated for him to the training manager when he failed to take a course pre-requisite exam. The Grievant's supervisor required all of the EHS to take the training. The Grievant argues that there was a white employee who was not required to take training and that this was disparate treatment based upon race. The Grievant's argument fails because the other employee was not similarly situated and was, in fact, further along in the training process than the Grievant when he retired. The white employee primarily performed rabies inspections and did not do restaurant inspections except to help out as needed. He was instructed to take training and had begun the process when he declared he would retire. Agency management made the decision not to fund further training for an employee who was going to retire. All employees similarly situated to the Grievant were required to take the training. The Grievant was the only EHS employee which had failed to do so. The witness evidence presented by the Grievant came from two black witnesses and one white witness. All had similar complaints against management, including poor communication, faulty equipment, management failure to address their issues and disgruntlement with the new "standardization" system. These complaints were universal for both white and black and did not indicate any discrimination based upon race or national origin. The testimony actually showed that all the EHS were treated the same regardless of race and were simply disgruntled with the performance of management.

The Grievant has also alleged that taking training would have created a family hardship for him; his wife needed to be transported to her job. This Hearing Officer finds no merit in this argument. All professionals are required to continue their education to stay current on developments in their field. Health safety professionals are part of an evolving field which updates regularly as human science advances. In this matter, the Grievant was given multiple opportunities, at multiple locations with significant advanced notice to take the required training. It was incumbent upon the Grievant to arrange his schedule and coordinate with his family to make himself available for one of the offered training sessions. By failing to do so he failed to perform his job duties thus justifying the Agency's disciplinary action.

Wherefore, it is found that the Agency has met its burden of proof establishing a violation of Agency policy which justifies a Group II Written Notice with employment suspension for five days.

2) The Department of Human Resource Management has established Policy Number: 1.40 - Performance Planning and Evaluation for the purpose of evaluating employee performance and communicating performance plans to employees. The policy defines standards and ratings for employee performance, creates procedures for evaluating employee performance and establishes procedures for employee improvement if needed. Performance evaluation ratings may be appealed within the Agency and in some cases may be qualified for a due process hearing. Policy Number: 1.40 - Performance Planning and Evaluation; Department of Employment Dispute Resolution Grievance Procedure Manual, §4.1 (1 & 2 & 3). The Grievant appealed his performance evaluation rating within the Agency where it was approved by his supervisor and manager. EDR qualified the issue for a due process hearing.

The Grievant has challenged his 2013 performance evaluation rating on the basis of racial and national origin discrimination and, alternatively, as being arbitrary and capricious. As held above, the Grievant's evidence presented no material which indicated he was discriminated against on the basis of race or national origin. None of the witnesses gave testimony which directly related to the Grievant's performance evaluation. The testimony of his witnesses was essentially an airing of general dissatisfaction with Agency management and complaints specific to each witness. The mere fact that the Grievant's supervisor is a white and the Grievant is a black is insufficient to establish the supervisor was motivated by racial or national origin bias. The Grievant's case is further diminished in this regard because the Grievant's manager is also a black and he concurred with the rating. There was no evidence which even touched upon the issue of national origin discrimination. The Grievant failed to meet his burden to prove he received a lower performance evaluation because of racial or national origin discrimination.

The Grievant has challenged his 2013 performance evaluation rating as arbitrary and capricious. The Grievant was given this rating for failing to maintain his calendar, enter data into the Venis system, turn in paperwork for review, complete training and communicate with his supervisor. The Grievant's supervisor has thus stated a reasoned basis for the rating. While there were, at times equipment problems in the Agency, the Grievant's supervisor was not always present and her mail box often full, there is a factual basis for her decision to make the rating. The Grievant unequivocally failed to take training as directed, admitted to not turning in files because

the supervisor's mail box was full even though it was standard practice to pile the files up on the box or near to it, did not update his calendar and did not enter data into the Venis system. The standard for finding an arbitrary and capricious performance evaluation rating is "in disregard of the facts or without a reasoned basis." Department of Employment Dispute Resolution Grievance Procedure Manual, §9; Rules for Conducting Grievance Hearings, section VI, C. 2. The Hearing Officer is not a "super-personnel officer" and must give deference to the actions of Agency management. Rules for Conducting Grievance Hearings, section VI, A. The Agency's rating in this matter is not unreasonable even if opinions could vary as to its appropriateness. The Grievant has failed to meet his burden of proof to show that Agency management acted without a reasoned basis or in disregard to the facts.

### DECISION AND ORDER

The disciplinary action of the Agency is affirmed. The Agency's performance evaluation rating is affirmed.

### 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by email to [EDR@dhrm.virginia.gov](mailto: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. Agencies must request and receive prior approval from EDR before filing a notice of appeal.

See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.

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Frank G. Aschmann  
Hearing Officer