

Issues: Group I Written Notice (disruptive behavior), misapplication of policy (transfer), and retaliation: Hearing Date: 11/15/05; Decision Issued: 11/16/05; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8195/8196; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8195 / 8196

Hearing Date: November 15, 2005
Decision Issued: November 16, 2005

PROCEDURAL HISTORY

On August 24, 2005, Grievant filed a grievance to challenge the Agency's transfer of him to another position.

On September 15, 2005, Grievant was issued a Group I Written Notice of disciplinary action for:

[Grievant] replied to an e-mail which included statements reflecting his frustration with a certain staff member, in particular, and others in the server support section. He did this by copying senior VITA management and an agency customer without first allowing his supervisor or local management the opportunity to assist in resolving the issue. [Grievant] was instructed in a memo from his supervisor [the Supervisor] on June 29 to "contact your immediate supervisor if you believe there are problems that must be addressed." In this instance, he circumvented his immediate supervisor and the next management level.

On September 19, 2005, 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 October 7, 2005, the EDR Director issued Ruling Numbers 2006-1148 and 2006-1163 consolidating the grievances. On October

12, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 15, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

Whether Grievant's transfer was contrary to policy.

Whether the Agency retaliated against Grievant.

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. Grievant has the burden of showing that the Agency violated policy thereby justifying the relief he seeks. 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 employs Grievant as an Information Technology Specialist III at one of its Facilities. No evidence of prior disciplinary action was introduced during the hearing.

In August or September 2004, Grievant was promoted from Seat Management Coordinator to leader of the Desktop Group. This promotion resulted in a salary increase. Grievant supervised one employee while in his prior position. After the promotion, he supervised more than twenty employees. A problem arose with the

Agency's desktop computers. Grievant's Supervisor had numerous opinions and made numerous decisions regarding correcting these problems. Grievant disagreed with those opinions and decisions. Grievant expressed his concerns to the Supervisor and to Agency managers but his opinions were disregarded. Grievant became increasingly frustrated and decided he wished to be returned to his former position. Grievant send the Service Level Director an email dated June 15, 2005 stating, "This is my official notice to you that I am resigning my assignment as CO desktop support manager effective immediately. I wish to continue on as the seat management director."¹ Grievant spoke with the Service Level Director about his request. The Service Level Director agreed to Grievant's request. Grievant's prior position had not yet been filled and Grievant could be returned to that position.² The Service Level Director informed Grievant that Grievant's salary would be returned to his salary prior to the promotion.

In June 2005, some issues regarding Grievant's work performance arose. On June 29, 2005, Grievant's Supervisor sent Grievant an email stating:

In lieu of disciplinary action, we have been instructed to provide you with some directives related to communication and correspondence.

Our relationship with the customer is of paramount importance to the Virginia Information Technology Agency (VITA). When we address personnel or technical challenges, it is imperative that we exhaust all internal resources before involving the customer. In the future, please contact your immediate supervisor if you believe there are problems that must be addressed. If your supervisor is unavailable or unresponsive, you should proceed to the next level of VITA management. Any correspondence or communication related to personnel or technical issues should follow this process; escalation of problems should occur within our VITA organization.³

On September 13, 2005 at 12:36 p.m., Mr. RA sent Grievant an email regarding resources provided by an external vendor. Mr. RA sent copies of the email to four people. Mr. RA discussed a problem he was having with an employee while Mr. RA was attempting to resolve a technical problem. Mr. RA asked Grievant to continue making payments to the vendor for another two months and said, "I do not understand why [another employee] is unwilling to allow roaming profiles. He did not give me a reason. I would appreciate [another employee] giving me a better way to deal with 52 profiles with 11 rotating staff on four computers."

On September 14, 2005 at 2:37 p.m., Grievant responded:

¹ Agency Exhibit 2.

² Both positions were in the same Pay Band and had the same role of Information Technology Specialist III.

³ Agency Exhibit 5.

I don't know [the answer] [Mr. RA]. My guess is since the person you are asking does not have to work with the customers directly or do the configuration himself it does not seem to be a big issue. On the other side, I actually like [another employee] and think he may be under "orders" from the true boss of ITO, the all-mighty Teflon Don himself, [the Supervisor].

I have heard 1800 roaming profiles is a huge cluster (unlike the perfectly harmonious set ups we use today) but seems to me a request for a few would be a manageable request.

Then again, I am a "non-technical" idiot and recently demoted manager. Let's ask his chain of command that question. I'm sure you will [receive] completely fair and unbiased responses very quickly.

Grievant sent his response to Mr. RA, the Service Level Director, the Enterprise Service Director, and Mr. CS. Grievant sent copies of the email to the same four people Mr. RA selected to receive copies of his original email. One of the individuals copied was an employee of VDOT, a customer of VITA. The Enterprise Service Director read Grievant's email and sent an email to his subordinate, the Service Level Director, stating, "This e-mail is totally inappropriate", referring to Grievant's comments.

