

Issue: Group II Written Notice (unsatisfactory performance and failure to follow instructions); Hearing Date: 03/06/17; Decision Issued: 05/05/17; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10941; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 05/22/17; EDR Ruling No. 2017-4556 issued 06/30/17; Outcome: AHO’s decision affirmed; DHRM Ruling Request received 05/22/17; DHRM Ruling issued 06/30/17; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10941

Hearing Date: March 6, 2017
Decision Issued: May 5, 2017

PROCEDURAL HISTORY

On September 15, 2016, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance and failure to follow instructions.

On October 7, 2016, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 18, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 6, 2017, 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 Notice?
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?

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:

Virginia Tech employs Grievant as an Application Developer.¹ She has been employed by the Agency for over ten years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant used MicroStrategy software to perform her work duties. MicroStrategy is a business intelligence tool. MicroStrategy functions by querying external databases based on an internal data model. The resulting data are presented in the form of a report, document, or dashboard where the data can be further analyzed, displayed, and reported to the user. This can be accomplished two ways – specifying a precisely defined model of the data ("data model") or by creating a freeform cube.

Data models can be set up to request database credentials from each user, which are then used when querying with the external database. This ensures that no user ever gets access to data he or she is not entitled to see. Cubes, however, acquire the access credentials of the developer. This means that when an Application Developer creates a cube, that cube has access to all of the University data to which the Application Developer has access. The Agency considered cubes to present a security data risk because they enabled users to access information for which the users would not otherwise be permitted to access.

¹ Grievant was later removed from employment through another employment action not part of this grievance.

Structured Query Language (SQL) is a programming language used to retrieve data in a relational database.

On October 15, 2015, Supervisor J sent Grievant an email stating:

I don't want to default to using a cube for these applications. Decisions to use cubes need to be made carefully taking into consideration response time, memory usage and other turning issues. It is easy to switch to a dataset if we decided not to run off of a cube? I am also not sure how security operates on a cube vs a dataset.²

On March 14, 2016, Supervisor J sent Grievant an email stating:

My concern is that we have addressed taking [name's] time up multiple times now and we have talked about standards multiple times now. Standards such as we will not be doing Send Now, Cubes, direct connects until the policies are in place but the communication still happens.³

During a meeting on July 13, 2016, Supervisor J told Grievant that, "team members will not be using cubes ([regardless] of what other teams use)".⁴

On occasion, Supervisor C would create cubes in MicroStrategy if he felt it was necessary to do so. His action to create a cube was not an authorization for Grievant to create a cube.

The Manager reviewed Grievant's changes to MicroStrategy from June 19, 2016 through August 30, 2016. On August 17, 2016, Grievant created an "Intelligence Cube" entitled OSP EOY Expenditures Cube_SAS_Based. On August 29, 2016, Grievant deleted the cube. Grievant did not obtain permission from Supervisor C to create this cube.

The Agency used work "tickets" to assign tasks to employees, including Grievant. Grievant was assigned responsibility on June 17, 2016 to create dashboards utilizing EOY information for Grants. She was told to complete the project by August 19, 2016. Grievant met with Supervisor C on a weekly basis. During those meetings, Supervisor C asked Grievant what problems she was having. Grievant responded that she was working on the assignment. Grievant did not complete the assignment by August 19, 2016. Supervisor C "closed the ticket" on August 24, 2016 because Grievant did not complete the assignment.

² Grievant Exhibit 7.

³ Grievant Exhibit 8.

⁴ Grievant Exhibit 1.

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.”

Failure to follow a supervisor’s instructions is a Group II offense.⁶ Grievant was repeatedly instructed to refrain from creating cubes without permission. On August 17, 2016, Grievant created a cube without permission from a supervisor. Grievant was instructed to complete a task by August 19, 2016. She did not complete the task by that deadline and the task was removed from her. It is not clear how much of the task she completed. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.

Grievant argued that she was given authorization to create cubes through the work tickets she was given. Grievant did not identify a ticket containing an instruction from Supervisor C or Supervisor J authorizing her to create a cube.

Grievant argued that she was authorized to create cubes to complete the OSP EOY Reports. The evidence showed that Grievant was authorized by Supervisor C to use cubes on a project. This authorization, however, was not with respect to Grievant’s creation of a cube on August 17, 2016. Her creation of a cube on August 17, 2016 was not authorized by a supervisor. Grievant was not disciplined for creating any cube for which she had authorization to do so.

Grievant argued that the August 19, 2016 deadline was a “soft deadline” meaning it could be moved if necessary depending on Grievant’s workload. The evidence showed that Grievant did not communicate to Supervisor C any need to move the deadline. Grievant did not request that the deadline be changed.

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”⁷ 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

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

⁶ See, Attachment A, DHRM Policy 1.60.

⁷ Va. Code § 2.2-3005.

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 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.