

Issues: Group II (unsatisfactory performance, failure to follow instructions, interference with State operations), Group II with Suspension (failure to follow policy); Group II (insubordination) and Termination; Hearing Date: 12/07/16; Decision Issued: 04/21/17; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10897, 10898, 10899; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10897 / 10898 / 10899

Hearing Date: December 7, 2016
Decision Issued: April 21, 2017

PROCEDURAL HISTORY

On February 1, 2016, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance, failure to follow instructions, and interference with State operations. On February 29, 2016, Grievant received a Group II Written Notice of disciplinary action with a two workday suspension for failure to follow policy. On March 21, 2016, Grievant was issued a Group II Written Notice of disciplinary action for insubordination. Grievant was removed from employment based on the accumulation of disciplinary action.

Grievant timely filed grievances to challenge the Agency's actions. On October 13, 2016, the Office of Employment Dispute Resolution issued Consolidation Ruling 2017-4426. On October 25, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency discriminated against Grievant because of his race?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. 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 the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Social Services employed Grievant as a Support Enforcement Supervisor. He began working for the Agency in September 2005. Grievant had prior active disciplinary action. On September 11, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance and failure to follow instructions.

The District Manager supervised 46 employees including two contract employees. Four supervisors including Grievant reported to the District Manager. The District Manager reported to the Regional Director.

Grievant filed a grievance on October 14, 2015. The Regional Director asked Grievant to meet regarding the grievance. Grievant attended a grievance step meeting with Regional Director on October 19, 2015. Grievant used his tape recorder to record

the meeting. On December 8, 2015, the Regional Director learned that Grievant recorded the grievance step meeting.¹

The Agency had a contract with a temporary staffing agency to have selected employees of the temporary staffing agency work at the District office. The District Manager and Accountant Senior reviewed the fiscal needs of the District and then followed a procurement process to pay the temporary staffing agency for the services rendered by its employees to the Agency. The temporary staffing agency paid its employees for working at the District office. Once an employee of the temporary staffing agency began working at the District office, his or her wages could only be changed following the Agency's procurement process. In other words, the temporary staffing agency could not independently decide to increase an employee's wages and expect or require the Agency to begin reimbursing it at a rate high enough to cover the wage increase. A temporary wage employee could receive a wage increase only if it was initiated by the District Manager and processed by the Accountant Senior and her staff.

Grievant was given permission to hire a "contract" employee. Grievant reviewed the work histories of potential candidates and conducted candidate interviews. He selected Mr. R as the "contract" employee. Mr. R was employed by the temporary staffing agency and worked at the District office. Mr. R had a lengthy commute to the District office.

Grievant called the Recruiter of the temporary staffing agency and indicated he wanted to increase the hourly rate for a position and have her recruit a new candidate for that position. He told the Recruiter that Mr. R could not continue to work at the District office because of his lengthy commute. He later called the Recruiter and told her Mr. R had worked out the problems with his commute and would be staying in the position but at the higher hourly wage. Grievant informed the Recruiter that he had already informed Mr. R of the increased pay rate.

The Recruiter completed the required paperwork to increase Mr. R's wage by an additional \$2 per hour. She changed Mr. R's wage rate in the temporary staffing agency's payroll system.

On December 14, 2015, the Recruiter sent an email to the Accountant Senior with a copy to Grievant indicating that Mr. R's "new title will be Administrative Assistant III and it has been requested that he be paid \$16.00/hour."² The Recruiter changed Mr. R's "code number" to reflect that his compensation had changed.

¹ Grievant claimed he placed the recorder on the table in plain view. The Regional Director asserted that she did not see Grievant's recorder.

² Agency Exhibit 7.

The Agency did not have sufficient funds in its budget to pay for the wage increase to Mr. R. The District Manager refused the wage increase for Mr. R. The District Manager spoke with Mr. R. Mr. R said Grievant would get him a two dollar per hour pay increase while he changed where he lived to be closer to the District office.

Grievant did not have the authority to change purchase orders. He did not have access to the eVa procurement system.

On February 5, 2016, Grievant met with the Regional Director, District Manager, and Mr. H in the District Manager's office. The District Manager sat behind her desk. Grievant was seated in the middle chair facing the District Manager. The Regional Director was seated to Grievant's right and next to a wall. Mr. H was seated to Grievant's left and closest to the office door. The office was approximately 120 square feet.

The Regional Director told Grievant she was placing him on administrative leave and intended to issue Grievant a Group II Written Notice for violating the grievance procedure by recording a grievance step meeting with the Regional Director. Grievant had provided a copy of the recording to the HR Manager.

The Regional Director told Grievant that recording the meeting was not allowed and was a violation of the grievance policy.

Mr. H asked Grievant if he had read the grievance procedure and finished employee training about the grievance procedure. Mr. H noted that Grievant must have been aware of the policy because he scored 100% on the exam required to pass the course.

The Regional Director told Grievant that because this was his second Group II Written Notice, his employment would be terminated. The Regional Director told Grievant that he needed to leave his access card and State ID with the District Manager and that Mr. H would escort him from the building.

Grievant stated several times that "you couldn't do this." He said they "had no right" and that he had filed an EEOC claim. Grievant said they were "violating his rights." Grievant repeatedly asked the Regional Director to get the HR Manager³ on the telephone because she would tell them they could not fire Grievant.

Mr. H told Grievant he would have the opportunity to respond to the written notice, but now was not the time to do so. Mr. H told Grievant he could formally respond to the notice. Grievant asked how he had to respond. The Regional Director said Grievant had until Monday to respond. Grievant said they should know that was not enough time to respond and typically employees were given a week to respond.

³ The HR Manager worked at another location.

The Regional Director said that normally a response to a notice of intent was needed within 24 hours of receipt.

Grievant repeated that he would not leave the office until he talked with the HR Manager. The Regional Director repeated that they would not be calling the HR Manager. Mr. H asked Grievant to go with him to collect his things. Mr. H said he would walk Grievant back to his desk as discretely as possible. Grievant repeated that he would not leave.

The Regional Director said she would have to call the authorities if Grievant was not willing to leave. The Regional Director stood up and the District Manager moved the telephone closer to the Regional Director. Grievant stood up and said, "Girl, you better not!"⁴ Grievant was angry. His voice was elevated, but he was not yelling. He was standing approximately eight or nine inches from the Regional Director.

Mr. H stood up and pulled Grievant back closer to his chair and said "You don't want to do this." Grievant and Mr. H returned to their seats. Mr. H said he would walk Grievant back to his desk so he could collect his belongings. Grievant remained angry. He glared at the District Manager and did not move. Mr. H then asked the Regional Director and District Manager if he could have a moment along with Grievant. The Regional Director and District Manager left the room. Mr. H reminded Grievant that "this is a process" and that he needed to leave the building.

Approximately ten to fifteen minutes later, Mr. H walked Grievant out of the office and over to his desk. Grievant gathered his personal belongings and gave his access card to Mr. H. Grievant left the building.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."⁵ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Group II Written Notice – Wage Employee

Failure to follow policy is a Group II offense. The Agency has an established procurement policy and practice governing how it compensated contract employees.

⁴ Grievant slurred the word "Girl" in a manner reflecting contempt for the Regional Director.

⁵ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant had no involvement in the financial process needed to change a contract employee's wages. He had no authority to authorize a change to a contract employee's wage.

Grievant discussed with Mr. R the appropriateness of his hourly wage and indicated Mr. R would receive a \$2 per hour pay increase. Grievant spoke with the temporary employment agency and indicated that Mr. R's wage should be increased to \$16 per hour. Mr. R believed his wage would be increasing and told others about his pay raise. The temporary staffing agency adjusted its payroll system to account for the pay raise based on Grievant's statements that Mr. R's compensation would increase by \$2 per hour. It is clear that Grievant gave the impression to Mr. R and the Recruiter that he could determine Mr. R's wage and that he was raising that wage even though he had no such authority. Grievant interfered with the Agency's procurement process thereby justifying the issuance of a Group II Written Notice.

Grievant testified that he contacted the Recruiter and told her to contact the Accountant Senior because he was considering increasing Mr. R's salary by two dollars per hour. Grievant testified that he had been the point of contact for all of the contract employees he had hired in the past. Grievant claimed he did not tell the Recruiter to increase Mr. R's hourly wage but rather to contact the Accountant Senior for her to increase the wage.

The evidence is clear that Grievant's role in raising Mr. R's wage was more than just recommending an increase and asking that the Recruiter contact the Accountant Senior. Grievant's testimony was that "he was considering increasing" Mr. R's wage. Both the Recruiter and Mr. R believed Grievant had the authority to increase the wage based on their conversations with Grievant.

Group II – Recording Meeting

Section 3.2 of the Grievance Procedure Manual provides that the second step meeting:

must not be recorded unless one of the parties has a disability that would be accommodated by recording the meeting, or if both parties mutually agree to recording the meeting (such an agreement must be in writing). If recorded, the other party may request a copy, provided that duplication expenses are paid by the requesting party.

Grievant recorded the second step meeting of his grievance without the agreement of the Regional Director. Grievant acted contrary to the grievance procedure manual.

Failure to comply with the grievance procedure does not form a basis for disciplinary action. When a party fails to comply with the grievance procedure manual, the opposing party's remedies are limited by Section 6.3 of the Grievance Procedure

Manual. Issuing a written notice is not one of the remedies available to an agency involved in a grievance. The Group II Written Notice with two workday suspension must be reversed.