CONCLUSIONS OF POLICY

Group I Written Notice

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).⁴ 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).

"Disruptive behavior" is a Group I offense.⁵ Grievant referred to the Supervisor as the "all-mighty Teflon Don" and sarcastically questioned the possible response from Agency managers. Grievant's comments were disruptive because they were offensive

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ DHRM Policy 1.60(V)(B)(1)(e).

and outside the Agency's expectations for normal discourse among employees.⁶ Grievant's email was also disruptive because he sent a copy to an employee of one of the Agency's customers after being instructed to exhaust internal resources before involving customers. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.⁷

Grievant argues that he only intended to send his response to Mr. RA and did not intend for the Service Level Director and the Enterprise Service Director to know of his comments. Grievant argues he merely hit the "reply to all" button instead of the "reply" button when responding to Mr. RA's email. This conclusion is not supported by the record. Mr. RA's email says "To:" Grievant with a "Cc:" to four other employees. Only Grievant's name is shown in the "To:" part of the address. Mr. RA begins the text of his email with Grievant's first name. It is not likely that Mr. RA would send his email "To:" the Service Level Director and the Enterprise Service Director but begin the email with Grievant's first name. If Mr. RA intended for his email to be sent to the Service Level Director and the Enterprise Service Director, Mr. RA would likely have included their names in the "Cc:" section of the email. Grievant's email lists the Service Level Director and Enterprise Service Director in the "To:" part of the address. It appears that Grievant may have used the "reply to all" function, but he added names to the "To:" part of the email. Nevertheless, if the Hearing Officer assumes for the sake of argument that Grievant only pushed the "reply to all" button and accidentally sent his response to the Service Level Director and the Enterprise Service Director, this assumption would not change the outcome of this case. To uphold a Group I Written Notice, it is not necessary for the Agency to show that Grievant intended to cause disruption. It is only necessary for the Agency to show that Grievant engaged in behavior that was disruptive. The Agency has done so. In addition, the *Rules for Conducting Grievance Hearings* set forth the circumstances under which the Hearing Officer is authorized to mitigate disciplinary action. The fact that an employee's action may have been accidental is not listed as a reason to mitigate. Accordingly, the disciplinary action against Grievant must be upheld.

Grievant contends the Agency took disciplinary action against him in retaliation for engaging in protected activity such as filing a prior grievance. No credible evidence was presented showing the Agency retaliated against Grievant. The Agency took disciplinary action because Agency managers believed Grievant acted contrary to the Standards of Conduct.

Transfer

⁶ Grievant argued that others in the Agency had sent disruptive emails. There is insufficient evidence to show that disruptive emails were sent by other employees with the knowledge and acquiescence of Agency managers.

⁷ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

A voluntary transfer occurs “when an employee moves to a different position within the same or different Role within the same Pay Band. Voluntary Transfers may be accomplished through a Competitive or Non-competitive Process.”⁸ “When an employee requests a transfer to a different position in the same Pay Band, the employee’s salary is negotiable [T]he negotiated salary may be less than the employee’s current salary.”⁹

Grievant asked the Service Level Director if he could return to his prior position. That position was in the same Pay Band as his most recent position. The Service Level Director agreed and mentioned that Grievant’s salary would return to his former salary as if the promotion had not occurred. Grievant agreed. The Agency then transferred Grievant to his former position and reversed his salary increase resulting from his promotion ten months earlier. Grievant’s revised salary included a percentage salary increase awarded to all State employees in December 2004. The Agency’s voluntary transfer by a non-competitive process was in accordance with DHRM Policy 3.05. There is no basis to grant any relief to Grievant regarding that transfer.

Grievant seeks reversal of the transfer because he made the decision based on unnecessary stress caused by his Supervisor at the time. Grievant contends his Supervisor was incorrectly attempting to resolve several significant problems affecting the Agency’s employees and customers. Despite Grievant’s numerous attempts to correct the Supervisor’s methods, Grievant’s suggestions and talents were ignored thereby resulting in hardship on Agency employees and customers. Grievant contends his resignation was based on the duress and hostile environment created by his Supervisor.

Whether Grievant’s decision to transfer was voluntary depends primarily on the degree of external and improper influence on his decision-making. In this case, the idea to transfer originated with Grievant. His decision was influenced by what he perceived as incompetent behavior by his Supervisor but not by improper, unethical, or unlawful behavior by his Supervisor. Although Grievant may now regret his decision, there is no evidence to suggest his decision was unduly influenced by others such that his decision was not his own. Grievant’s decision to transfer was voluntary. No basis exists to reverse the Agency’s acceptance of Grievant’s request.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant’s request for relief is **denied**.

⁸ DHRM Policy 3.05, *Compensation*, p. 6 of 22.

⁹ DHRM Policy 3.05, *Compensation*, p. 8 of 22.

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.¹⁰

[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].

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer