

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 05/30/19;
Decision Issued: 06/18/19; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11330; 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: 11330

Hearing Date: May 30, 2019

Decision Issued: June 18, 2019

PROCEDURAL HISTORY

On December 11, 2018, Grievant was issued a Group I Written Notice¹ of disciplinary action for failure to follow a supervisor's instructions.

On December 28, 2018, 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 March 19, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 30, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

¹ The Agency initially issued a Group II Written Notice and then mitigated the discipline to a Group I Written Notice. Grievant objected to the Agency's decision to reduce the disciplinary action.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Virginia Department of Transportation employs Grievant as an Environmental Program Planner at one of its locations. She had been employed by the Agency for approximately 11 years. Grievant's prior supervisor considered Grievant to be extremely intelligent and highly motivated. No evidence of prior active disciplinary action was introduced during the hearing.

The Supervisor began working for the Agency in September 2005. She assumed her position in the Unit in January 2015 following a competitive selection process.

Agency managers decided to reorganize parts of the Agency. The reorganization placed Grievant's position in the Unit and caused her to report to the Supervisor. On October 5, 2018, the Manager met with Grievant to discuss Grievant's objections to reporting to the Supervisor. Agency managers concluded Grievant should report to the Supervisor despite Grievant's complaints. Grievant began reporting to the Supervisor on October 25, 2018.

Grievant was in the process of preparing for a meeting with her Unit's customers scheduled for December 7, 2018. The Supervisor also planned to attend the meeting and offer introductory comments before Grievant began her presentation and discussion.

On December 5, 2018 at 11:37 AM, Grievant sent the Supervisor an email about the December 7, 2018 meeting:

I intend for this to be an informal meeting, so that we can get to know each other and the issues through an open discussion. Ultimately, this would provide a good basis for collaborative work for in the future. Rather than passing out a formal agenda, I plan to introduce following topics (as led by):

- [Unit's] effort to identify and address inconsistencies between policy (CO) and practice (Districts)-- [Grievant's name].
- Follow-up to "ACE verification" issue raised in 10/28/18 email correspondence "Light Revision to Section 15.12.1 of LAP Manual" and possible solutions-- [Grievant's name].
- [Unit's] Commitments and Performance Programs-- [Ms. R].

I talked with [Ms. R] earlier this week, and she agreed to share information about her programs.²

The Supervisor believed she needed additional information about the agenda for the meeting to "make sure we were all on the same page".

Grievant and the Supervisor met on December 5, 2018 for their weekly meeting. The Supervisor had received three bullet items for the December 7, 2018 meeting. The Supervisor said she wanted more detail about the three bullet items. Grievant said that Grievant did not intend the meeting to be a formal meeting and that the Supervisor did not need a detailed agenda for the meeting. The Supervisor said that she understood the meeting would not be formal but that she needed to understand in detail the matters to be discussed. The Supervisor again asked for more information. Grievant said the Supervisor could come to the meeting and that Grievant would not provide the Supervisor with additional information.

Grievant said that she had been "working on this" and had "pages and pages of notes." The Supervisor said "Great, I can take that" referring to the notes. Grievant said "No, it's not done." The Supervisor asked when it would be done. Grievant said the Supervisor could come to the meeting.

The Supervisor said "As a manager, I want additional information." Grievant replied, "No, you can write me up if you want but I'm not going to do it."

² Agency Exhibit 2.

Because Grievant would not provide the Supervisor with any information about Grievant's planned presentation, the Supervisor spoke with the Manager and they decided to cancel the December 7, 2018 meeting and reschedule it for January 9, 2019.

On December 6, 2018, the Agency gave Grievant a Notice of Intent to take disciplinary action regarding her failure to follow the Supervisor's instructions.

On December 13, 2018, Grievant provided the Supervisor with the notes the Supervisor had requested. The Supervisor provided Grievant with her edits of the notes.

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."³ 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. In this case the Agency mitigated the disciplinary action to a Group I Written Notice. On December 5, 2018, the Supervisor instructed Grievant to provide the Supervisor with an update and any information Grievant had prepared for the meeting scheduled for December 7, 2018. The Supervisor would have accepted a verbal detailed update, a written update, or Grievant's existing notes. Grievant refused to provide the information despite the Supervisor's several requests. As a result of Grievant's refusal to provide the requested information, the Supervisor canceled and then rescheduled the December 7, 2018 meeting. The Agency is presented sufficient evidence to support the issuance of a Group I Written Notice for failure to follow a supervisor's instructions.

Grievant argued that the Supervisor was a bully who targeted Grievant and other employees with the Agency. Grievant believed the Supervisor was aggressive and demanding. Grievant presented testimony from the Supervisor's former supervisor who described the Supervisor as "rude and extremely aggressive." Grievant believed the Supervisor had created a hostile work environment for Grievant and that the Agency had failed to respond to Grievant's repeated requests to be removed from under the supervision of the Supervisor.

The Hearing Officer can assume for the sake of argument that Grievant's characterizations of the Supervisor are true. This assumption would not affect the

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

outcome of this case. The Supervisor's instruction was lawful, ethical, and consistent with her authority as a supervisor. Grievant was obligated to comply with the Supervisor's instruction regardless of the Supervisor's management style. On December 5, 2018, the Supervisor did not engage in behavior that would have provoked Grievant's response.

Grievant argued her interaction with the Supervisor was a "professional disagreement." The evidence showed that Grievant failed to comply with the Supervisor's instruction.

Grievant argued she was "blindsided" by the Agency decision to present her with a Notice of Intent to take disciplinary action. Grievant asserted the Agency should have engaged in progressive corrective action by counseling her instead of taking disciplinary action. Although agencies are encouraged to take progressive corrective action, they are not required to do so and may issue disciplinary action when an employee engages in behavior giving rise to disciplinary action.

Grievant argued that the Agency had made its decision to issue her a Group II Written Notice even before she had the opportunity to read her response to the Notice of Intent to take disciplinary action. To the extent the Agency failed to fully consider Grievant's response to the disciplinary action, it does not affect the outcome of this case. Grievant had every opportunity to present her defenses as part of the hearing. The hearing process cured any possible procedural defect in the Agency's issuance of disciplinary action.

Grievant argued the Agency retaliated against her by issuing her disciplinary action. She provided examples of what she perceived as ongoing retaliation following the disciplinary action. The evidence presented by Grievant is not persuasive. It is clear that the Agency issued Grievant disciplinary action because of her behavior on December 5, 2018 and not as a form or pretext for retaliation.

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"⁴ 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

⁴ *Va. Code § 2.2-3005.*

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 I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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