Group II Written Notice

Insubordination is a Group II offense. Failure to follow a supervisor's instruction is a Group II offense. On February 5, 2016, Grievant was repeatedly instructed by the Regional Director to leave the office. At least three or four times, he refused to leave. Grievant wanted the Regional Director to call the HR Manager by telephone so that the issue of his removal could be discussed at that time. He was advised that he would have another opportunity to address the pending disciplinary action, yet Grievant insisted on speaking with the HR Manager at that moment. When the Regional Director threatened to call the police to force Grievant to leave, Grievant stood up and displayed his anger. He also expressed contempt towards the Regional Director and her authority by referring to her as "Girl." The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for insubordination.

Grievant justified his actions by contending the Agency did not have the right to discipline him and he merely wanted to have the HR Manager explain why he could not be fired. Grievant was repeatedly instructed to leave the office and informed that he would have another opportunity to explain why the disciplinary action was inappropriate. The Regional Director had the authority to force Grievant to leave the office. His failure to do so immediately along with his disregard of the Regional Director's authority form a sufficient basis for issuing disciplinary action.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁶ Under the *Rules for Conducting Grievance Hearings*, "[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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice

⁶ Va. Code § 2.2-3005.

of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁷ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"⁸ cause of the alleged adverse action by the employer.⁹

Grievant filed complaints about his supervisors thereby engaging in protected activity. He suffered an adverse employment action because he received a Group I Written Notice. Grievant has not established a nexus between his protected activity and the Agency's disciplinary action. The Agency took disciplinary action because it believed Grievant's work performance was not adequate.

Discrimination

Governor's Executive Order 1 provides:

This policy specifically prohibits discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, or against otherwise qualified persons with disabilities.

DHRM Policy 2.05 governs Equality Employment Opportunity and provides:

⁷ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁸ This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

⁹ See, Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

Provides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability in accordance with the Governor's Executive Order on Equal Opportunity and state and federal laws.

Grievant had a difficult relationship with his supervisors. Grievant's supervisors expected a higher level of performance from Grievant than he was providing. Grievant expected his supervisors to respond to his requests for additional assistance. This difference in expectations resulted in conflict between Grievant and his supervisors with neither party believing the other party's position was valid.

Grievant argued that the Agency discriminated against him because of his race. He claimed the Agency created a hostile work environment for him. Grievant testified that his supervisors discriminated against him because of his race. He presented testimony from his subordinates who also believed Grievant's managers acted based on race. These opinions are important considerations, but standing alone they are insufficient to show racial discrimination.

The conflict that arose between Grievant and his supervisors appears primarily based on the different expectations held by Grievant and his supervisors and not based on Grievant's race. The pressure Grievant's two supervisors placed on him related to their beliefs that Grievant and his unit were under performing and not because of Grievant's race. This pressure made Grievant feel he was in a hostile environment.

Grievant offered as an example of discrimination an incident when the District Manager interrupted a meeting Grievant was holding with several subordinates. The District Manager perceived the meeting to be one where Grievant was instructing his subordinates how to file complaints regarding their workload. According to Grievant, the District Manager entered the room and threw documents on the table and in an irate manner said, "I am sorry to interrupt your little meeting, but I am sick of these complaints."¹⁰ At the conclusion of the meeting, Grievant went to the District Manager's office and told her that her behavior was hostile and unprofessional. Ms. G was also in the meeting and described the District Manager's behavior as "rude and very disrespectful to [Grievant] as a Supervisor and to [Ms. R] and me as his senior staff."¹¹ If the Hearing Officer assumes Grievant's version of the facts to be true, the incident shows the District Manager engaged in offensive behavior because she was tired of complaints. It does not show that the District Manager's behavior related to Grievant's race.

¹⁰ Ms. R heard the District Manager say, "I just received another customer complaint and I am sick of it!" "Fix it now!"

¹¹ Grievant Exhibit 15.

Grievant argued that the Agency discriminated against him because of his race as shown by the District Manager's behavior during a staff meeting. The District Manager conducted a staff meeting and asked employees if they had any questions. When Grievant raised his hand to ask a question, the District Manager said, "I don't want to hear it." This interaction is not sufficient to show racial discrimination. It reflects rudeness on the part of the District Manager which is consistent with the ongoing conflict between Grievant and the District Manager.

In short, what Grievant perceived as racial discrimination was more likely the result of conflict between Grievant and several managers with strongly held beliefs regarding Grievant's work performance. The "hostile environment" Grievant experienced was not because of Grievant's race but was because Grievant disagreed with and challenged his supervisors.

The Hearing Officer's conclusion is consistent with the finding of the EEOC that it was unable to conclude civil rights statutes were violated by the Agency.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for violation of policy is **upheld**. The Group II Written Notice with a two workday suspension for recording a grievance step meeting is rescinded. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the two workday suspension and credit for leave and seniority that the employee did not otherwise accrue. The Group II Written Notice for insubordination is **upheld**. Grievant's removal is upheld based on the accumulation of disciplinary action is **upheld**.

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
Department of Human Resource Management
101 North 14th St., 12th 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 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 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.¹²

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹² Agencies must request and receive prior approval from EDR before filing a notice of appeal.