

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 10/21/14; Decision Issued: 11/10/14; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10457; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR Ruling Request received 11/14/14; EDR Ruling No. 2015-4041 issued 12/17/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 11/14/14; DHRM Ruling issued 12/18/14; Outcome: AHO's decision affirmed.**

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 10457**

**Hearing Date: October 21, 2014**

**Decision Issued: November 10, 2014**

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### **SUMMARY OF DECISION**

The Agency had found Grievant failed to follow instructions and/or policy. It then issued Grievant a Group II Written Notice. The Hearing Officer found Grievant engaged in the behavior alleged and it was misconduct. Next, finding the Agency's discipline was consistent with policy and reasonable, the Hearing Officer upheld the discipline.

### **HISTORY**

On May 8, 2014, the Agency issued Grievant a Group II Written Notice for failing to follow instructions/policy. On May 15, 2014, Grievant timely filed her grievance challenging the Agency's discipline. The Office of Employment Dispute Resolution (EDR) assigned the undersigned as the hearing officer to this grievance on September 24, 2014.

The Hearing Officer held a telephonic prehearing conference (PHC) on September 30, 2014.<sup>1</sup> Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was October 21, 2014. Accordingly, by agreement of the parties, the hearing was set for that date. On September 30, 2014, the Hearing Office issued a scheduling order addressing those matters discussed and ruled on during the PHC. The Hearing Officer held a second PHC on October 7, 2014, at the request of the Agency's Advocate, for the sole purpose of changing the start time of the hearing. By agreement of the parties, the hearing remained scheduled for October 21, 2014; however, the start time was amended to accommodate a material witness of the Agency.

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 Office. None were presented. During the hearing, the Hearing Officer admitted Agency Exhibits 1 through 4 to which Grievant did not object. Grievant's Exhibits 1 through 14 were also admitted without objection.

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 witnesses presented by the opposing party.

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

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<sup>1</sup> This was the parties' first date available for the PHC.

## **APPEARANCES**

Advocate for Agency  
Witnesses for the Agency (3 witnesses)  
Grievant  
Witnesses for Grievant (none)<sup>2</sup>

## **ISSUE**

Was the written notice 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 actions against Grievant were 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, the Hearing Officer makes the following findings of fact:

1. Grievant is employed as a Senior Support Enforcement Specialist in the child support enforcement division of the Agency. (Testimony of District Manager; G Exh. 7, p. 9; A Exh. 3, p. 1).

Grievant is not satisfied with the air quality and temperature in the office, to include her individual office space. (G Exh. 7, p. 4; G Exh. 7; G Exh. 8).

2. Concerning this issue and in response to Grievant’s complaints regarding it, by email dated November 18, 2013, the following information was provided to all staff including Grievant:

Effective immediately, the office temperature will no longer be monitored. The thermometer has been removed from the wall. You will need to work with your co-workers to control the temperature in your workspace. If you are experiencing unusual discomfort in your workspace and can’t come to a peaceful resolution with your co-worker, only then will management look at the situation. No one will be permitted to control any vents and/or heaters in someone else’s workspace. If you have a walk-in, the interview room becomes your workspace and you are permitted to control the vents while you are interviewing. Please remember that we are servicing the public and need to be mindful of our customers. We do not want to expose them to extreme temperatures. The Office Park has been contacted

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<sup>2</sup> Grievant identified one individual as a possible witness. Grievant had the opportunity to call this witness during the hearing, but she decided to not obtain testimony from this person.

regarding the temperature and they are working with us to ensure our workspace is as comfortable as possible. We are confident that you will be considerate of your coworkers as you have always demonstrated in the past.

Management Team

(A Exh. 1, p. 7; G Exh. 10, p. 2).

3. In addition, by email on January 16, 2014, staff, including Grievant, was reminded of the policy change noted in the November 18, 2013 email. The January 16 reminder stated the following:

Just a reminder per the email dated 11/18/13 (attached):

No one is permitted to control any event and/or heaters in someone else's workspace at any time. You can control them in the interview rooms when you are interviewing. However, please remember that we are servicing the public and need to be mindful the customer.

Thank you  
Management Team

(A Exh. 1, p. 6).

4. The instructions noted in the emails dated November 18, 2013, and January 16, 2014, were, at least in part, responsive to Grievant's complaints regarding the Office temperature. (Testimony of District Manager; A Exh. 1, pp. 1 and 8).

5. The office had an aged air conditioning system on April 30, 2014. As such the air conditioning in the office was not regulated by a thermostat; that is, it did not automatically shut on and off based on a certain temperature that was set. The evidence establishes that vents were adjusted to turn the air conditioning on or off. Grievant was known to keep a yard stick in her individual office to adjust her vents/temperature. (Testimonies of District Manager and Agency Witness 1; A Exh. 2, p. 6). Grievant had her own office with a door that could be opened or closed by Grievant. (A Exh. 1, p. 1).

