

Issue: Group II Written Notice with Suspension (failure to follow policy and falsifying records); Hearing Date: 02/20/15; Decision Issued: 03/12/15; Agency: VDH; AHO: John V. Robinson, Esq.; Case No. 10534; Outcome: No Relief - Agency Upheld.

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

DIVISION OF HEARINGS

In the matter of: Case No. 10534

Hearing Officer Appointment: January 13, 2015

Hearing Date: February 20, 2015

Decision Issued: March 12, 2015

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of a Group II Written Notice issued by Management of the Department of Health as described in the Grievance Form A dated October 21, 2014.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on January 20, 2015 at 10:00 a.m. The Grievant, the Agency's attorney and the hearing officer participated in the call. The Grievant confirmed he is seeking the relief requested in his Grievance Form A. Following the conference call, the hearing officer issued a Scheduling Order entered January 20, 2015, which is incorporated herein by this reference.

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.

At the hearing, the Agency was represented by its attorney and the Grievant represented himself.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Exhibits 1 - 30 in the Agency's binder, and all documents in the Grievant's binder, Exhibits 1 - 26.¹

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.

APPEARANCES

Representative for Agency
Witnesses
Grievant

FINDINGS OF FACT

1. The Grievant is employed as a General and Operations Manager for a Health District of the Agency. AE 8 and 9. The Grievant's direct supervisor (the "Health Director") explained that in such role the Grievant functions as a Chief Operating Officer for the district, including serving as the financial manager who approves Travel Expense Reimbursement Vouchers ("TERV") for those persons whom the Grievant supervises, including the Office Service Supervisor Senior. GE 25 & AE 9.
2. Pursuant to his Employee Work Profile ("EWP"), the Grievant is "[r]esponsible for the independent management of all fiscal activity, procurement, human resource and physical environment. Responsible for non medical, administrative decisions, particularly in the absence of the Director." AE 9.
3. It is important to the operations of the Agency and to preserve the public trust that the Grievant follow the policies and procedures of the Agency concerning fiscal management controls, ethics and state travel, including those pertaining to supervisor approval of subordinates' claims for travel reimbursement.
4. Agency Policy 20336 provides that when a supervisor, like the Grievant, signs a subordinate's TERV, "[t]he signature of the traveler's supervisor certifies that he/she agrees that the travel was necessary and the requested reimbursements are proper." AE 4 at 6 and 8.
5. Agency Policy 20336 further provides that:

Travelers must submit the TERV to the supervisor within 30 working days after completion of the trip...

By signing the travel reimbursement request, the traveler is certifying the accuracy of all information and the legitimacy of the travel. The signature of the traveler's supervisor certifies that the supervisor agrees that the travel was necessary and the requested reimbursements are proper. It is the responsibility of the Fiscal Office at each agency to ensure that any type of reimbursement (Travel, Vendor Payment, Petty Cash, etc.) is not paid more than once.

AE 4 at 11.

6. Agency Policy 20335 contains similar provisions concerning the certifications (AE 5 at 8-9) and the traveler's need to submit to their supervisor the TERV within 30 working days after the completion of the trip (AE 5 at 8).
7. Additionally, Agency Policy 20335 provides:

Employees are permitted to use their personally owned automobile when a State-owned vehicle or Office of Fleet Management Services (OFMS) rental vehicle is not available, or when the use of a personally owned vehicle is cost-beneficial to the agency. Employees electing to use their personal vehicle as a matter of convenience will be reimbursed for mileage at the lowest combined capital and operational trip pool rate charged by OFMS. The Personal Vehicle Use Statement at the top of the Travel Expense Reimbursement Voucher should be checked with the appropriate choice.

Reimbursement rates are set in the current Appropriation Act (Section 4 - 5.04f). Currently, the rates for the first 15,000 miles of use each fiscal year are:

- **Current IRS rate** - when a personally owned vehicle is cost justified or a State-owned vehicle/OFMS rental is not available.
- **\$.246 mile** - when use of a personally-owned vehicle is elected for the convenience of the employee.

Reimbursement rates are reduced to **\$.13/ mile** for travel in excess of 15,000 miles in one fiscal year, unless a State-owned vehicle is not available; then, the rate shall be **the current IRS rate**.

