

Issue: Group II Written Notice (disruptive and insubordinate behavior); Hearing Date: 01/12/05; Decision Issued: 02/09/05; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 7929



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7929

Hearing Date: January 12, 2005
Decision Issued: February 9, 2005

PROCEDURAL HISTORY

On August 25, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

This Group II notice is being given to you due to your disruptive behavior in stating your refusal to perform an assigned task, as directed. Due to the insubordinate character of this incident, this written notice is considered a Group II offense.

On August 30, 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 she requested a hearing. On November 23, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 12, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate

Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for disruptive and insubordinate behavior.

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 Virginia Information Technologies Agency has employed Grievant since 1981. She works as an Information Technology Specialist I. Grievant reports to the Supervisor who reports to the Associate Director. The Associate Director reports to the Division Director.

On August 11, 2004, Grievant's Supervisor sent Grievant an email regarding the Virginia State Police project and instructing Grievant,

starting today, please log all direct calls you receive for this project. Annotate who originated the call, the reason for the call and the action taken and/or solutions provided to the customer for the particular call. This will assist us with analyzing how we can improve upon how we approach the project. I look forward to reading your documentation by August 26.¹

Grievant did not agree with the assignment. She took her concerns to the Division Director. She told him she was being asked to do something that was not necessary. Grievant did not tell the Division Director that she was refusing to perform the task. Grievant was respectful and courteous to the Division Director. The Division Director told Grievant he would look into her concern and respond to her. The Division

¹ Grievant Exhibit 1.

Director spoke with the Supervisor and the Associate Director and concluded the task was worthwhile.

On August 18, 2004, Grievant and the Supervisor met. Grievant questioned the purpose of the phone log. She did not see the relevance of the call log, nor its importance. The Supervisor explained that the log was needed to obtain information that would be used when the second phase of the project began. In particular, the call log would be used to determine what type of customer service would be necessary in the future. Grievant said she would not provide the project call log. She did not yell or curse. The Supervisor again asked Grievant whether she would complete the project call log. Grievant refused and said she felt he was harassing her. She pointed out that the level of documentation expected from her had not been expected of her coworkers. In frustration, the Supervisor raised his arms above his head, told Grievant he would take the matter to upper management, and then left the room.

The Supervisor spoke with the Associate Director about his conversation with Grievant. The Associate Director went to Grievant's office and asked if Grievant had refused to do work as assigned. The Associate Director told Grievant that the Supervisor's assignment was reasonable and that Grievant could not refuse -- Grievant had to comply. Grievant complained that others were not being asked to do the same work. Grievant asked the Associate Director if they could meet for 15 minutes on the following day (August 19, 2004) to discuss the matter. The Associate Director agreed.

On the next day, Grievant went to the Associate Director's office and said she hoped they could disagree without it being personal and that she would do as she was asked. Grievant thanked the Associate Director for her time and then left.

The Agency initiated disciplinary action on August 25, 2004 because of Grievant's refusal to perform her work. The Agency was adamant it did not take disciplinary action based on whether Grievant completed the assignment as directed. Accordingly, the Hearing Officer finds events occurring after August 19, 2004 to have limited importance.²

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).³ Group II offenses "include acts and behavior which are

² Accordingly, the Hearing Officer will not consider whether Grievant should receive a Group II Written Notice for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.

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

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).

“Disruptive behavior” is a Group I offense.⁴ An employee is expected to comply with the lawful and ethical instructions of his or her supervisor. By expressing a refusal to comply with the Supervisor's instruction, Grievant disrupted the Agency's normal operations. She unnecessarily diverted the time and attention of the Supervisor and the Associate Director away from other duties.

The Agency contends Grievant's behavior rises to the level of a Group II offense. This argument fails for two reasons. First, Grievant did not yell or curse when she refused to perform the assigned task. She was professional in her dealings with her supervisors. Second, one day after being confronted by the Supervisor and the Associate Director, Grievant relented and told the Associate Director she would do as she had been asked.

Grievant contends she was issued a Group II Written notice as a result of racial discrimination and in retaliation for her complaint that she was being unfairly singled out from her coworkers to perform a task that was not required of her coworkers, and further in retaliation for Grievant having initiated the process to complain about her job classification. Based on the evidence presented, there's no reason to believe that the Agency's actions arose from retaliation or any improper purpose. Although Grievant was asked to perform duties not assigned to her coworkers, the Agency was motivated by a legitimate business reason. Agencies are free to assign different tasks to employees holding similar positions so long as those tasks fall within the boundaries of an employee's Employee Work Profile. Requiring Grievant to maintain a telephone contact log was an appropriate task and not a pretext for unlawful discrimination.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. Grievant's request for relief based on discrimination and retaliation is **denied**.

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:

⁴ DHRM Policy § 1.60(V)(B)(1)(e).

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.⁵

[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.

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Hearing Officer