

Issue: Group II Written Notice with termination due to accumulation (failure to perform essential duties of job); Hearing Date: 11/22/04; Decision Issued: 12/22/04;
Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 7914



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7914

Hearing Date: November 22, 2004
Decision Issued: December 22, 2004

PROCEDURAL HISTORY

On September 9, 2004, Grievant was issued a Group II Written Notice¹ of disciplinary action for:

Failed to perform the essential duties of his job. [Grievant] continues to display poor supervisory skills and judgment in performing the essential duties of the job. [Grievant] mishandled a situation with a student after he moved into the resident hall. He further failed to ensure that the environment was clean. He delayed moving items out of the room after being told to remove them. Additionally, failed to establish the computer lab in the resident hall. Lastly, when asked to report to the Director's office on Wednesday, September 8, 2004 by [Ms. KB], Administrative Program Specialist, [Grievant] refused by giving the explanation that he could not meet at 5:00 p.m. because his ride was leaving at that time. Subsequently, when the Director called [Grievant] he said he wasn't able to meet due to his ride departing at 5:00 and he was feeling ill.

Grievant was removed from employment effective September 9, 2004 based on the accumulation of disciplinary action.

¹ Agency Exhibit 5.

On September 29, 2004, 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 he requested a hearing. On November 4, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 22, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failing to perform the essential duties of his job.

BURDEN OF PROOF

The burden of proof is on the University 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 State University employed Grievant as a Resident Educator. Grievant's duties included providing a safe environment for students residing in the dorm and supervising Resident Assistants. Grievant reported to the Program Coordinator.²

On February 2, 2004, Grievant received a Group I Written Notice for unsatisfactory work performance.³ On May 10, 2004, Grievant received a Group II

² The Program Coordinator was later promoted to Director of Resident Life.

³ Agency Exhibit 1.

Written Notice for failure to follow supervisor's instructions in performing assigned duties over the course of three months since the first written notice was issued.⁴

The University hired contractors to perform certain work on a dorm. Even though Grievant would be responsible for working in the dorm once school began, University staff including Grievant were not permitted to enter the dorm until the contractors finished their work. On August 13, 2004, the contractors completed their work and the dorm was made available to University staff. Not all of the work was properly completed and several discrepancies were noted. Grievant took necessary actions to identify and correct problems he observed. He also attempted to have University staff install and correct problems preventing the functioning of the computer lab inside the dorm.

A Student moved into an unclean dorm room. The Student's Mother was upset with the cleanliness of the Student's room. She cleaned the room. She had purchased a new mattress for her son's bed because she considered the mattress already on the bed to be filthy. She took the old mattress and placed it out in the hallway. Grievant observe the mattress in the hallway and decided to put it back in the Student's room. His objective was to cause the Student to contact him since the Student had not responded to a note Grievant left on the Student's door.

On August 24, 2004, the Student's Mother called the Program Coordinator for Resident Life to complain about the dirty room.⁵ She told the Program Coordinator that she had pictures of the room and was going to write the University President to express her concerns. The Program Coordinator asked the Student's Mother to give them the opportunity to resolve the matter before she wrote her letter. She agreed.

The Program Coordinator walked to the Resident Hall and asked Grievant to remove the dirty items from the Student's room. The Program Coordinator asked Grievant to determine if he had checked the particular wing of the first floor. Grievant responded "No, people are in the room." The Program Coordinator then instructed Grievant to check immediately the remaining rooms to verify that they were clean. The Program Coordinator left the area to conduct other duties. Approximately 45 minutes later, she called Grievant to inquire if the Student's room was free of dirty items. Grievant had not complied with the Program Coordinator's request. Grievant asked "Do you want me to stop what I'm doing and move the stuff at this moment?" The Program Coordinator replied, "Yes, do it now." Grievant call the Program Coordinator later to state that another room was found to be dirty.

On Friday, August 27, 2004, the Student's Mother called the University to complain that Grievant had chastised her son because the Student's Mother reported her concerns to the Program Coordinator rather than the Student reporting his concerns

⁴ Agency Exhibit 4.

⁵ Students arrived at the University on Sunday, August 22, 2004.

directly to the Grievant. The Program Coordinator asked Grievant to provide a statement regarding the incident. Grievant wrote:

I asked him why he had not initially come to me and tell me his concerns about his room instead of going around me. I told him that kind of thing would be frowned upon when he got out into the job world.⁶

On September 7th, 2004, the Program Coordinator went to the dorm and noticed that the computer lab was not set up and functioning. The lab was supposed to have opened on August 15, 2004. Grievant made attempts to have his lab open on time but the availability of technical support was limited. Computer labs in other dorms were not fully functioning as well.

On September 18, 2004 at approximately 4:30 p.m., the Program Coordinator wanted to speak with Grievant immediately and asked the Administrative Assistant to call Grievant. The Administrative Assistant called Grievant and told him the Program Coordinator needed to see him at 5 p.m. and he should come to the Program Coordinator's office. Grievant replied that his ride home left at 5 p.m. and he would not be going to the Program Coordinator's office to meet.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).⁷ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.⁸ Grievant fail to follow supervisor's instructions on two occasions. First, after being instructed to remove the items from the Student's room, Grievant fail to do so until asked to second time. Second, after being instructed to meet with the Program Coordinator, Grievant refused.

⁶ Agency Exhibit 8.

⁷ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ DHRM § 1.60(V)(B)(2)(a).

Grievant argues that leaving the mattress in the hallway would have created a fire hazard contrary to University policy.⁹ By placing the mattress back inside the room, he hoped that the Student would contact him. Grievant should not have put the mattress back into the Student's room. Grievant could have moved the old mattress downstairs into storage. If the mattress was too heavy, Grievant could have asked for assistance from other employees residing at the dorm. If Grievant wished for the student to contact him, placing the mattress back inside the room was not an appropriate method of communicating with the Student. Grievant's actions were unsatisfactory work performance.¹⁰

Grievant contends he did not go to meet with the Program Coordinator at 4:30 p.m. because of his concerns about his health. If health reasons were Grievant's primary concern, however, he would have expressed that as the reason for not meeting with the Program Coordinator and would not have had to mention that his ride home left at 5 p.m.

The Student's Mother became upset when she learned of Grievant's comments to her son. She perceived Grievant as having chastised her son because she complained about the conditions of her son's dorm room. Although Grievant may not have intended to chastise the son, the mother's perception of Grievant's actions is logical and sufficient to justify the University's concern about his work performance.

The University contends Grievant failed to properly establish the computer lab in the dorm. This allegation is unsupported. Grievant took action to properly establish the lab but was unable to have the lab fully functioning due to inadequate technical resources and problems he was unable to correct on his own. Although the University has not established this allegation, the remaining allegations are sufficient to support issuance of a Group II Written Notice.

Grievant contends the University is retaliating against him. The evidence is insufficient to establish that Grievant engaged in some protected activity and the University is taking retaliatory action against him for that reason. The evidence shows that the University disciplined Grievant because of its concerns about his work performance.

An employee may be removed from employment by the accumulation of a second active Group II Written Notice. With the notice forming the basis of this appeal, Grievant has two active Group II Written Notices and, thus, the University's removal of Grievant must be upheld.

⁹ Grievant Exhibit 2.

¹⁰ Grievant also argues that the Student should not have replaced the old mattress with a new one without first obtaining permission from the University. Although the Student's actions may have been contrary to University policy, this has no bearing on Grievant's work performance. Grievant was not disciplined for failing to inform the Student that he needed permission prior to removing the old mattress.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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 give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.¹¹

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.