6. Agency Witness 1 is a co-worker of Grievant. Agency Witness 1's work station consists of a cubicle which is located only a few feet from Immediate Supervisor's office and another office that was vacant on April 30, 2014. The doors to these two offices were initially open on the morning of April 30, 2014. (Testimony of Agency Witness 1).

That morning, Immediate Supervisor requested that Agency Witness 1 enter her office and look for Immediate Supervisor's keys. Agency Witness 1 entered the office several times between 7:00 a.m. and 7:30 a.m. to comply with her supervisor's request. While in Immediate Supervisor's office, Agency Witness 1 observed that there was no air blowing from the vents. Consequently, she noted that the air conditioning was off in her supervisor's office. After

leaving Immediate Supervisor's office and later during the day, Agency Witness 1 observed Grievant coming out of the immediate supervisor's office with a yard stick. Next, Agency Witness 1 observed that the air conditioning was on in her immediate supervisor's office. She could hear air being blown out of the vents. Also, the temperature in the work area of Agency Witness 1 had become very cold. (Testimony of Agency Witness 1).

6. In addition, Agency Witness 1 had observed in the morning that the air conditioning was not on in the adjacent vacant office space mentioned above as air was not blowing out of the vents. She later observed as mentioned before that Grievant had a yardstick and the air conditioning was now on in the vacant office as well. (Testimonies of Agency Witness 1 and District Manager).

7. Agency Witness 1 is anemic and had become very cold. Recognizing the policy implemented by email on November 18, 2013, and confirmed on January 16, 2014, Agency Witness 1 located a supervisor regarding the air conditioning being on and the vents blowing out air. (Testimony of Agency Witness 1).

8. At some point after Agency Witness 1's report, Supervisor 1 or another supervisor then locked the doors to the vacant office and the immediate supervisor's office. (Testimony of Supervisor 1).

9. Later during the day in the afternoon, Grievant asked Supervisor 1 if she would unlock the immediate supervisor's office because the vent was on and Grievant desired to turn it off so when her supervisor returned, she would not be cold. (Testimony of Supervisor 1).

10. The matter came to the attention of District Manager. It was reported to the District Manager, that Grievant had been seen leaving the immediate supervisor's office with a yard stick. Prior to that observation, the air conditioning vents in that office were off. Subsequently, the vents were on. Grievant was then issued a letter of intent to issue her a group notice regarding the incident. Grievant responded and thereafter, the Agency issued Grievant a Group II Written Notice. The group notice described the nature of the offense as follows:

[Grievant] failed to follow Supervisory instructions by entering into another staff members work area and adjusting the air conditioning vent on April 30, 2014. [Grievant] was notified via office email on November 18, 2013 and again on January 16, 2014 along with all [City] staff (see attached)

(A Exh. 1, p. 1; A Exh. 2, pp. 3-4).<sup>3</sup>

11. Another employee whom management determined had adjusted the air conditioning vents received a counseling memorandum from management. This employee started working for the Agency after the emails were sent to staff that set forth the policy prohibiting employees from adjusting the vents in another employee's workspace. (Testimony of District Manager).

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<sup>3</sup> Grievant originally received in addition to the Group II Written Notice, a Group I Written Notice for contacting the office park manager. The Group I Written Notice was eventually reduced to a counseling memorandum and is not the subject of the grievance before this hearing officer. (Testimony of District Manager; G Exh. 10, p. 1).

12. One other employee was issued a counseling memorandum regarding adjusting the vents. This matter involved a misunderstanding and it was not certain if the employee had actually adjusted any vents. (Testimony of District Manager).

13. Grievant contends she is being harassed and retaliated against by the Agency's management. (A Exh. 2, pp. 1, 7, 9 and 10).

14. A reasonable inference from Grievant's actions on April 30, 2014, is she adjusted the vents in Immediate Supervisor's Office.

15. The failure to follow supervisor's instructions or comply with written policy is a Group II offense under the Standards of Conduct Policy 1.60 (Policy 1.60). (A Exh. 4, p. 22).

### **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.

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 (Policy 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 categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first

occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

On May 8, 2014, management issued Grievant a Group II Written Notice for the reason stated in the above section. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

**I. Analysis of Issue(s) before the Hearing Officer**

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

**A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?**

The Agency contends that on April 30, 2014, Grievant failed to follow supervisory instructions by entering into another staff member's work area and adjusting the air conditioning vent. The evidence demonstrates that on two occasions prior to April 30, 2014, staff were instructed to not adjust the vents and/or heaters in another staff member's workspace. Nonetheless, the evidence discussed below illustrates that Grievant disobeyed this directive.

Grievant argues the evidence fails to establish she disobeyed this instruction. She contends no one actually saw her adjust the vents in the immediate supervisor's office. Regarding Grievant's assertion, the evidence shows that Grievant kept a yardstick at work to adjust the air conditioning vents in her own office. Further, the evidence establishes that on April 30, 2014, Immediate Supervisor's individual office was open. Witness 1, testified that on that morning, Immediate Supervisor was out of the office and had asked Witness 1 to go in her office and look for Immediate Supervisor's keys. Agency Witness 1 entered the office and while searching for the keys observed that the air conditioning was not on. She went on to say that she was certain of this because the air conditioning vents had not been adjusted for air to blow out of them. Agency Witness 1 also explained that she was familiar with the way the air conditioning system worked in the office due to the number of years she had worked in the building for the Agency. Moreover, she noted that her husband worked in the heating and air conditioning trade and by virtue of his employment she had become familiar with the manner in which the air conditioning system worked.

Agency Witness 1 further testified that she later observed Grievant coming out of Immediate Supervisor's office with a yardstick. Thereafter, Agency Witness 1 testified that the vents were turned on in Immediate Supervisor's office and it became uncomfortably cold in the office. Agency Witness 1 testified she is anemic. She noted the policy prohibiting staff from adjusting the vents in another staff's work space. As such, Agency Witness 1 testified that she reported the matter to a supervisor. The evidence shows that the immediate supervisor's office was then closed and locked. Also, the evidence shows that sometime later that day, Grievant determined the immediate supervisor's office door was locked. Grievant then requested Supervisor 1 un-lock the immediate supervisor's door to permit Grievant to turn off the vents.

The Hearing Office had an opportunity to observe the demeanor of Agency Witness 1 and found her testimony credible. Further, the Hearing Officer has considered the above evidence and the totality of the circumstances; that is, she has considered the following:

- Grievant was known to use a yard stick to adjust air conditioning vents;
- Grievant was observed leaving the immediate supervisor's office with the yard stick;
- The air conditioning was off in the immediate supervisor's office before Grievant was seen leaving that office with the yard stick;
- Once Grievant left the office, the vents were noticed to be on and cold air blowing out;
- It became uncomfortably cold after Grievant left the immediate supervisor's office;
- Grievant's requested that Supervisor I open the immediate superviosr's office so Grievant could turn off the vents;
- After Grievant turned on the vents in the immediate supervisor's office, the evidence is unclear regarding when the vents were turned off.

After her thorough review of the evidence and reasonable inferences drawn from the facts, the Hearing Officer finds the Agency has met its burden and shown that Grievant did adjust the air conditioning vents in the immediate supervisor's office.

Moreover, the Hearing Officer finds Grievant's action was against the instructions given to staff by management on November 18, 2013, and January 16, 2014. Thus, Grievant's behavior was misconduct.

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

As mentioned above, Grievant failed to follow the instructions of her superior. Under Standards of Conduct 1.60, such behavior is identified as a Group II Offense.

That said, Grievant contends there were other employees who engaged in the same behavior and they were either not punished or received less severe discipline. The Hearing Office did consider the evidence offered to support this contention and finds it is not sufficient to show disparate treatment. In addition, Grievant argues the group notice she received is in effect retaliation/harassment by Agency management. The Hearing Officer also finds these claims are not substantiated.

Accordingly, the Grievant'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>4</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

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<sup>4</sup> Va. Code § 2.2-3005 and (c)(6)



level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>5</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>6</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 group notice and that the behavior was 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 claims disparate treatment. As discussed above, the evidence is insufficient to establish such treatment. Of note, the Agency did issue counseling memorandums to two other employees concerning adjusting vents. In one case, the Agency was unable to show that the employee was aware of the policy as this employee became a member of the staff after the policy was issued. Consequently, her situation differed from Grievant who received the policy on November 18, 2014, and January 16, 2014. The other employee ultimately received a counseling memorandum because there was some misunderstanding about the situation. In addition, the evidence showed that management was not certain that this employee adjusted a vent/heater. Thus, this evidence as well as other documentation presented by Grievant was not sufficient to support Grievant’s claim of disparate treatment.

Grievant also asserts retaliation and harassment. As previously mentioned, the evidence fails to support these claims.

The Hearing Officer has considered all of Grievant’s arguments and all evidence whether specifically mentioned or not. Having undergone this thorough deliberation, the Hearing Officer finds the Agency’s discipline is reasonable.

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<sup>5</sup> *Rules for Conducting Grievance Hearings VI(A)*

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

## DECISION

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

## 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>7</sup>

Entered this 10<sup>th</sup> day of November, 2014.

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

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.