

Issue: Group II with Suspension (failure to follow instructions); Hearing Date: 03/18/15; Decision Issued: 03/25/15; Agency: UVA; AHO: William S. Davidson, Esq.; Case No. 10555; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 10555

Hearing Date: March 18, 2015
Decision Issued: March 25, 2015

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective February 24, 2015, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on February 25, 2015 at 10:00 a.m. The telephone pre-hearing conference was conducted with the Grievant and Agency representative. At that time, the grievance hearing was scheduled to be conducted on Wednesday, March 18, 2015 commencing at 9:30 a.m.

In accordance with the discussion during the telephone pre-hearing conference, the Hearing Officer mailed a letter notice of hearing dated February 26, 2015 to both parties establishing the hearing date and deadline for the exchanging of exhibits and list of witnesses.

APPEARANCES

Grievant
Agency Representative
Agency Advocate

ISSUES

1. Did the Grievant refuse to complete an assignment as instructed by the Grievant's supervisor?
2. If so, was the Grievant's conduct a violation of the Standards of Conduct Policy: 1.60?
3. If so, was the Grievant's conduct a Group II offense under the Standards of Conduct and was the discipline in accordance with the Standards of Conduct?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in a single notebook with the following contents:

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|--------|--|
| Tab 1. | Grievance Form A
Written Notice issued 12-1-14 with attachments
2013 Performance Evaluation
2012 Performance Evaluation
2011 Performance Evaluation
2010 Performance Evaluation
2009 Performance Evaluation
Written Notice issued 2-15-13 |
| Tab 2. | Written Notice issued 12-1-14 |
| Tab 3. | Emails dated 2-18-14
Emails dated 1-29-14
Notebook entries from 2-4-14 to 5-16-14 |
| Tab 4. | Written Notice issued 2-5-13
2013 Performance Evaluation
Letter of counseling dated 12-20-13 with attachments
Letter of counseling dated 9-19-13 with attachments |
| Tab 5. | 2012 Performance Evaluation with attachments |
| Tab 6. | 2011 Performance Evaluation
Letter of counseling dated 8-16-2011 with attachments |
| Tab 7. | Standards of Conduct, Policy: 1.60 |

The Grievant's single exhibit introduced as rebuttal was:

- Exhibit A - Email dated 2-19-14

WITNESSES

The Agency called [A] Manager, [B], Supervisor and [C], Housekeeper.

The Grievant testified.

FINDINGS OF FACT

The Agency witness [A]. testified that the written notice issued on December 1, 2014 was based on actions which occurred on October 30, 2014. The witness testified that the written notice was issued because early in the Grievant's shift on October 30, 2014 the Grievant's supervisor assigned the Grievant to assist a co-worker with cleaning a display case later in the day but that the Grievant refused indicating that the Grievant did not want to work with the other assigned employee and that cleaning the display case was not the Grievant's job. The witness further testified that another employee was found to assist the Grievant with cleaning the display but that the Grievant said that it was not the Grievant's job to clean the display. The witness further testified that the Grievant did not in fact assist in cleaning the display as requested. Further, the witness testified that the Grievant told the Grievant's supervisor that the Grievant would follow up by telephone regarding the cleaning assignment but the Grievant did not do so. The witness stated that the Grievant said that the Grievant was too busy doing the Grievant's regular work to take time to call the supervisor.

The Agency called two other witnesses who confirmed that the Grievant did not assist in cleaning the display as requested.

The Grievant testified that he never refused to do the work and that he didn't report to clean the display because he saw the co-worker (with whom he did not want to work) going over to help clean the display.

The Agency recalled as a rebuttal witness [A]. who testified that she spoke with the Grievant on three separate occasions after October 30, 2014 and that the Grievant admitted that the Grievant's supervisor extended the opportunity for the Grievant to work with another employee but that the Grievant refused.

The Written Notice dated October 30, 2014, at Section IV-Circumstances Considered indicates that the Grievant's six and a half years of employment, the Grievant's "inconsistent" rating on recent performance evaluations, a Group I Written Notice issued on 2-15-13 and several earlier Written Letters of Counseling resulted in the Group II Written Notice with a three day unpaid suspension.

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).

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.

To establish procedures on Standards of Conduct and Performance 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 to provide appropriate corrective action.

DECISION

The action of the Agency is upheld. The evidence established that the Grievant intentionally refused to follow his supervisor's orders. The Grievant's actions were a violation of the Standards of Conduct Policy: 1.60, being a Group II Offense, "insubordination". The Written Notice with an active life of three years, together with the suspension of three unpaid work days is in accordance with the applicable policy and procedures.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A 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 administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. "Received by" means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

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 with which the hearing decision is not in compliance. The director's authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.
2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, 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 hearing 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 must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal

must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of 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 ben decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may makes its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer