

Issues: Group II Written Notice (failure to follow instructions and disruptive behavior), and Termination (due to accumulation; Hearing Date: 04/02/15; Decision Issued: 04/20/15; Agency: NSU; AHO: Ternon Galloway Lee, Esq.; Case No. 10565; Outcome: No Relief – Agency Upheld.

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 10565**

**Hearing Date: April 2, 2015**

**Decision Issued: April 20, 2015**

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### **SUMMARY OF DECISION**

The Agency had found Grievant failed to follow supervisor's instruction and engaged in disruptive behavior. The Agency then issued Grievant a Group II Written Notice and terminated her due to an accumulation of Group II notices. The Hearing Officer found Grievant engaged in the behaviors alleged and they constituted misconduct. Next, finding the Agency's discipline was consistent with policy and reasonable, the Hearing Officer upheld the discipline.

### **HISTORY**

On February 16, 2015, the Agency issued Grievant a Group II Written Notice for failure to follow instructions and for disruptive behavior. Prior to issuing the group notice, the Agency had terminated Grievant on January 30, 2015.<sup>1</sup> It noted termination was appropriate because Grievant's disciplinary record already consisted of an active group II Written Notice. On or about February 16, 2015, Grievant timely filed her grievance to challenge the Agency's action. The Office of Employment Dispute Resolution ("EDR") appointed the undersigned as the Hearing Officer in this matter effective March 5, 2015. A pre-hearing conference ("PHC") was held on March 16, 2015,<sup>2</sup> and a scheduling order was issued the same date setting the hearing for April 2, 2015.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were presented. The Hearing Officer admitted, without objection, Agency Exhibits A through C and the contents of the Agency's entire binder. Over the Agency's objection, the Hearing Officer admitted Grievant's Exhibit 1, statement of former Human Resource employee of the Agency.<sup>3</sup> Without

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<sup>1</sup> On January 27, 2015, Grievant met with management and received her due process letter. Management advised Grievant that the Agency intended to terminate her on January 30, 2015, for failing to follow instructions and disruptive behavior. Grievant was then provided an opportunity to respond to management's notice of proposed discipline and she did so in writing.

<sup>2</sup> This was the first date that the parties were available.

<sup>3</sup> Grievant did state that she desired the person who wrote the statement to appear as a witness. However, according to Grievant, this individual had informed Grievant that she was unable to attend the hearing. Grievant had not requested an order be issued requiring this individual to attend the hearing. Although the Grievant did not request a continuance, the Hearing Officer determined continuing the case to obtain live testimony from this individual was unwarranted. As noted above, however, the Hearing Officer did admit as evidence the statement from the individual.

objection, the Hearing Officer admitted her exhibits numbered 1 through 4.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate/attorney and the Grievant represented herself.

### **APPEARANCES**

Advocate for Agency  
Agency's Representative  
Witnesses for the Agency (4 witnesses)  
Grievant  
Witnesses for Grievant (2, including the Grievant)

### **ISSUE**

Was the Group II Written Notice with termination warranted and appropriate under the circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

### **FINDINGS OF FACT**

After reviewing all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is an institution of higher learning and known as a university. Grievant had been employed by the Agency for at least five years as a custodian until management terminated her on or about January 30, 2015. Prior to her being terminated, Grievant was scheduled to work the day shift from 7:00 a.m. to 4:00 p.m. (A Exh. A, p. 1; Testimonies of Supervisor and Supervisor 2).
2. The Agency terminated Grievant for failure to follow instructions and disruptive behavior based on several occurrences set forth below.

### **SEPTEMBER 12, 2014 INCIDENT**

3. On September 12, 2014, Supervisor 2 verbally informed Grievant of her assignments for

the shift. The supervisor's instructions identified three buildings Grievant was assigned to clean that day and the order in which she was expected to do her work. Upon hearing the instructions, Grievant yelled displaying dissatisfaction with the assignment requiring her to move to Building 1, then Building 2, and then Building 3 to accomplish her assigned work. She stated words to the effect of "Lord give me strength...I never asked to be a floater!" Supervisor 2 suggested that Grievant speak with Supervisor about her dissatisfaction. To this, Grievant stated "No I don't want to talk to her." Grievant then proceeded to the area where other custodial staff was gathered and stated in a loud voice to Supervisor 2 "I [sic] going to tell you right now I'm going to [Building 1] then to [Building 2] but I am not going to [Building 3] I will be going to HR to make a complaint." (Testimony of Supervisor 2; A Exh. A, p. 11).

