

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 12/15/17;  
Decision Issued: 12/19/17; Agency: W&M; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11102; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11102**

Hearing Date: December 15, 2017  
Decision Issued: December 19, 2017

#### **PROCEDURAL HISTORY**

On June 14, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On July 10 2017, 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 October 3, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 18, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Representative  
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. 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 College of William and Mary employs Grievant as a Fiscal Technician. She has been employed by the Agency for approximately 13 years. Her work performance was satisfactory to the Agency except for the disciplinary action issued in this matter. Grievant had no prior active disciplinary action.

The Agency had an online training program. Employees could sit at their computers and watch on their computer monitors training programs and then answer a few questions about the training in order to complete the training.

On February 24, 2017, the President sent all College employees including Grievant an email stating:

William & Mary must be a community where each of us can learn, work and spend time without fear of sexual violence or harassment. Although students are most often affected, faculty and staff can be too. Our last training on this matter took place two years ago. A new training program named "The Haven" is now available. It is more W&M-specific and user-friendly than the program last used. "The Haven" provides information to help us personally and to equip us to help others.

The online "Haven" module is here [website]. If you don't have easy access to a computer, one will be provided for your use at the times and places notes on the schedule attached to this message.

Each of us must take "The Haven." I must do it: you must do it. Let's get it done no later than March 31<sup>st</sup>. Few of us approach obligatory training with delight, but "The Haven" can help out community in a vital respect. So let's take the training with a willing spirit and open mind. Let's take it to learn.<sup>1</sup>

The Haven course lasted approximately one hour and could be completed online at a time selected by the employee.

On March 14, 2017, the Administrative Assistant sent Grievant and several other employees an email reminding employees to complete the Haven training by March 31.

On March 23, 2017, the Supervisor sent Grievant an email stating:

Please be aware this training must be completed by March 31<sup>st</sup> so you only have a little over a week to complete. This is mandatory training and we do not want to be the unit that has employees who fail to complete ....<sup>2</sup>

Grievant refused to complete the training because she was frustrated with the College's failure to provide her with information about her son's dismissal from a staffing agency. On March 24, 2017, Grievant sent the Supervisor an email stating:

How can the College of William and Mary expect me to take a survey without being biased on a subject that appears to have condemned a temporary employee who happened to be my son? \*\*\* I am not trying to be difficult however my current state of mind and feelings with how my son is being portrayed to a privileged few with information is leaving me extremely frustrated.<sup>3</sup>

Grievant's Supervisor responded, "I understand your frustration but this training is mandatory."<sup>4</sup>

On March 24, 2017, the Chief Compliance Officer sent Grievant and others a "second reminder" to complete the Haven training by March 31, 2017. On March 30,

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> Agency Exhibit 7.

<sup>3</sup> Agency Exhibit 7.

<sup>4</sup> Agency Exhibit 7.

2017, the Chief Compliance Officer sent Grievant an email extending the training deadline to April 4, 2017.

On April 7, 2017, the Administrative Assistant sent Grievant an email reminding her to complete the Haven training.

Grievant completed the training after the Group II Written Notice was issued.

### **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.”<sup>5</sup> 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 is a Group II offense. Grievant was instructed by the President and the Supervisor to complete the training by March 31, 2017. Grievant did not complete the training. The deadline was extended to April 4, 2017. Grievant did not complete the training by that date. Grievant did not complete the training until after the Written Notice was issued. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant contends the disciplinary action should be mitigated. She argues the level of disciplinary action is too harsh and that her refusal to take the training was based on her concerns for her son’s well-being. Grievant’s son was employed by a third-party vendor who rendered services to the College. When Grievant’s son was removed from the vendor’s employment, Grievant repeatedly asked College managers for an explanation. College managers would not provide Grievant with information about her son’s removal. In response, Grievant refused to take the training.

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 ....”<sup>6</sup> 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

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

<sup>6</sup> Va. Code § 2.2-3005.

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’s frustration with the College’s failure to provide her with information about her son’s removal is not a basis for mitigation under the Rules for Conducting Grievance hearing. Although the College could have issued a lower level of disciplinary action, it was authorized by the Standards of Conduct to issue a Group II Written Notice. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that her telecommuting privileges were removed inappropriately. Although discussion of removal of telecommuting privileges should not have been discussed as part of the disciplinary action, the Agency’s action is harmless error. It appears that the College separately considered Grievant’s eligibility for telecommuting and concluded she was ineligible because an employee must have “no active formal disciplinary actions on file ....”<sup>7</sup>

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

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.

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<sup>7</sup> Agency Exhibit 9.

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.<sup>[1]</sup>

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

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.