

May 31, 2011

TO: Norma Luna

FROM: Teresa Parsons, SPHR
Director's Review Program Supervisor

SUBJECT: Norma Luna v. Department of Personnel (DOP)
Director's Review Request No. RULE-10-014

On December 21, 2010, you filed a request for a Director's review alleging DOP violated WAC 357-40-010 and WAC 357-40-015 (Exhibit A). While you also alleged violations of DOP policies, a Director's review is limited to a violation of the state civil service law, Chapter [41.06](#) RCW, or rules adopted under it (RCW 41.06.170(2)). The Director's review of an alleged rule violation per WAC 357-49-010(4) is the first step in the appeal process (WAC 357-49-017). Further, as stated in the December 23, 2010 letter acknowledging your request, an internal grievance process is separate and apart from a Director's review request under Chapter 357-49 WAC.

On March 10, 2011, DOP provided a response to the alleged violation (Exhibit J). On March 18, 2011, you provided an additional document addressing DOP's responses to your rule violation claims (Exhibit H). As the Director's designee, I conducted a Director's review based on the written documents in the record. After reviewing the documents, I conclude no violation of the rules occurred.

Nature of Alleged Violation

Specifically, you allege DOP violated WAC 357-40-010 and WAC 357-40-015 when the department issued you a letter of expectations on November 29, 2010. You assert the letter of expectations served as a corrective action and that you had already fulfilled the disciplinary action of a one-week suspension issued on November 1, 2010. You assert you were adversely impacted because it denied you "just cause and due process" and created "a double jeopardy situation" (Exhibit A).

WAC 357-40-010 provides that "[a]n appointing authority may dismiss, suspend without pay, demote, or reduce the base salary of a permanent employee under his/her jurisdiction for just cause."

WAC 357-40-015 provides the following:

Employers may develop a corrective discipline policy that identifies actions that an appointing authority may take other than dismissal, suspension, demotion, or reduction in base salary, that represent alternative formal measures that do not deprive an employee of pay, yet still help an employee address unsatisfactory performance. Actions taken by an appointing authority in accordance with the employer's corrective discipline policy carry the same weight as disciplinary actions which impact pay.

Background

You work as an Employee Assistance Professional Expert (EAP Expert), and part of your job assignment involves traveling from your work station in Seattle to Bellingham and Everett. In early 2010, your supervisor, Employee Assistance Program Manager Carol Kramer, discovered some discrepancies with your travel. As a result, a fact finding investigation was initiated to obtain more information. In meetings with Ms. Kramer and Development Services Division Assistant Director Scott Turner, you admitted to non-travel on specific dates identified by management and noted mistakes in reporting had occurred (Exhibit J-2, attachment 4). On July 16, 2010, Mr. Turner (appointing authority) provided you with a pre-disciplinary letter (Exhibit J-2), and he conducted a pre-disciplinary meeting on August 12, 2010 (Exhibit J-3). On November 1, 2010, you received official notification of a one-week suspension without pay, effective November 13 – November 20, 2010, inclusively (Exhibit J-4). On November 19, 2010, you reimbursed DOP for payment you had previously received for non-travel dates (Exhibit J-7).

On November 15, 2010, you filed an internal grievance with your supervisor in response to the November 1, 2010 letter of discipline (Exhibits F and G). On December 1, 2010, you filed the grievance with Mr. Turner, as instructed by your supervisor (Exhibit C). As part of your grievance, you stated, in part, "the discipline does not meet the just cause principles," you were "denied due process, . . . treated more severely than other employees with similar mistakes," and you were "not availed [your] right to file the grievance" (Exhibits F and G). The November 1, 2010 disciplinary letter included your right to appeal the disciplinary action to the Washington State Personnel Resources Board, your avenue to appeal under RCW 41.06.170(2) and WAC 357-52-010(1)(a) (Exhibit J-4). Nevertheless, Mr. Turner and Human Resources Consultant Cecilia Garcia agreed to meet with you on December 9, 2010, to discuss your grievance and your request to rescind the disciplinary action. However, after meeting with you, Mr. Turner remained convinced the disciplinary action of a one-week suspension was appropriate (Exhibit B).