4. Supervisor 2 had supervised Grievant since June 2014. Similar to Grievant's response to Supervisor 2's instructions on September 12, 2015, typically when Supervisor 2 would give instructions to Grievant, her response would be to yell at Supervisor 2 and announce that she would not do the assignment or refer to them/him as "stupid." Also, as was done on September 12, 2014, Grievant's response was sometimes given in the presence of other staff. In addition, when Supervisor 2 would instruct Grievant to speak with her immediate supervisor about any dissatisfaction she had, Grievant would state that she would not speak to her immediate supervisor. (Testimony of Supervisor 2).

#### **OCTOBER 29, 2015 INCIDENT**

5. On October 29, 2014, Supervisor assigned Grievant to clean Dormitory 1's third floor. On that day, Supervisor received a complaint from the resident hall coordinator. He reported to Supervisor that the worker assigned to clean the hall had not done so in the last two days. Upon arriving to the dormitory to investigate the complaint, a student reported that no one had cleaned the area that morning. Further, Supervisor was informed that the custodial worker assigned the task was constantly on her telephone and texting. Upon arriving by elevator to the third floor, Supervisor observed Grievant sitting and texting on her telephone as previously reported by a student. The supervisor inspected to see if any cleaning had taken place. Upon doing so she determined the three bathrooms on the hall were not cleaned and in bad shape. She described them as being "ridiculous" and noted, among other things, that none of the bathrooms had toilet paper in them. The time was approximately 11:30 a.m. and Supervisor instructed Grievant to clean the bathrooms before taking her lunch break. Grievant failed to obey her supervisor's instruction and was observed leaving the building several minutes later after being told to clean the bathrooms before leaving for a break. (Testimony of Supervisor; A Exh. A, p. 12).

6. Supervisor 2 accompanied Supervisor to the dormitory. He also witnessed Grievant on the telephone when the two supervisors arrived on the dormitory's third floor and described the condition of the bathrooms and floors as being unclean. (Testimony of Supervisor 2).

#### **NOVEMBER 6, 2014 INCIDENT**

7. At the beginning of her shift on November 6, 2014, Supervisor assigned Grievant to clean the library. At 10:00 a.m. a staff person called and informed Grievant's supervisor that no cleaning had been conducted throughout the building. Supervisor and Supervisor 2 went to the

building after receiving the call to investigate. Upon doing so, they found the bath rooms throughout the building were in deplorable conditions. Specifically, toilet paper was in most of the toilets. In addition, the toilets were unflushed with urine and feces in them. Paper was found on the floors, streaks were on the mirrors, and the sink and counter tops were messy with dried soap and wet paper towels on them. Further, the bathrooms smelled badly. (Testimony of Supervisor; A Exh. A, p. 13).

### **JANUARY 17, 2015 INCIDENT**

8. Grievant had not been scheduled to work on January 20, 2015, the day following the Martin Luther King Holiday. However, on January 17, 2015, Supervisor 2 informed Grievant the university had determined January 20, 2015, was a mandatory work day for staff because numerous events were taking place on campus and all employees were needed to handle the work load. To this news Grievant responded "I am not coming in on Tuesday. My Sister is having surgery and that's more important." Supervisor 2 then informed Grievant that she would have to talk to Supervisor about her dilemma. Grievant then responded "I am not talking to Supervisor and I am not coming in on Tuesday." Grievant did not speak to Supervisor about her situation and neither did she report to work on Tuesday, January 20, 2015. (Testimony of Supervisor 2; A Exh. A, p. 14).

### **TERMINATION AND GROUP NOTICE**

9. By letter dated January 27, 2015, management provide Grievant notice that it intended to issue her a Group II Written Notice due to her failure to follow supervisor's instruction and disruptive behavior. The Agency noted in that letter that because it was Grievant's second group II notice, she would be terminated. Grievant did respond to the letter. On February 16, 2015, the Agency issued Grievant a Group II Written Notice. Grievant's termination on January 30, 2015, predated the group notice. (A Exh. B, pp. 1-5).

10. The group II Written Notice described the nature of the offense as follows:

Failure to clean assigned areas  
Disputed supervisor's authority to approve requested time-off

(A Exh. A, p. 1).

### **OTHER**

11. Grievant was previously disciplined for failure to follow a supervisor's instruction/insubordination on July 2, 2013. She received a Group II Written Notice for the offense and a five day suspension. (Testimony of Former Supervisor; A Exh. A, p. 5). That Group II Written Notice described the offense as follows:

On July 2<sup>nd</sup>, the employee was directed by her supervisor to assist with an assignment involving stripping floors. [Grievant] responded, "I'm not going to do it... tell Mr. ... to do it." She was asked again; however, she did not follow the

instructions.

(A Exh. A, p. 5).

12. Supervisor 2 describes Grievant as routinely expressing displeasure with her work assignments and noting that she is being victimized by having to work in various buildings or locations on campus during her shift. (Testimony of Supervisor 2).

13. Previously, management had determined that the location of Grievant's work assignment must be changed due to Grievant engaging in inappropriate communications with students/staff. For example, management transferred Grievant from working in one dormitory because students in that particular dormitory had complained that Grievant had spoken rudely to them and they were afraid to come forward because Grievant would threaten them. (Testimonies of Supervisor and Former Supervisor; A Exh. A, p. 6).

14. Prior to management issuing Grievant a Group II Written Notice and terminating her on January 30, 2015, she had meetings with management about work assignments and her performance or Grievant was offered the opportunity to speak with her supervisor about her assignments/schedule and she declined to do so. (Testimonies of Supervisor 2 and Grievant; A Exh. A).

15. Concerns regarding Grievant's poor cleaning performance have existed for at least three years. (Testimony of Supervisor; A Exh. A, p. 8).

16. The evidence is insufficient to establish that Supervisor was disrespectful to Grievant. (Testimony of Assistant Director for Housekeeping and Grounds; G Exh. 1).

### **DETERMINATIONS 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/her 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 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.<sup>4</sup>

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 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.

Under the Standards of Conduct, Group I offenses are acts of misconduct that are minor in nature. Group II offenses include misconduct of a more serious nature and/or of a repetitive nature that require more formal disciplinary action. In addition a second Group II offense normally warrants discharge. Finally, the most serious offenses are categorized as Group III offenses. *See* Standards of Conduct Policy 1.60(B)(3).

On or about January 30, 2015, management terminated Grievant. It issued Grievant a Group II Written Notice noting Grievant already had an active group II notice and that removal was justified due to that existing notice. Accordingly, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

## **I. Analysis of Issue before the Hearing Officer**

### **Issue: Whether the discipline was warranted and appropriate under the circumstances?**

#### **A. Did the employee engage in the behavior described in the Group II Written Notice and did that behavior constitute misconduct?**

An examination of the evidence shows Grievant failed to follow her supervisor's instruction as asserted by the Agency.

For example, the evidence shows that on October 29, 2014, Grievant was assigned to clean the third floor of Dormitory 1. Grievant's supervisor received a complaint that day that the assigned area had not been cleaned. It was also reported that for the past two days Grievant had not cleaned the dormitory and could be seen on the telephone or texting. The evidence shows that the supervisor immediately investigated the complaint on October 29, 2014, along with Supervisor 2. The supervisors found all three bathrooms in Grievant's assigned work area in unacceptable condition. This was the case even though Grievant's work shift began at 7:00 a.m. and it was about 11:30 a.m. at the time of Supervisor's finding. Moreover, when Supervisor and Supervisor 2 arrived for the investigation, Grievant was observed on the telephone either texting

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<sup>4</sup> GPM §5.8

or playing games.

The evidence further demonstrates that Grievant does not deny the uncleanness of the bathrooms. She offers that she was cleaning at another location on campus as instructed to do. Other than her statement, Grievant provided nothing to support her assertion. Moreover, after finding the complaint was valid, Supervisor instructed Grievant to clean the bathrooms before leaving for her lunch break. Despite this instruction, Supervisor and Supervisor 2 observed Grievant leaving the dormitory several minutes later, presumably to take a lunch break. The Hearing Officer finds that based on the filthiness of the three bathrooms, more than a few minutes were needed to clean them. Thus, the evidence shows that Grievant failed to follow her supervisor's instructions. First, Grievant did not clean the dormitory as initially instructed at the beginning of her shift. Second, Grievant did not clean the three bathrooms before taking her break.