The current IRS rates can be found at the following sites:

<http://www.irs.gov/uac/Newsroom/New-Standard-Mileage-Rates-Now-Available;-Business-Rate-to-Rise-in-2015>

If the higher mileage rate is used for reimbursement, the Agency Fiscal Officer is responsible for ensuring the appropriate justification has been **documented and approved by the Agency Head or designee** (as outlined in the following sections). This documentation and approval must be attached to the Travel Expense Reimbursement Voucher.

AE 5 at 34.

8. The Grievant serves as the Agency Fiscal Officer for the Health District.
9. During a regularly scheduled internal audit of the Health District, for the period July 1, 2013 to June 30, 2014, the audit found inadequate fiscal controls concerning the District's travel reimbursements, discovering also that the Office Service Supervisor Senior had on at least 8 instances made inappropriate claims for mileage reimbursement for using her personal vehicle on occasions when she had actually used a state vehicle for business travel. The Grievant and the Office Service Supervisor Senior admit the erroneous claims.
10. The Grievant approved the claims, certifying the corresponding TERVs.
11. The Grievant asserts that he was justified in trusting the Office Service Supervisor Senior as a long-term, valued employee. In the Second Step Meeting, among the Grievant, the Deputy Commissioner and the Operations Director on October 21, 2014, the Grievant admitted that the Grievant would not question the Office Service Supervisor Senior when she turned in her TERVs.
12. The evidence, however, is overwhelming that the Grievant should have noticed numerous red flags concerning the Office Service Supervisor Senior's TERVs, which should have caused the Grievant to question her further.
13. The Office Service Supervisor Senior testified that if the Grievant had asked for the supporting documentation required by the Terv form, the Office Service Supervisor Senior would have discovered her errors. The Office Service Supervisor Senior admitted that the Grievant never once asked for such required supporting documentation.
14. Similarly, the testimony of the Director of Internal Audit was credible and compelling on the issue of the red flags. The Grievant should have been alerted to problems with the subject TERVs because of numerous factors, including the reverse date sequencing of certain travel claims, the fact that many claims were submitted way beyond the permitted 30 work day period, the fact that the claims were always for the highest 55.5¢ reimbursement rate, the fact that no required supporting documentation was submitted and the fact that the Office Service Supervisor Senior was so extremely busy.
15. The Grievant currently has an active Group I Written Notice for failure to follow state policy. AE 29.

16. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

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).

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. The Standards of Conduct (the "SOC") provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

Consistent with the SOC Policy, the Grievant's infraction can clearly constitute a Group II offense:

Examples: Failure to follow supervisor's instructions or comply with written policy.

SOC Attachment A. AE 3.

The Agency agreed that the asserted offense code of falsification of records did not apply.

Pursuant to DHRM Policy 1.60, Standards of Conduct, 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 Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The hearing officer also agrees with the Agency's attorney that each of the 8 cited offenses could have stood alone as a Group II offense and could potentially have lead to termination if accumulated or if asserted as a Group III. The Grievant argues that the discipline was too harsh. The Agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The Agency reduced the discipline to a Group II offense with a 5 day suspension from a Group III 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 attorney that the Grievant's disciplinary infractions justified the discipline by Management concerning the infraction. 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 after giving effect to the mitigation.

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

DHRM's *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).

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 and in fact mitigated the discipline.

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 herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's good service to the Agency;
2. the Grievant's hard work and the quality of the Grievant's work;
3. the fact that the Grievant had significantly reduced the overall travel expenses of the District;
4. the fact that the Grievant was extremely busy in a large office;
5. the multiple work roles covered by the Grievant;
6. the grievant's good evaluations (GE 1); and
7. the stressful circumstances of the Grievant's work environment.

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.* Obviously, there were also aggravating factors which militate against the Grievant in this proceeding, including the active Group I Written Notice. AE 29. As a supervisor, the Grievant is held to a higher standard. *See*, EDR Case No. 9872. In this case, 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).

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious 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 Group II 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 in this proceeding 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

As the *Grievance Procedure Manual* sets forth in more detail, this 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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

- 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. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
- 2. A challenge that the hearing decision does not comply with grievance procedure** 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 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 should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However,

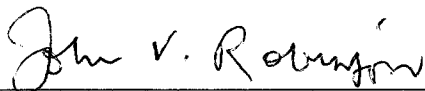
the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an 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 been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 3 / 12 / 2015



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Rules for Conducting Grievance Hearings*, § V(C)).

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