

Issues: Group I Written Notice (disruptive behavior and inappropriate conduct) and Group II Written Notice (failure to follow supervisory instructions), discrimination and harassment; Hearing Date: 09/29/06; Decision Issued: 10/24/06; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8395, 8424; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8395 / 8424

Hearing Date: September 29, 2006
Decision Issued: October 24, 2006

PROCEDURAL HISTORY

On April 26, 2006, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior and inappropriate conduct. On May 25, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction, perform assigned work, or otherwise comply with established written policy. On May 25, 2006, 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 September 7, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 29, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

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. 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 Commonwealth University employs Grievant as a Financial Specialist in one of its Department. The purpose of her position is:

Responsible for providing accounting services to Departmental E&G, Overhead, University Funds, grants, contracts, fellowships, and awards in accordance with the established policies and procedures.

- Communicates with principal investigators, staff, and graduate/undergraduate students regarding accounting or purchasing issues.
- Prepares and processes all E&G/Overhead/University Fund/Grant Fund (not faculty/classified) PAF actions.
- Independently communicates with HRS and Payroll regarding personnel transactions.
- Prepares and receives purchase orders and other financial documents for purchase of materials, supplies and services.
- Interpret procurement policies and regulations.¹

¹ Agency Exhibit 7.

Grievant has been employed by the University for approximately 17 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

University Department Managers were concerned about how well the employees in Grievant's unit were working. In October 2005, the University hired the Supervisor to begin supervising Grievant's unit which included three fiscal technicians. Grievant reported to the Supervisor.

On October 17, 2005, the Supervisor sent Grievant and other fiscal staff employees a memorandum regarding mandatory office procedures. The Supervisor wrote, in part:

It is expected that you will be courteous, respectful and professional to both "internal and external customers" (e.g. faculty, staff, students, etc.) **at all times.**" (Emphasis original.)²

The Student was employed by the University and reported to the Executive Secretary. The Student was responsible for answering telephone calls, making copies, and running errands. She worked approximately two to three hours per day as an hourly wage employee. The Student did not report to Grievant or to Grievant's Supervisor.

On April 26, 2006, Grievant spoke with the Student employee regarding Grievant's financial circumstances. Grievant asked the Student to leave the front desk where the Student was working and come to Grievant's office. The Student did so. Grievant informed the Student, Grievant was having financial problems. As a result of Grievant's statements, the Student wrote a check in the amount of at least \$100 and presented the check to Grievant. The Student left Grievant's office.

The Student called her Mother to discuss her loan to Grievant. The Student also entered the Executive Secretary's office and told the Executive Secretary that she usually felt good when she helped someone out but this time she did not have a good feeling about helping out Grievant. As the Student left the Executive Secretary's office, Grievant questioned the Student as to why she was in the Executive Secretary's office.

The Student's Mother and the Executive Secretary advised the Student to retrieve the check she had given to Grievant. The Student went to Grievant's office and asked for her check. Grievant returned the check to the Student.

The Student's Mother later called the University's managers and complained about Grievant's behavior. University managers began an investigation to determine what had happened.

² Agency Exhibit 6.

On April 27, 2006, the Supervisor sent Grievant an email instructing Grievant to “have all grant accounts reconciled by May 10, 2006.” On May 9, 2006, the Supervisor informed Grievant that the deadline to finish reconciliations had been extended to May 22, 2006 and that the accounts would be reviewed on May 23, 2006. On May 10, 2006, the Supervisor sent Grievant and others an email stating:

You have the accounts that you are responsible for reconciling. As per our discussion in the fiscal staff meeting on May 9, the accounts need to be reconciled by May 22. On May 23 we will meet to discuss fiscal year end and Banner Transition. We must have a clearly defined balance for each account, labeled folder (grant accounts) as seen in the attachment and 021 commitment screen clear or justification of carrying the commitment. Each grant account must have the proposal and aware in its folder.

On May 24, 2006, the Supervisor sent Grievant and others an email extending the deadline for the reconciliation project to May 25, 2006 at 3:30 p.m.

In order for student employees to be paid, a Personnel Action Form (PAF) must be completed. If the form is not completed, the student employees cannot be paid.

The Supervisor assigned Grievant with responsibility for completing the PAFs for three student employees. Several meetings were held in May 2006 to discuss completing PAFs. On May 9, 2006, the Supervisor sent Grievant an email stating, “PAFs for accounts assigned to you must be completed this week (5/12/06).”³

Grievant did not complete the PAFs by May 12, 2006 and the three students were not timely paid. Another employee was assigned to complete the PAFs and did so.

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).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

³ As requested by the Supervisor, Grievant printed the email and then signed and dated the email and gave it to the Supervisor. Agency Exhibit 5.

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

of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

Group I Written Notice

“Disruptive behavior” is a Group I offense.⁵ By discussing her personal financial problems with the Student, Grievant disrupted the Student’s work activities. The Student left the front desk where she was working and entered Grievant’s office to discuss a matter unrelated to the Student’s work. Grievant exercised poor judgment by accepting money from the Student. There was no reason for Grievant to question the conversation between the Student and the Executive Secretary. As a result of Grievant accepting money she should not have accepted, the Mother made a complaint to the University. University managers were distracted from their regular duties to investigate the matter. The Agency has presented sufficient evidence to support its assertion that Grievant engaged in disruptive behavior justifying the issuance of a Group I Written Notice.

Group II Written Notice

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.⁶ Grievant was instructed by her Supervisor to “grant accounts reconciled” by May 10, 2006. The deadline was extended to May 25, 2006. Grievant did not reconcile all of her grant accounts by the deadline. Grievant was assigned responsibility for completing PAFs for three students by May 12, 2006. She did not perform this task by the deadline and the task was assigned to another employee. The deadlines given to Grievant were reasonable and she given ample notification of the dates her assignments were due. Grievant failed to perform assigned work thereby justifying the issuance of a Group II Written Notice.

Grievant contends she was performing her original work assignments and also the duties of another employee who was absent from work. Although Grievant had assumed some of the duties of another employee, the additional duties were not so extensive that Grievant was unreasonably prohibited from completing her assignments on time. The Supervisor testified that all of grant accounts for which Grievant was assigned responsibility to reconcile could be completed in 16 hours.

Mitigation

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 Employment Dispute

⁵ DHRM Policy 1.60(V)(B)(1)(e).

⁶ DHRM § 1.60(V)(B)(2)(a).

Resolution....”⁷ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary actions.

Workplace Harassment

Workplace harassment is defined as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Grievant contends the Supervisor is engaging in workplace harassment with respect to her treatment of Grievant. Grievant has described numerous objections to how the Supervisor manages employees. No credible evidence was presented to suggest the Supervisor took any action against Grievant “on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability.” Accordingly, Grievant has not established workplace harassment.

Racial Discrimination

Grievant contends the Agency discriminated against her because of her race. She contends an employee of another race, the Executive Secretary, was the only one permitted to smoke at her desk and burn open flame candles at her desk on a daily basis. It is unclear when the Executive Secretary may have done these things, but it is clear that Agency managers did not realize her actions were contrary to the Agency’s expectations. The Executive Secretary did not report to the Supervisor and, thus, if the Supervisor observed the Executive Secretary, the Supervisor would not have had the authority to take action against her. There is no credible evidence to suggest the Agency discriminated against Grievant because of her race.

Management Style

⁷ Va. Code § 2.2-3005.

Grievant presented evidence supporting her opinion that the Supervisor is difficult to work for, strict, and demanding in her management style. For example, a former employee removed a day parking sticker and gave it to her boyfriend who was also a patient at the Agency's hospital. The former worker believed she could remove the parking sticker.⁸ Rather than informing the former worker that she should not have taken the parking sticker, the Supervisor initiated an investigation by the University police which resulted in criminal prosecution against the former worker. The former worker believed it was unnecessary to initiate a criminal prosecution for a parking sticker at a parking deck. In addition, Grievant also expressed her opinion that the Supervisor "talked down" to Grievant and other employees.

Nothing in the Grievance Procedure Manual or the Standards of Conduct authorizes a Hearing Officer to prohibit or correct a supervisor's abrasive management style. As long as a supervisor does not act contrary to policy, it is the Agency who must determine whether an employee's claims of inappropriate management style are valid.⁹

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for disruptive behavior is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction and perform assigned work is **upheld**. Grievant's claims of discrimination and harassment are **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:

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

⁸ As part of the former employee's grievance, the Hearing Officer found that the former employee did not intend to steal the parking sticker.

⁹ Grievant also asserted that the Supervisor failed to maintain Grievant's confidentiality regarding Grievant's absence from work due to health concerns. Insufficient evidence was presented to support Grievant's claim. There is no reason to believe, based on the evidence presented, that the Supervisor breached Grievant's confidentiality regarding Grievant's medical concerns.

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 all of your appeals to the other party and to the EDR Director. 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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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