

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow policy) and Termination; Hearing Date: 05/22/17; Decision Issued: 05/25/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10989; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10989

Hearing Date: May 22, 2017

Decision Issued: May 25, 2017

PROCEDURAL HISTORY

On March 2, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant received a second Group II Written Notice with removal for failure to follow policy.

On March 13, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 27, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 22, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
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?

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 Behavioral Health and Developmental Services employed Grievant as an Office Services Specialist III. She had been employed by the Agency for approximately 27 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Supervisor who reported to the Manager.

On January 2, 2017, the Manager assigned Grievant to work on the Committee Project. Grievant had volunteered to be on the Committee Project. On January 5, 2017, the Manager instructed Grievant to devote 100 percent of her time on the Committee Project.

Grievant did not devote all of her time to the Project Committee. She failed to appear at several meetings. When she failed to appear at one of those meetings, two employees went to find her. They found her in the Supervisor's office working on the computer.

Grievant had access to KRONOS on her computer. She had a log in identification and unique password. She had this access for several years. On January 17, 2017, the Manager removed Grievant's access to KRONOS. Another employee approached Grievant to inform her that her KRONOS access had been removed and ask that she sign a form acknowledging this action. Grievant refused to sign the form.

Prior to January 20, 2017, the Supervisor provided Grievant with the Supervisor's unique log in identification and unique password to access the Supervisor's desktop computer and also to access KRONOS. This practice was consistent with the practice of Grievant's prior supervisor.

On January 20, 2017 at approximately 10 a.m., Grievant went to the Supervisor's office, logged into the Supervisor's computer using the Supervisor's password. The Supervisor's computer was connected to other computers by the Agency's local area network. Grievant then logged into the KRONOS application using the Supervisor's unique log in identification and unique password. Grievant used the Supervisor's computer to enter information into KRONOS. Grievant's objective was to ensure that her co-workers were paid on a timely and accurately basis.

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."¹ 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 Instructions

Failure to follow instructions is a Group II offense.² The Manager instructed Grievant to devote 100 percent of her time to the Committee Project. Grievant performed duties other than those relating to the Committee Project thereby failing to follow the Manager's instruction. 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 volunteered to perform the additional work on KRONOS during her break. Grievant was a non-exempt employee under the Fair Labor Standards Act. The Agency would not have allowed her to perform additional work duties during her break.

Grievant argued that the Committee Project duties were not within her Employee Work Profile and that she had resigned from the Committee Project. This argument is unpersuasive. Grievant was obligated to follow the instructions of her Manager and the Manager clearly instructed Grievant to devote 100 percent of her duties to the

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

Committee Project. At the time of the Manager's instruction, Grievant had been assigned to work on the Committee Project.

Failure to Follow Policy

DHRM Policy 1.75 governs Use of Electronic Communications and Social Media. This policy defines Electronic Communication Tools as:

Tools used as a means of sending and receiving messages or information electronically through connected electronic systems or the Internet. Tools may include networked computers, email, voicemail, cell phones, smart phones, any other similar system, and new technologies as they are developed.

Grievant used an electronic communication tool when she used the Supervisor's computer to access KRONOS.

Section D of DHRM Policy 1.75 provides:

Certain activities are prohibited when using the Commonwealth's ... electronic communications media ... in reference to the work environment. Employees who engage in prohibited activities may be subject to disciplinary action according to Policy 1.60, Standards of Conduct. Prohibited activities include, but are not limited to: ***

Posting information or sending electronic communications such as email using another's identity.

Grievant accessed the KRONOS system and posted information in that system using the Supervisor's identity. The KRONOS system showed that the entries actually made by Grievant were made under the Supervisor's name. The Agency has established that Grievant violated DHRM Policy 1.75 thereby justifying the issuance of a Group II Written Notice.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove Grievant 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”³ 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 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.

Grievant argued that she accessed the Supervisor’s KRONOS account at the direction of the Supervisor. The Supervisor did not testify but according to Grievant the Supervisor told Grievant to access the Supervisor’s KRONOS account to complete payroll on a timely basis. If Grievant was following her Supervisor’s instructions, mitigating circumstances exist because an employee is expected to follow the instructions of a supervisor. Aggravating circumstances, however, also exist. At the time Grievant accessed the Supervisor’s KRONOS account, Grievant knew that her authority to access KRONOS under her own name had been removed. Another employee presented her with a form to sign to acknowledge that her access to KRONOS had been denied. It is difficult for the Hearing Officer to believe that if Grievant had fully disclosed to the Supervisor that Grievant had been denied access to KRONOS that the Supervisor would have instructed Grievant to continue to use KRONOS under the Supervisor’s name. Several other employees (typically supervisors) at the Facility had access to KRONOS and the Supervisor could have asked them to use their own accounts to enter information into the KRONOS system. This aggravating factor sufficiently counters the mitigating factor to allow the Agency to issue a Group II Written Notice without any reduction in the level of disciplinary action.

Grievant argued that her length of service and otherwise satisfactory work performance justified reduction in the disciplinary action. It is unclear whether there are any instances under EDR’s mitigation standard in which an employee’s work performance and tenure would justify mitigation of disciplinary action. Although the Agency could have easily and effectively addressed Grievant’s behavior without imposing removal, the Hearing Officer may not substitute his preference regarding how an employee should be disciplined once the Agency has met its burden of proof to justify the issuance of disciplinary action.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary actions.

³ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow instructions is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow policy is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.