

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 07/15/19;
Decision Issued: 07/31/19; Agency: VDOT; AHO: John V. Robinson, Esq.; Case No. 11365;
Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 11365

Hearing Officer Appointment: May 29, 2019
Hearing Date: July 15, 2019
Decision Issued: July 31, 2019

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group II Written Notice issued by Management of the Virginia Department of Transportation (the “Agency” or “VDOT”), as described in the Grievance Form A dated March 4, 2019. The Grievant is seeking the relief requested in her Grievance Form A, including reducing the Group II Written Notice to a Memorandum of Counseling.

The hearing officer issued an Amended Scheduling Order entered on June 24, 2019 (the “Scheduling Order”), which is incorporated herein by this reference.

At the hearing on July 15, 2019, the parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. Both parties were represented by their respective advocates. The hearing officer also received various documentary exhibits of the Agency into evidence at the hearing¹.

¹ References to the Agency’s exhibits will be designated AE followed by the exhibit number. References to the Grievant’s exhibits will be designated GE followed by the exhibit number.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

APPEARANCES

Representative for Agency
Witnesses for Agency

FINDINGS OF FACT

1. The Grievant is employed by the Agency as one of 3 Regional Procurement Managers. This is a senior management position within the Agency. At the relevant time, the Grievant was supervised by the then Director of the Administrative Services Division (the "Director"), who in turn reported to the Chief of Administration, (the "Chief").
2. The Grievant was issued a Group II for failure to follow instructions and/or policy for her poor management of the Integrated Directional Signing Program (IDSP) procurement process.
3. This 15-year contract set to expire 1/31/2019 was sent to the Administrative Services Division ("ASD") for re-advertising in early 2018.
4. The Grievant assigned it to a new contract officer who had very limited RFP experience. The contract officer did not receive proper guidance and made numerous errors concerning the RFP which had to be cancelled on August 28, 2018 and re-advertised.
5. After numerous internal meetings between Traffic Engineering, ASD, the Office of Attorney General and VDOT Executive staff, a plan was developed to move forward with re-advertising it and to prevent the re-occurrence of any additional issues.

6. As part of the litigation process by 1 of the 2 vendors concerning the IDSP, many documents were requested through discovery, including the reasons for the cancellation of the first the RFP.
7. During the discovery process, the Director was made aware that certain key documentation for the cancellation was not added to the RFP file.
8. When the Grievant signed the Notice of Cancellation for the first RFP in August 2018, the Grievant did so without preparing the required documentation (Form ASD-03) and obtaining the required authorization.
9. In July 2018, the Chief was contacted by Ray Cory of Traffic Engineering who said that his division was not happy with the level of support from ASD concerning the IDSP procurement.
10. A meeting was held by the Grievant and the Director with Traffic Engineering and the Director instructed the Grievant to complete a file review to check the document compliance status of the file before issuing any Notice of Intent to Approve (“NOIA”). The Grievant failed to follow this instruction.
11. The NOIA was issued but because of irregularities in documentation, the Agency decided to cancel the first RFP in August 2018.
12. A new RFP was issued in late August/September 2018. A new NOIA on the second procurement was awarded in about December 2018 and the unsuccessful vendor commenced litigation as a result.
13. The Grievant’s failure to include documentation in the RFP file is a violation of Department of Human Resource Management (DHRM) Policy 1.60 *Standards of Conduct* for failure to follow supervisor’s instructions and/or comply with the letter and spirit of all state and agency policies and procedures, and the Commonwealth’s laws and regulations.
14. On January 28, 2019, the Director asked the Grievant to provide a copy of the e-mail that the Grievant sent to the OAG requesting advice. The email did not include the Form ASD-03 to document the cancellation. When the Director asked why, the Grievant indicated “[The contract officer] is new and she doesn’t know how we usually handle cancellations.” The Director replied, “But she gave it to you and, you are here to provide direction.”
15. The Grievant’s failure to follow policies and procedures has put the Agency at risk and precipitated legal actions to correct previous erroneous submissions to the Circuit Court and to try to appease opposing counsel that this was an administrative oversight and not an attempt to mislead or withhold information.
16. As a senior level manager, the Grievant should be able to exercise sound judgment and take appropriate steps to resolve important procurement issues. In this case, the Grievant’s inaction has exposed the agency to more risk in an already contentious situation. The Grievant’s actions and decisions as a senior

level manager in this case violate the DHRM Policy 1.60, *Standards of Conduct* by failing to follow policy and/or instructions.

17. The Grievant's infractions disrupted Agency operations, adversely affecting the Agency's operations and reputation.
18. The testimony of the Agency witnesses was credible. The demeanor of the Agency witnesses was open, frank and forthright.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

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).

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 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. *Grievance*

Procedure Manual, § 5.8.

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. AE 5. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serves 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 Agency Procurement and Surplus Property Manual provides, amongst other things;

- d. Cancelling a Solicitation. An Invitation For Bids, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be cancelled or rejected.... The reasons for cancellation shall be made a part of the contract file.

AE 2 at 2.

Similarly, Va. Code § 2.2-4319 provides in part as follows:

- A. An Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be cancelled or rejected. The reasons for cancellation or rejection shall be made part of the contract file.

AE 8.

Pursuant to DHRM Policy No. 1.60 and Agency policy and State law, the Grievant's conduct of failing to follow instructions and/or policy could clearly constitute a Group II offense, as asserted by the Agency. AE 9. In this instance, the Agency appropriately determined that the Grievant's violations constituted a Group II Offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer

agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the Group II Written Notice by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group II offense.

In this case, the Grievant was clearly given by the Agency both pre-discipline and post-discipline constitutional and policy due process rights. AE 3.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has asserted that the discipline was too harsh. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in his analysis:

1. the Grievant's many years of service to the Agency;

2. the demands of the Grievant's work environment;
3. the complicated nature of the IDSP procurement; and
4. the departure of Carolyn Wisdom

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the policy is important to the proper functioning of the Agency and the Agency issued to the Grievant significant prior progressive counseling and discipline concerning infractions in the recent past. AE 10. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable

behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a “super-personnel officer” and must be careful not to succumb to the temptation to substitute his judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management.

Id.

In this proceeding, the Agency’s actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department’s discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency’s action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

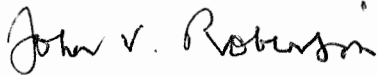
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

ENTER: 7/31/2019



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.