

Issues: Group II Written Notice with suspension (unauthorized use of State property), Group I Written Notice (failure to follow policy), Group II Written Notice with termination (due to accumulation) (failure to perform assigned work and comply with established performance standards); Hearing Date: 05/15/07; Decision Issued: 07/09/07; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8586; Outcome: Partial Relief: All Written Notices and Termination Upheld (No Relief – Agency Upheld); Suspension rescinded (Full Relief); **Administrative Review: EDR Ruling Request received 07/23/07; EDR Ruling #2008-1747 issued 08/07/07; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/23/07; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8586

Hearing Date: May 16, 2007
Decision Issued: July 9, 2007

PROCEDURAL HISTORY

On January 31, 2007, Grievant was issued a Group II Written Notice of disciplinary action with ten workday suspension for unauthorized use of State property. He also received a Group I Written Notice for failure to follow written policy. Grievant received a Group II Written Notice of disciplinary action for failure to perform assigned work and comply with established performance standards. Grievant was removed from employment effective January 31, 2007 based on the accumulation of disciplinary action.

Grievant 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 April 5, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 16, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Tech employed Grievant as a Banquet Manager at one of its conference centers. He began working for the Agency in 2003. Grievant reported to the Director of Food and Beverage.¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing.²

¹ Grievant reported to the Director of Food and Beverage on December 30, 2006 because his direct supervisor was on vacation.

² Grievant described himself as a hard-working employee with a reputation for working days that no one else wanted to work.

During a staff meeting on December 8, 2006, one of the issues discussed was that employees who may be absent from work should contact their supervisors directly and only their supervisors.³ Grievant attended the staff meeting.

During the winter holiday, the Agency sometimes had difficulty obtaining a sufficient number of employees to work. Mr. AB was in charge of scheduling employees to work on particular days. For December 30, 2006, Mr. AB scheduled approximately 13 employees to work. Grievant was one of those employees. Approximately 11 employees actually worked on December 30, 2006 as scheduled.⁴ Approximately one employee is necessary to work for every 20 guests attending a plated dinner.

On December 30, 2006, Grievant was responsible for supervising two events at the Conference Center - a corporate dinner party and a wedding.⁵ Events were scheduled using Event Order Sheets.

Event Order Sheet 47550 set forth the terms of a holiday dinner for a private company with approximately 121 people attending. A reception was scheduled from 4:30 p.m. until 5:30 p.m. in the Foyer. A dinner was scheduled from 4:30 p.m. to 7 p.m. in the Ballroom. A cash bar⁶ was to be set up in the Ballroom from 4:30 p.m. to 5:45 p.m. No one attending the corporate holiday dinner complained about the function.

Event Order Sheet 45804 set forth the terms of a wedding with approximately 87 people attending. A reception was scheduled in the Foyer from 6 p.m. to 11 p.m. Hors d'oeuvres and champagne were to be served from 6 p.m. to 7 p.m. in the Foyer. A dinner/dance was scheduled in rooms CDEF from 6:30 p.m. to 11 p.m. Salads were to be placed on tables at 6:30 p.m. in rooms CDEF with guests to be seated at 6:45 p.m. A host bar was scheduled for 7 p.m. to 10 p.m. in rooms CDEF.

At 4:30 p.m., Grievant was informed that the dinner scheduled for 4:30 p.m. would be delayed until 5:30 p.m. At approximately 5:30 p.m., Grievant was informed that the wedding would begin 15 minutes early at 5:45 p.m. instead of 6 p.m.

At approximately 4:30 p.m. or 4:45 p.m., the Director of Food and Beverage drove to the back dock of the Facility and observed Grievant and several of his staff smoking. Grievant told the Director of Food and Beverage that he was ready for the functions and all he had to do was to "drop the salad, tea, and waters".

The bride was upset at how her wedding was handled. She complained and attempted to locate staff. At approximately 6 p.m., three employees working elsewhere

³ Agency Exhibit 7.

⁴ Only employees 21 years of age could serve as bartenders.

⁵ Grievant and his staff were not responsible for preparing food for the events.

⁶ A cash bar is a bar set up in a private room where guests pay for drinks. See, Agency Exhibit 2.

at the Facility left their duties to assist Grievant and his staff with the wedding function. They assisted by pouring champagne for guests, setting salads on tables, and helping serve hors d'oeuvres.

On December 30, 2006, Ms. KT called the Director of Food and Beverage regarding the two functions under Grievant's supervision. She told the Director of Food and Beverage that:

1. The room was not completely set.
2. The passed appetizers were not served on time. (15 minutes late) The bride had to come and find out where they were.
3. Champagne was not out, [three employees] had to find the champagne and pour it into glasses to serve.
4. No napkins on the hors d'oeuvres station.
5. Preset salads were not dropped, on the tables, at the time of service. Start time of function was 6:30 p.m.
6. Table settings were not complete, butter knives not on the table.
7. Iced tea, and waters were not on the tables, running behind.
8. Dressings were not on the table until 6:30 start time of the function.

On Sunday, December 31, 2006 at 8:55 a.m., Grievant wrote an email stating:

I'm currently running a [fairly] serious fever. My upper arm/shoulders hurt bad, and it literally hurts to move my eyes. I don't know the exactly what this is but it's hell enough just typing this email. I do not at all foresee being able to make it to work tonight. I sincerely apologize for getting very sick at a quite bad time and [Mr. AB's first name], I'll take a shift next time off you you need off.

Grievant sent the email to the Food and Beverage Manager, Mr. AB⁷, and to the Director of Food and Beverage. Grievant sent the email to Mr. AB because Mr. AB was in charge of scheduling employees for work. Grievant used Mr. AB's correct email address and Mr. AB receive the email. Grievant sent the email to the Director of Food and Beverage because he was Grievant's supervisor. Grievant used the incorrect email address for the Director of Food and Beverage and the Director did not receive Grievant's email.

The Agency operates its cash register system using a MICROS server computer.⁸ This computer is located in a room with a door that is supposed to be locked at all times. To obtain access to the computer Grievant had to obtain a set of keys from an employee at the front desk. Once Grievant finished using the computer he

⁷ Grievant and Mr. AB were peers. Grievant did not report to Mr. AB

⁸ The computer is supposed to remain on at all times.

was supposed to return the keys. Employees sitting in front of the computer server could see a sign stating:

NO SURFING
NO GAMES
Do Not Use This Computer for Anything Other Than F/B Micros or Audit
Functions.

The sign also showed the name of the Food and Beverage Manager.⁹

Grievant obtained the keys to the computer room on January 13, 2007 at 5 p.m. On January 15, 2007 at approximately 11 a.m., an employee entered the computer room and observed the computer screen which showed parts of a conversation of a personal nature. This employee found the computer screen showing a conversation with Grievant's instant message screen name. The computer screen also contained the "buddy list" for Grievant's instant message screen name. Grievant had used the computer server for personal use.

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).¹⁰ 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 Perform Assigned Work and Comply with Established Performance Standards

"[F]ailure to ... perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.¹¹ Local Standard Operating Procedures for banquet setup timing required that:

All meals. Breaks and receptions will be completely set 15 minutes prior to start time stated on banquet event order.¹²

⁹ Agency Exhibit 9.

¹⁰ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

¹¹ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

¹² Agency Exhibit 8.

The Agency has presented sufficient evidence to establish most of the factual allegations contained in the Written Notice. First, the rooms for the wedding were not completely set 15 minutes before the wedding began. When the corporate dinner was delayed, Grievant should have had his staff complete the setup for the wedding function. Second, although the appetizers were not passed among guest on time (15 minutes late), the delay was not completely Grievant's fault. The bride asked that her function begin 15 minutes early. The corporate dinner was one hour late. This meant that staff who would otherwise be working as part of the wedding function were distracted by their remaining duties with respect to the corporate dinner. Grievant did not cause the appetizers to be passed late. Third, champagne was not being served to guests. Three other employees who were not part of the banquet team had to find the champagne and pour it into the wineglasses to serve. Grievant only had three champagne bottles ready to serve wedding guests. Approximately 13 other champagne bottles remained in the refrigerator.¹³ Grievant should have had more than three bottles of champagne ready for guests when the wedding function began. His poor planning contributed to the failure of wedding guests to be adequately served champagne. Fourth, there were no napkins on the hors d'oeuvres station. Grievant admitted during the hearing that this was a mistake. Grievant had adequate time to ensure that his staff appropriately placed napkins. Fifth, the table settings were not complete, butter knives were not on the table. Grievant had adequate time to ensure that his staff appropriately completed table settings including placing butter knives on tables. Grievant could have had table settings placed well in advance of the wedding start time. Sixth, iced teas and waters were not on the tables on time. Grievant needed to have iced teas and waters placed on tables shortly before dinner was to be served. Because some of his staff were still attending to the corporate dinner that had been delayed and because the wedding had been rescheduled 15 minutes earlier, Grievant was not at fault for this delay. Seventh, the bar in the Foyer area was not ready. The Agency has not established this allegation. Grievant set up a bar for the corporate dinner and a bar in the foyer for the wedding. He intended to inventory the liquor and move it from the corporate dinner to the wedding. This approach was logical. When the corporate dinner was delayed and the wedding was moved sooner, this affected Grievant's ability to operate two bars. Eight, dressings were not on the tables until 6:30 p.m. which is a start time for the event. The Agency has not presented sufficient evidence to explain the facts supporting this allegation.

Upon consideration of all of the sustained allegations, the Agency has presented sufficient evidence to show that Grievant failed to have events ready 15 minutes prior to the start of the event as originally scheduled. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Failure to Follow Policy

¹³ Sixteen champagne bottles were ordered for the function.

The Agency's Classified Employee Handbook states that, "[e]mployees should report to work as scheduled and notify the supervisor as soon as possible if they must arrive late or miss work. Failure to report according to department attendance requirements may result in disciplinary action."¹⁴ The Agency's Conference Center Employee Handbook states, a "team member who is sick must notify the manager on duty of his or her inability to work as soon as possible, but no later than one hour prior (preferably three hours) to the beginning of the scheduled work shift." *** "When notifying the [Facility], the team member must talk with a supervisor, a secretary or someone on the management team. The team member must give his or her name, department, work schedule and reason for absence. It is the employee's responsibility to ask for the name of the person receiving the message. If the message is not relayed, an unexcused absence may be charged unless the person receiving the message can be accurately identified."¹⁵

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant attempted to notify his supervisor that he would be absent from work. He chose to send an email rather than using the telephone to call his supervisor.¹⁶ Grievant did not know the supervisor's email address but assumed it was a combination of the supervisor's first and last names. Grievant's assumption was incorrect and the email was not properly addressed.¹⁷ Grievant's work performance was inadequate thereby justifying the issuance of a Group I Written Notice.¹⁸

Unauthorized Use of State Property

"Unauthorized use or misuse of state property" is a Group II offense. Grievant knew that he was supposed to use the server computer only for entering information relating to the cash register system. He knew that he was not supposed to use the computer server for any reason other than using the cash register system. The computer server was State property. Grievant misused State property because he sent instant messages and private email using the computer server. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

¹⁴ Agency Exhibit 1.

¹⁵ Agency Exhibit 2.

¹⁶ The Director of Food and Beverage testified that employees in his department are often "on their feet" during the day and not able to check email.

¹⁷ Grievant's illness was not a factor in his usage of an incorrect email address. Grievant's assumption was based on his understanding of the typical format used by the Agency to assign email addresses.

¹⁸ Grievant argued that sending the email to Mr. AB was sufficient because Mr. AB was Grievant's acting supervisor that day. The evidence showed that Mr. AB was Grievant's peer, not his supervisor.

Agencies are not authorized to issue disciplinary suspension to employees for days prior to the issuance of the Written Notice.¹⁹ The Written Notice was issued on January 31, 2007 but the suspension was for the period January 15, 2007 through January 29, 2007. The Agency must reimburse Grievant for these days of suspension.

Grievant contends he did not misuse the computer server because he used a different computer in the room to send his instant messages and that another employee had access to the room between the time he left the room and the personal use was discovered. Grievant's argument fails because if the Hearing Officer assumes for the sake of argument that another employee accessed the computer room, Grievant admitted to using the computer server to send a private email to another employee about the death of a coworker. Using the computer server to send a private email was contrary to the Agency's expectation and Grievant's understanding of what was appropriate use for the computer server.

"[A]ccumulation of two Group II offenses normally should warrant removal."²⁰ Grievant accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

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 Resolution..."²¹ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because it is not progressive. Grievant relies upon language in the Conference Center Handbook which states, "[t]eam members who disregard or violate policy and procedures may be subject to Progressive Disciplinary Action." Grievant's argument fails because the Handbook states that disciplinary action may be progressive. Nothing in the Handbook requires

¹⁹ This is not to be confused with pre-disciplinary suspension while the Agency investigates and determines whether to take disciplinary action.

²⁰ Virginia Department of Corrections Operating Procedure 135.1(XI)(C)(2).

²¹ *Va. Code § 2.2-3005.*

the Agency to provide written warnings to an employee prior to taking disciplinary action against an employee. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.²²

DECISION

For the reasons stated herein, the Agency's issuance on January 31, 2007 to the Grievant of a Group II Written Notice of disciplinary action for failure to perform assigned work and comply with established performance standards is **upheld**. The Agency's issuance on January 31, 2007 to the Grievant of a Group I Written Notice of disciplinary action for failure to follow written policy is **upheld**. The Agency's issuance on January 31, 2007 to the Grievant of a Group II Written Notice of disciplinary action for unauthorized use of state property is **upheld**. Grievant's removal based on the accumulation of disciplinary action is **upheld**. Grievant's suspension for the period January 15, 2007 through January 26, 2007 is **reversed**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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

²² Grievant also expressed some concerns that he was not given an adequate opportunity by the Agency to inform the Agency of his defenses to the disciplinary actions. Grievant had a full and fair opportunity to present all of his defenses to the Hearing Officer at the grievance hearing. To the extent the Agency may have denied Grievant procedural due process during the Step Process, the grievance hearing cured those defects.

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.²³

[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

²³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.