Similarly, the evidence illustrates that on November 6, 2014, Grievant failed to clean the library as instructed by her supervisor. Grievant contends the library is a large building and she needed assistance to complete the tasks. Of note, the evidence shows that two and a half hours into her shift on November 6, 2014, practically no cleaning had been performed by Grievant at the library. Accordingly, Grievant's contention that she needed assistance is not persuasive as the evidence illustrates she failed to do any of her assigned work in the building. Accordingly, here too, the evidence demonstrates that Grievant failed to follow instructions.

Moreover, the evidence shows that on January 17, 2015, Supervisor 2 instructed Grievant to report to work on January 20, 2015. Although Grievant initially was scheduled off on that day, the university deemed it necessary to require all staff to work due to the numerous campus activities on January 20, 2015. Supervisor informed Grievant that the university would give her another day off. Grievant then stated to Supervisor 2 that her sister had surgery scheduled for January 20, 2015, and she was not reporting for work. Supervisor 2 then instructed Grievant to speak with Supervisor about her dilemma. The evidence shows that Grievant next stated "I am not talking to Supervisor and I am not coming in on Tuesday." Grievant did not show up for work on January 20, 2015. Clearly, Grievant's responses and conduct on January 17, 2015, also illustrate that she failed to follow the instructions of her superior.

Accordingly, the evidence shows that on at least three occasions, Grievant did not follow the instructions of her superior. Such conduct is a violation of Policy 1.60 and therefore misconduct.

The Agency also contends that Grievant's behavior was disruptive. Supervisor 2 testified that his problem with Grievant was insubordination. He testified that very seldom could he give Grievant an instruction and she carry it out without some kind of loud outburst or statement of defiance. The Hearing Officer finds that at the very least, Grievant's normal responses when given an instruction were disturbing as well as distracting to the operation of the Agency, in this specific case the housekeeping department of the university. As such, the Hearing Officer finds Grievant's behaviors on October 29, 2014, and January 17, 2015 were disruptive and therefore misconduct under Policy 1.60.



## **B. Was the discipline consistent with policy and law?**

Policy 1.60 indicates that failure to follow instructions is a Group II offense. Moreover disruptive behavior is classified as a Group I Offense. Of note, however, Grievant's defiant behaviors displayed on October 29, 2014, and January 17, 2015, were similar in nature to conduct Grievant displayed previously on July 2, 2013. On that date, Grievant had been instructed by her supervisor to perform a certain task, to which Grievant replied "I'm not going to do it...tell Mr. ... to do it." Moreover, when asked again to perform the task, she failed to do so. The Standards of Conduct provides that for misconduct of a repeat nature, a Group II Written Notice is appropriate. Here, Grievant's disruptive behavior is clearly a repeated offense. Moreover, Grievant's disciplinary history consists of an active Group II Written Notice. Policy 1.60 also provides that normally an employee is discharged upon her receiving two Group II Written Notices. Hence, for the reasons noted here, the Hearing Officer finds the Agency's discipline is consistent with policy and law.

## **II. Mitigation.**

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."<sup>5</sup> EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>6</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>7</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the

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<sup>5</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>6</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>7</sup> *Rules for Conducting Grievance Hearings* VI(B)

group notices and that the behaviors constituted misconduct. Further, the Hearing Officer has found, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. In her plea for mitigation Grievant presents that she needed assistance in doing her assigned work. She also asserts that Supervisor mistreated her and that she was never counseled. Grievant presented a statement (which has been considered by this Hearing Officer) by a former employee to support her contention that she was mistreated.

The Hearing Officer has considered all of Grievant's arguments and all evidence whether specifically mentioned or not. After giving careful thought to the evidence, the Hearing Officer finds Grievant's conduct aggravating considering she received a Group II Written Notice for a similar offense in 2013. Also, the Hearing Officer finds nothing unreasonable about the Agency's discipline.

### **DECISION AND ORDER**

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

#### **Order**

As the Group II Written Notice of which the Agency has based Grievant's termination was not issued until February 16, 2015, the Agency is ordered to take the following action:

1. Pay Grievant back pay, minus any interim earnings, for the period February 1, 2015, to February 15, 2015; and
2. Restore all appropriate benefits for this time period.

### **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  
Departmental of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

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

or, send by e-mail 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.<sup>8</sup>

Entered this 20<sup>th</sup> day of April, 2015.

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Ternon Galloway Lee, Hearing Officer  
cc: Agency's Advocate/Representative  
Grievant's Advocate/Grievant  
EDR

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<sup>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.