

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisor's instructions); Hearing Date: 09/24/04; Decision Issued: 10/01/04; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 865



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 865

Hearing Date: September 24, 2004
Decision Issued: October 1, 2004

PROCEDURAL HISTORY

On June 21, 2004, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

The employee fails to follow directions in the office. Specific instances are cited in the June 18, 2004 correspondence to [Grievant]. Note the following: 1) [Grievant] left her duty station for an hour without leaving her whereabouts. 2) Refused to use time clock in office. 3) Whited out calendar showing time she arrived at work.¹

On June 18, 2004², Grievant timely filed a grievance to challenge the University's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 1, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2004, a hearing was held at the University's regional office.

¹ Agency Exhibit 1.

² Grievant filed a grievance to challenge the Supervisor's notice of intent to terminate and then subsequently merge that grievance with a grievance to challenge the Written Notice.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for failure to follow a supervisor's instructions.

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:

The Virginia State University employed Grievant as an Administrative and Office Specialist II until her removal on June 21, 2004. She began working for the University in September 1998. She received an overall rating of "Contributor" on her November 2003 performance evaluation.³ She reported to the Supervisor and worked in an office along with the Supervisor and the Administrative Specialist III. Grievant had prior active disciplinary action of a Group III Written Notice with a 30 workday suspension.

Grievant was not at work on June 11, 14, 15, and 16, 2004. Grievant arrived at work on June 17, 2004 and sat at her desk. Shortly thereafter, the Supervisor spoke with Grievant and reminded her that she should attend training. The Supervisor told Grievant she should rush to attend the training because he did not wish for her to be late. Grievant asked whether anyone would be able to pick up her payroll check. The Supervisor said he would pick up the payroll check and leave it on her desk. Grievant

³ Grievant Exhibit 8.

left for the training. The Supervisor left to pick up Grievant's payroll check at another building. When the Supervisor reached the building, he was informed that Grievant had already picked up her check.

When Grievant arrived at the scheduled training, she was informed that she could not take the class. The training began two days earlier and Grievant would not have benefited from beginning the training on the final day. Grievant was advised to take the three day class on a later date. Grievant returned to her office.

The Supervisor wished to begin having Grievant and the Administrative Specialist III record their time of arrival using a time clock. The Administrative Specialist III recorded her arrival times on June 15, 16, and 18, 2004. She did not punch in on June 17th, 2004 because she went to training. When Grievant arrived at work on June 18, 2004, the Administrative Specialist III told Grievant that the Supervisor now expected them to use a time clock when they arrived and that Grievant should punch in. Grievant questioned whether this was an appropriate procedure and she told the Administrative Specialist III she would talk to the Supervisor before she began using the time clock.

Earlier in the morning of June 18, 2004 at approximately 7:45 a.m., the Supervisor arrived at work early in order to type a memorandum to Grievant and the Administrative Specialist III. The Administrative Specialist III also reported to the Supervisor and worked near Grievant. The memorandum stated:

Please be advised that the time clock is to be used each day when reporting to work. Your cooperation with this matter is appreciated.⁴

The Supervisor placed the memorandum on Grievant's desk and on the Administrative Specialist III's desk and left the office for meeting. Although the memorandum was on their desks, the Administrative Specialist III did not realize she had the memorandum until approximately 9:30 a.m. on June 18th. Grievant also did not realize the memorandum was on her desk until later in the morning.

At approximately 9:22 a.m., a fire alarm sounded in the office where Grievant and the Supervisor worked. Grievant is especially sensitive to loud sounds and she quickly left the building. She took a letter of recommendation that she had typed at home for a co-worker and delivered that letter to the co-worker in another building. Grievant also discussed with the co-worker the Supervisor's intention to require Grievant use a time clock. Grievant returned to her office at approximately 10:30 a.m. Grievant did not notify the Supervisor where she was going because she hurried to leave the office and avoid the loud sound.⁵

⁴ Grievant Exhibit 5.

