

Issues: Group I Written Notice (disruptive behavior) and Group II Written Notice (failure to follow instructions; Hearing Date: 08/23/06; Decision Issued: 08/29/05; Agency: Jamestown-Yorktown Foundation; AHO: Carl Wilson Schmidt, Esq.; Case No. 8406/8407; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8406

Hearing Date: August 23, 2006
Decision Issued: August 29, 2006

PROCEDURAL HISTORY

On April 10, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction and to perform assigned work. On April 19, 2006, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. On May 8, 2006, Grievant timely filed a grievance to challenge the Agency's issuance of a Group II Written Notice. On May 12, 2006, Grievant timely filed a grievance to challenge the Agency's issuance of a Group I Written Notice. The outcome of the Third Resolution Step of each grievance was not satisfactory to the Grievant and she requested a hearing. On August 3, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 23, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
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:

The Jamestown-Yorktown Foundation employed Grievant as an Education Support Specialist III at its Facility. The purpose of her position was:

Coordinates and presents effective outreach education and other programs throughout Virginia and the Nation that support the mission of the Jamestown-Yorktown Foundation and its commitment to providing quality internal and external customer service and curriculum-based, structured educational programs to targeted service levels. Supervises part-time instructors and represents the Foundation and Jamestown 2007.¹

Grievant reported to the Supervisor. Beginning in August 10, 2005, Grievant began supervising several other employees. Grievant received an overall rating of "Contributor" on her October 2005 annual performance evaluation.²

¹ Agency Exhibit 11.

² Grievant Exhibit 1.

In early March 2006, the Supervisor met with Grievant and asked Grievant to prepare "in-person promotion background information" for an employee regarding promoting outreach services in County C. Grievant was also told to prepare materials for another employee who would be promoting outreach services in County Ch on either April 6 or 7, 2006. When Grievant returned from her vacation, Grievant created materials for one employee but delivered them on April 10, 2006 after the due date. Grievant did not create any materials for the other employee.

On April 6, 2006, Grievant was speaking to the Supervisor in the Supervisor's office. Grievant told the Supervisor that the Supervisor was "forcing" Grievant to cancel personal plans. The Supervisor told Grievant to stop using that terminology but Grievant continued to do so. Grievant also accused the Supervisor of being unwilling to grant Grievant leave to attend an interview. The Supervisor also explained to Grievant that she would be unable to contact schools until the following morning in order to determine if Grievant's schedule could be changed to permit her to attend the interview. Grievant continued to argue with the Supervisor. The Supervisor asked Grievant to leave the Supervisor's office and said the conversation as over. Grievant did not leave. The Supervisor repeated several times to Grievant that the Supervisor had other work to do and could not continue to repeat explanations to Grievant. The Supervisor continued to request that Grievant leave her office, but Grievant refused. Finally, Grievant left the Supervisor's office.

On April 14, 2006, the Supervisor wanted to tell Grievant that a State vehicle assigned to Grievant had to receive maintenance service and, thus, Grievant would not be able to use that vehicle. The Supervisor approached Grievant and began speaking. Grievant responded that the Supervisor was not allowed to speak to Grievant without a witness being present. The Supervisor walked to find another person to serve as a witness. The Supervisor and the witness walked to find Grievant. Grievant had returned to her desk. The Supervisor attempted to speak again. Grievant interrupted and said, "you are not allowed to speak to me; you need an appointment." The Supervisor tried to speak to Grievant to tell her about the State vehicle; Grievant said "actually, I have to go to the bathroom" and abruptly walked away from the Supervisor and the witness as the Supervisor was speaking.

Grievant disagreed with many of the factual assertions presented by the Agency. The Agency presented credible witnesses to support its facts. Grievant did not present any testimony to rebut the Agency's presentation.

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 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).

Group I

“Disruptive behavior” is a Group I offense.⁴ On April 14, 2006, Grievant was disruptive. A subordinate has no authority to require a witness for communications with a supervisor. A subordinate has no authority to require a supervisor to obtain an appointment prior to speaking with her. A subordinate has no authority to ignore a conversation initiated by a supervisor and abruptly walk away to the restroom. Grievant’s actions disrupted communication between the Grievant and the Supervisor. Grievant’s behavior was insubordinate towards her Supervisor. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice for disruptive behavior.

Group II

“Failure to follow a supervisor’s instructions” ... is a Group II offense.⁵ In March 2006, Grievant’s Supervisor instructed Grievant to prepare promotion materials for two employees by April 6th. Grievant prepared the materials four days late for one employee and did not prepare any materials for the second employee. On April 6, 2006, Grievant’s Supervisor instructed Grievant to leave the Supervisor’s office because the conversation was ended. Grievant refused to leave the Supervisor’s office and instead continued to argue with the Supervisor. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice for failure to follow a supervisor’s instructions.⁶

Mitigation

Grievant contends the disciplinary action should be mitigated. *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

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

⁴ DHRM Policy 1.60(V)(B)(1)(e).

⁵ DHRM § 1.60(V)(B)(2)(a).

⁶ The Agency alleged Grievant engaged in other examples giving rise to the Group II Written Notice. The examples offered by the Agency are insufficient in themselves to support disciplinary action of any level other than a Group I Written Notice for inadequate or unsatisfactory job performance. Accordingly, the Hearing Officer will not discuss those examples. The examples discussed by the Hearing Officer are sufficient in themselves to support the Group II Written Notice.

rules established by the Department of Employment Dispute 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 action.

Retaliation

An Agency 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. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant’s evidence raises a sufficient question as to whether the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency’s explanation was pretextual.

Grievant contends the Supervisor retaliated against Grievant because of a memorandum Grievant’s wrote and submitted to the Agency on December 22, 2005. The memorandum expressed Grievant’s ideas regarding how the Agency could operate more cost effectively. A staff meeting was held on January 6, 2006 with one of the agenda items being Grievant’s proposed cost savings.⁹ During the meeting, Grievant became upset at the discussion and the meeting had to be ended.

⁷ Va. Code § 2.2-3005.

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.

⁹ The Supervisor sent an email to staff on December 28, 2005 to schedule the January 6, 2006 meeting. In that email, the Supervisor wrote, “[Grievant] submitted some excellent suggestions for saving money in outreach. It seems it might be good to discuss them.” See Agency Exhibit 14.

If the Hearing Officer assumes for the sake of argument that Grievant acted in a protected activity when she submitted her memorandum, there is insufficient evidence to suggest that the Supervisor took disciplinary action against Grievant because of the memorandum. Grievant's memorandum did not directly affect the Supervisor's position and it cannot be construed as a criticism of the Supervisor. The Supervisor testified she was not offended or angered by Grievant's memorandum and did not take disciplinary action against Grievant because of the memorandum.¹⁰ There is no basis for the Hearing Officer to conclude that the Agency retaliated against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance to Grievant of a Group II Written Notice 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:

¹⁰ Grievant also objected to a document the Supervisor drafted outlining problems with Grievant. Grievant found the document in the Agency's computer system and concluded the document was available for all employees to see. The Supervisor testified that the document was not intended to be public and that the Information Technology staff failed to limit access to the document as the Supervisor believed had been done.

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.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].

S/Carl Wilson Schmidt

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.