On November 29, 2010, after serving your one-week suspension without pay, Mr. Turner provided a letter of expectations regarding your role as an EAP Expert within the Employee Assistance Program. The intent of the letter was to provide you with clarification and to serve as a reminder management's expectations of EAP Experts. The letter also supplemented the Performance and Development Plan (PDP) Expectations already set in place by your supervisor (Exhibit E). In your December 1, 2010 grievance letter to Mr. Turner, you also stated your belief that the letter of expectations represented corrective action, which you believed was a double jeopardy situation (Exhibit C).

Summary of Ms. Luna's Allegations

You allege the November 29, 2010 letter of expectations violates WAC 357-40-010 and WAC 357-40-015. Specifically, you assert the letter was issued seven months after you had accepted responsibility and took action to correct the situation. You further assert the letter served as a corrective action, which you received four weeks after the disciplinary action had been dispensed and fulfilled. You assert two of the expectations in the letter related to the action described in the July 16, 2010 pre-disciplinary letter, while the other expectations were new and introduced for the first time. You contend you did not have an opportunity to correct issues not previously brought to your attention. You further contend the expectations are not consistent with those of your colleagues.

You assert you were adversely impacted as a result of receiving new expectations with the consequence of further corrective or disciplinary action up to and including dismissal and that you were denied your right to just cause and due process. You describe the letter of expectations as a separate and additional disciplinary action because the expectations were not included in the disciplinary letter. Therefore, you contend the letter of expectations created a double jeopardy situation, and you ask that the letter of expectations be removed from your personnel file (Exhibits A and H).

Summary of DOP's Response to Alleged Rule Violations

DOP asserts the purpose of the letter of expectations was to provide clarification and to serve as a reminder to you the expectations of management in your role as an EAP Expert. DOP further indicates the expectations were not to supersede the Performance and Development Plan (PDP) expectations set by your manager. DOP contends the appointing authority, Mr. Turner, determined the expectations were warranted upon your return to work after serving the one-week suspension. DOP asserts expectations are not considered formal discipline. In addition, DOP contends management has the right to set clear expectations at anytime to ensure understanding of what is expected of an employee. In this case, DOP reiterates the letter of expectations served as clarification to you about your position's expectations and supplemented the expectations already in place. DOP contends the department took all appropriate actions and does not believe you were adversely impacted by receiving new expectations (Exhibit J).

Director's Determination and Rationale

WAC 357-40-010 provides that "an appointing authority may dismiss, suspend without pay, demote, or reduce the base salary of a permanent employee under his/her jurisdiction for just cause." The rule refers to formal disciplinary actions taken by an appointing authority. The November 1, 2010 suspension letter served as formal discipline. WAC 357-40-015 provides, in part, that an employer "may develop a corrective discipline policy that identifies actions that an appointing authority may take . . . that represent alternative formal measures . . . yet still help an employee address unsatisfactory performance." Further, "[a]ctions taken by an appointing

authority in accordance with the employer's corrective discipline policy carry the same weight as disciplinary actions which impact pay" (WAC 357-40-015).

DOP has established Policy Number HR 1.03, Corrective/Disciplinary Action. The policy describes corrective action as "a series of steps taken to encourage an employee to correct an issue that may contribute to poor performance or behavior in the work place." The policy further indicates that "[a] monitoring period may be established including timelines required for employee correction in order to avoid further disciplinary action" (Exhibit J-1). The November 29, 2010 letter of expectations on its own may be considered a form of corrective action consistent with WAC 357-40-015. However, during your December 1, 2010 meeting with Mr. Turner to discuss your grievance, he clarified, in part, the following:

[The] letter sets forth expectations that Ms. Kramer and I believe all Employee Assistance Program employees should adhere to, and I provided you with these expectations in writing because I wanted you to have clear guidance and instruction for the future, to help you avoid repeating the misconduct that caused you to be disciplined (Exhibit B).

This is consistent with the intent of the November 29, 2010 expectations, which also highlighted expectations included in your PDP (Exhibit J-9) and included attachments of related agency policies. In this context, the letter of expectations served as a follow-up to the November 1, 2010 suspension letter, which Mr. Turner provided to you within a short time period of serving the one-week suspension. Mr. Turner and Ms. Kramer met with you to go over the expectations and provided you an opportunity to ask questions.

The former Personnel Appeals Board (PAB) has previously addressed the "double discipline" concept. "[The] Board has long held that employees may not be formally disciplined for conduct for which they have already been reprimanded . . . or for which corrective action has been taken . . ." Further, either a reprimand or a corrective action "may be the basis for dismissing a disciplinary action as 'double discipline.'" Berry v. Dep't of Social & Health Services, PAB No. RED-95-0035 (1995); O'Holleron v. Dep't of Social & Health Services, PAB No. D87-21(1987).

However, in Berry and O'Holleron, the Board dismissed the formal disciplinary actions of reduction in salary, which had been imposed after the Appellants received letters of reprimand for the same charges of misconduct. This differs from your case in that you received a follow-up letter of expectations to the disciplinary action of suspension. There is nothing in the rules that precludes an agency from setting future expectations following a disciplinary action. Therefore, you have not met your burden of proving DOP violated WAC 357-40-010 or WAC 357-40-015.

Appeal Rights

WAC 357-49-018 provides that either party may appeal the results of the Director's review to the Personnel Resources Board (board) by filing written exceptions to the Director's determination in accordance with Chapter 357-52 WAC.

WAC 357-52-015 states that an appeal must be received in writing at the office of the board within thirty (30) calendar days after service of the Director's determination.

The mailing address for the Personnel Resources Board (PRB) is P.O. Box 40911, Olympia, Washington, 98504-0911. The PRB Office is located at 600 South Franklin, Olympia, Washington. The main telephone number is (360) 664-0388, and the fax number is (360) 753-0139.

If no further action is taken, the Director's determination becomes final.

c: Katie Gerard, DOP
 Connie Goff, DOP

Enclosure: List of Exhibits

NORMA LUNA v DOP

RULE-10-014

List of Exhibits

Norma Luna's Exhibits

- A. December 21, 2010 Director's Review Request
- B. December 15, 2010 letter from Scott Turner, DOP Assistant Director, denying reconsideration of disciplinary action
- C. December 1, 2010 Norma Luna's letter forwarding grievance to Mr. Turner
- D. November 29, 2010 letter from Carol Kramer, EAP manager, acknowledging Ms. Luna's grievance filed via email November 15, 2010, elevating issue to Mr. Turner
- E. November 29, 2010 letter of expectations from Scott Turner to Norma Luna, with the following attached: (25 pages total)
 - Expectations for July 1, 2010 to June 30, 2011
 - OFM's Manual section 10.80 – Travel Expense
 - Administrative Procedures for Travel by DOP Employees
 - DOP Ethics Policy 4.08
 - HR 1.03 Corrective Action Policy
- F. November 15, 2010 letter of grievance to Carol Kramer from Norma Luna, with description, date of occurrence, and requested remedy (2 pages)
- G. November 15, 2010 letter officially filing grievance and outlining Norma Luna's case summary (8 pages) with 14 attachments:
 - 1) DOP Policy 5.02
 - 2) November 1, 2010 meeting notice for personnel discussion
 - 3) July 16, 2010 notice of possible disciplinary action from Scott Turner, Assistant Director, DOP
 - 4) DOP Policy HR 1.03
 - 5) August 11, 2009 email from Norma Luna sending Outlook printout for Aug. 9-15, 2009 to EAP staff
 - 6) August 11, 2009 email from Carol Kramer, EAP manager explaining why Seattle office scheduling is done through Olympia office
 - 7) August 12, 2009 email exchange with IT with incident ticket
 - 8) November 5, 2010 email from Carol Kramer asking Norma Luna for leave slips
 - 9) PM leave slip for December 7, 2009 signed 12/1
 - 10) AM leave slip for December 7, 2009 signed 12/7 with medical statement
 - 11) November 5, 2010 email from Cecilia Garcia, HR, outlining grievance procedure
 - 12) Travel reimbursement overpayment correspondence Nov. 15-17 2010
 - 13) November 29, 2010 letter from Ms. Kramer acknowledging Ms. Luna's grievance filed November 15, 2010, elevating it to Mr. Turner
 - 14) November 29, 2010 letter of expectations from Scott Turner to Norma Luna, with the following attached: (25 pages total)
 - Expectations for July 1, 2010 to June 30, 2011
 - OFM's Manual section 10.80 – Travel Expense

Administrative Procedures for Travel by DOP Employees
DOP Ethics Policy 4.08
HR 1.03 Corrective Action Policy

H. Letter from Norma Luna dated March 18, 2011 providing additional documents and exhibit list for Director's review. (9 pages)

- 1) Meeting invitation April 28, 2010 – notebook paper with dates
- 2) Disciplinary letter dated November 1, 2010
- 3) Department of Personnel Performance and Development Expectations for July 1, 2010 to June 30, 2011 (Interim Review)
- 4) Letter of Expectations dated November 29, 2010
- 5) Performance and Development Plan Evaluation July to December 2010, Performance and Development Plan Evaluation July 2009 to June 2010, Performance and Development Plan Interim Review July 2009 to December 2009
- 6) DOP Corrective/Disciplinary Action Policy HR 1.03
- 7) Grievance Response letter dated December 15, 2010
- 8) Series of emails and corresponding Outlook calendar screen print out (approx. 24 dates)
- 9) Email and corresponding Outlook calendar screens for March 11, 2011
- 10) Letter from Carol Kramer dated November 29, 2010
- 11) DOP Internal Employee Investigation Policy 2.29
- 12) Letter to Eva Santos dated December 20, 2010

I. Booklet from Norma Luna prepared and distributed at the August 12, 2010 meeting with Mr. Turner, Ms. Kramer, and Ms. Garcia.

DOP's Exhibits

J. Letter from Katie Gerard, DOP summarizing events and listing documents submitted for Director's review, dated March 10, 2011.

1. Department of Personnel HR 1.03 Corrective Action Policy (4 pages)
2. Pre-disciplinary letter dated July 16, 2010 with 58 attachments (166 pages)
3. Letter to Norma Luna rescheduling Pre-disciplinary meeting dated July 22, 2010
4. Disciplinary letter dated November 1, 2010 with 20 attachments (91 pages)
5. Heidi Jones letter to Norma Luna dated November 15, 2010 with enclosures (5 pages)
6. Revised Code of Washington (RCW) 43.09.185 Loss of Public Funds-Illegal Activity – Report to state auditor's office (1 page)
7. Norma Luna letter to Heidi Jones dated November 17, 2010 with enclosures (4 pages)
8. Memo of expectations from Scott R. Turner dated November 29, 2010 with attachments (24 pages)
9. Performance and Development Plan Expectations for July 1, 2010 to June 30, 2011 (3 pages)
10. Washington Administrative Code 357-10-040 (1 page)
11. Department of Personnel Employee Grievance Policy 5.02 (2 pages)
12. Employee Policy Acknowledgement Checklist with email clarifying Driver Safety portion from Norma Luna August 2010 (6 pages)
13. DOP Internal Employee Investigation Policy 5.04 (numbered as policy 2.29) (2 pages)
14. DOP Guidelines for Conducting an Investigation (3 pages)