⁵ The Supervisor testified that Grievant should have left him a note telling him where she was going and because she failed to do so she left the worksite. The evidence showed, however, that there was not established practice or requirement for staff to notify the Supervisor if they were leaving their desks. Grievant did not leave the University's property.

At approximately 10:30 a.m., Grievant and the Supervisor spoke about the memorandum. The Supervisor informed her that she needed to use the time clock. Grievant said she did not have to use the time clock since she was a classified salary employee. Grievant said that only certain non-salaried workers had to use time clocks and that she would not use the time clock. The Supervisor did not verbally instruct Grievant to use the time clock at that moment. Based on Grievant's expressed intention to refrain from using the time clock in the future, the Supervisor decided to take disciplinary action against Grievant. He drafted a memorandum to Grievant dated June 18, 2004 stating he intended to recommend Grievant's termination from employment effective June 21, 2004. The Supervisor delivered that memorandum to her. The Supervisor did not expect or permit her to come to her office to work on June 21, 2004.

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).⁶ 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.⁷ Grievant expressed an intent to disregard the Supervisor's instruction, but she was not given the opportunity to take action amounting to a disregard of her Supervisor's instruction. Grievant was not permitted or expected to come to work and use the time clock on Monday, June 21, 2004. As a result, Grievant did not fail to follow her Supervisor's instruction, she merely expressed the intent to disregard that instruction. Grievant asserts that after discussing the time clock with other employees she concluded that the Supervisor could use a time clock and, thus, she would have used the time clock on June 21, 2004 when she arrived at work. Had the University permitted Grievant to come to work on Monday, June 21, 2004 and she then failed to use the time clock, then Grievant would have failed to follow a supervisor's instructions thereby justifying issuance of a Group II Written Notice.

The University did not present any evidence suggesting Grievant used white out on a calendar.

⁶ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁷ DHRM § 1.60(V)(B)(2)(a).

The University contends Grievant's co-worker, the Administrative Specialist III, instructed Grievant to use the time clock when Grievant first arrived for work on June 18, 2004 and that Grievant's failure to do so justifies disciplinary action. The evidence showed that the Administrative Specialist III was not Grievant's supervisor accordingly Grievant's failure to comply with the instruction of the Administrative Specialist III was not a failure to follow a supervisor's instruction.

The University contends Grievant left her work area without permission from approximately 9:22 a.m. to 10:23 a.m. without telling the Supervisor where she was going. Grievant left her desk because of a fire alarm sounding. She took a letter of recommendation to a co-worker. She had typed the letter at home for a co-worker who was applying for a job at the University. She spoke with a co-worker about the appropriateness of being required to use a time clock. Grievant had not been advised of any procedure requiring her to notify the Supervisor every time she was away from her desk. Based on the evidence presented, Grievant left her work station for a legitimate reason and she did not remain away from her desk for a significant period of time that would justify taking disciplinary action. At most, Grievant's behavior rises to the level requiring a counseling memorandum.

The University asserts Grievant should receive disciplinary action for failing to go directly to training on June 17, 2004 as instructed by the Supervisor. Instead, Grievant picked up her payroll check and then went to the training. Grievant's behavior does not rise to the level requiring disciplinary action. Grievant was not able to begin the training on the last day of training. No evidence was presented suggesting Grievant arrived late for the training; but even if she had been a few minutes late, this would not have mattered. She was not eligible to take the training. At most, Grievant's behavior rises to the level requiring a counseling memorandum.

A University may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁸ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity.

Grievant contends the University retaliated against her because she filed a prior grievance. The University did not retaliate against Grievant. The Supervisor chose to initiate disciplinary action based on Grievant's expression of her refusal to comply with

⁸ See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

the time clock procedures. The University did not take action against Grievant because of her prior grievance.

The Hearing Officer recommends that the University, at its own discretion, transfer Grievant to another position within the University.

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **rescinded**. The University is directed to **reinstate** Grievant to her former position or, if occupied, to an objectively similar position. The University is directed to provide the Grievant with **back pay** since the date of her removal less any interim earnings that the employee received and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2).

APPEAL RIGHTS

You may file an administrative review request within **10 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 10 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 10-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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.