

Issues: Group II Written Notice with Termination (due to accumulation) (leaving the worksite without permission); Hearing Date: 07/25/07; Decision Issued: 07/26/07; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8646; Outcome: No Relief – Agency Upheld in Full; **Administrative Reviews: HO Reconsideration Request, EDR Administrative Review Request, and DHRM Administrative Review Request received on 08/13/07; Request Untimely to all three reviewers; Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8646

Hearing Date: July 25, 2007
Decision Issued: July 26, 2007

PROCEDURAL HISTORY

On March 15, 2007, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for leaving the work site during work hours without permission. On April 11, 2007, 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 June 29, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 25, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

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 Virginia Commonwealth University employed Grievant as a Housekeeper until his removal effective March 15, 2007. He had been employed by the Agency for approximately 3 years.

On September 26, 2006, Grievant received a counseling memorandum, "about seeing you and another employee leave your work site at 8:15 a.m. a non-break time and without permission from your supervisor." Grievant was advised that, "[y]ou cannot leave your work site without prior approval from your supervisor or unless it is [your] assigned break time."¹

Grievant had prior active disciplinary action. On October 16, 2006, Grievant received a Group I Written notice for disruptive behavior. On November 8, 2006, Grievant received a Group II Written Notice with a 10 work day suspension for leaving the work site during work hours without permission²

¹ Agency Exhibit 3.

² Agency Exhibit 3.

Grievant's work shift began at 7 a.m. and ended at 3:30 p.m. He was authorized to take a break from 9 a.m. until 9:15 a.m. Grievant reported to Mr. S. Mr. S worked as a Housekeeping Supervisor.

On March 10, 2007, Grievant was working on the fifth floor of a building containing many floors. Grievant was responsible for working on that floor until assigned elsewhere. He stopped working and left the building to take a morning break. He walked to a gas station approximately one block away. He purchased several snacks and began walking back to his building. At 8:53 a.m., Mr. S and another Housekeeping Supervisor, Mr. F, observed Grievant outside of the building.

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).

DHRM Policy 1.25 requires employees to "take breaks and lunch periods as authorized". Group II offenses include, "[l]eaving the work site during work hours without permission". Grievant's work site was the building where he was assigned to work. Grievant was not authorized to leave that building until 9 a.m. when he was permitted to take a 15 minute break. Grievant left his work site prior to 9 a.m. without permission during work hours thereby justifying the issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice "normally should result in discharge."⁴ Grievant has a prior active Group II Written Notice. His removal based on the accumulation of disciplinary action must be upheld.

Grievant argues that the testimony of Mr. S should be disregarded because Mr. S had been harassing Grievant for several months. If the Hearing Officer disregards the testimony of Mr. S, there remains sufficient evidence to support the disciplinary action. Mr. F also testified that Grievant was away from the work site at 8:53 a.m. In addition, Grievant has not presented any evidence showing that the actual time he was at the

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 § 1.60(VII)(D)(2)(b).

gas station was between 9 a.m. and 9:15 a.m. The evidence is clear that at 8:53 a.m. Grievant was outside of his work site.⁵

Grievant argues that he checked his watch before leaving for his break, and that according to his watch, it was 9 a.m. when he left the work site. This argument fails. It is not likely that Grievant knew the actual time he left or returned to the building. When Grievant returned to the building from the gas station he entered the building and went to a break room. He read a newspaper until 9:26 a.m. when Mr. F and Mr. S approached him. Although Grievant was entitled to take only a 15 minute break, he was on break from 8:53 a.m. until 9:26 a.m., a period of 33 minutes. This suggests Grievant was not paying attention to the time on the morning of March 10, 2007.

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....”⁶ 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. 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;⁷ (2)

⁵ Grievant argued that the Agency originally charged him with sleeping on the job. The Written Notice before the Hearing Officer does not relate to sleeping on the job. Whether the Grievant was asleep on the job is not an issue before the Hearing Officer.

⁶ Va. Code § 2.2-3005.

⁷ 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.

suffered a materially adverse action; and (3) a causal link exists between the adverse 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 engaged in a protected activity because he brought to the attention of several supervisors that he intended to file an allegation of harassment by Mr. S. He asked questions regarding how to file a claim. Grievant suffered a materially adverse action because he received disciplinary action and was removed from employment. Grievant has not established a link between the adverse action and the protected activity. The Agency decided to take disciplinary action against him because he left the work site without permission even though he had been repeatedly warned not to do so.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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 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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8646-R

Reconsideration Decision Issued: August 22, 2007

RECONSIDERATION DECISION

The Hearing Officer received Grievant's request for reconsideration on August 13, 2007. The original Hearing Decision was issued on July 26, 2007 and reminded Grievant that, "You may file an administrative review request within **15 calendar** days from the date the decision was issued." Section 7.2(a) of the Grievance Procedure Manual states, "all requests for review must be made in writing, and **received by** the administrative reviewer, within 15 calendar days of the date of the original hearing decision." (Emphasis added).

The Hearing Officer received Grievant's request for reconsideration more than 15 calendar days after the date of the original hearing decision, and, thus, his request is untimely. The Hearing Officer lacks jurisdiction to hearing the request. For this reason, Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Commonwealth University

Ruling Number 2008-1770

August 22, 2007

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8646. Because the grievant's request for administrative review was untimely, this Department will not review the hearing officer's actions or decisions.

FACTS

This case involves a grievant who received "a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for leaving the work site during work hours without permission."⁹ The hearing decision was issued July 26, 2007.¹⁰ The hearing officer upheld the disciplinary action and removal.¹¹ On August 13, 2007, this Department received the grievant's request for administrative review of the hearing officer's decision. The hearing officer and the Director of the Department of Human Resource Management (DHRM) received requests for administrative review on August 13, 2007 as well.

The grievant states that he contacted EDR on or about August 8, 2007, and someone at EDR told him that to be timely, he only needed to have his request for administrative review postmarked by August 10, 2007. His requests for administrative review were postmarked August 10, 2007. However, the grievant's claim concerning the alleged advice he received from EDR is not consistent with EDR practice and is not supported by EDR records or by any other supporting evidence provided by the grievant.

DISCUSSION

The Grievance Procedure Manual provides that "all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."¹² Further, the July 26, 2007 hearing decision clearly advised the parties that any request they may file for administrative review to the hearing officer, the Department of Human Resource Management (DHRM) or EDR must be received by the

⁹ Decision of Hearing Officer, Case No. 8646, July 26, 2007 ("Hearing Decision"), at 1.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 5.

¹² *Grievance Procedure Manual* § 7.2(a).

reviewer within 15 calendar days of the date the decision was issued.¹³ Here, however, this Department received the grievant's request for administrative review on August 13, 2007, three days beyond the 15 calendar days following the July 26, 2007 decision. Moreover, it is the requesting party's burden to show evidence of timeliness and/or "just cause" for untimeliness.¹⁴ The grievant's unsupported and disputed statement of alleged advice received from EDR is insufficient to establish just cause for the delay in this case. Accordingly, the grievant's request for administrative review by this Department is untimely.¹⁵

APPEAL RIGHTS

A hearing officer's decision becomes a final hearing decision when the 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request or once all timely requests for review have been decided.¹⁶ Because the grievant's administrative review requests to the hearing officer, this Department, and the Director of DHRM were untimely, the hearing decision became a final hearing decision on August 10, 2007. The grievant has 30 calendar days from that date to appeal the decision to the circuit court in the jurisdiction in which the grievance arose. The basis of any such appeal must have been that the final decision is contradictory to law.

Claudia T. Farr
Director

¹³ Hearing Decision at 5-6.

¹⁴ See *Grievance Procedure Manual* § 7.2(a). "Just cause" is defined as a "reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9.

¹⁵ This Department would like to note that although the grievant's request for administrative review is untimely, he may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

¹⁶ See *Grievance Procedure Manual* § 7.2(d).

August 27, 2007

RE: **Grievance of v. Virginia Commonwealth University**
Case No. 8646

Dear :

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for a review of the hearing officer's decision in the above referenced case. Please note that as stipulated in the Grievance Procedure Manual, §7.2(a), "all requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."

The records show that the hearing officer issued his original decision on July 26, 2007. The Department of Human Resource Management received your request for administrative review on August 13, 2007, more than 15 calendar days after the date of the original decision. Thus, this request is untimely and must be denied.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services

c: Sara R. Wilson, Director, DHRM
Claudia T. Farr, Director, EDR