

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 10/29/07;
Decision Issued: 11/07/07; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8717; Outcome: No Relief, Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8717

Hearing Date: October 29, 2007
Decision Issued: November 7, 2007

PROCEDURAL HISTORY

On June 8, 2007, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow supervisor's instructions. On July 2, 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 she requested a hearing. On October 3, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 29, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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:

Old Dominion University employs Grievant as a Locksmith Senior. Grievant's ongoing work performance was well-regarded and respected by Agency managers. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency provides housing to some of its students. Periodically, the Agency changes the locks on the doors in student suites. To accomplish this, the Agency must change both the lock and lock core for doors to student rooms and also for doors securing utilities in common areas. In order to avoid confusing students, the Agency provides students with advanced written notice of the day on which the locks are scheduled to be changed.

Grievant's Supervisor maintained a list of suite numbers for which locks would be changed on a particular day. The Supervisor's list showed that the last suite number for which locks were to be changed on June 1, 2007 was number 5307. The Supervisor had provided Grievant with this list in an email dated May 29, 2007. The email states:

This is the schedule for Wed, Thur, Fri of this week *** Fri – 5209, 5210, 5211, 5301, 5302, 5304, 5305, 5306, 5307.¹

On Friday June 1, 2007, Grievant was responsible for preparing the cores for student room doors and cores for common area doors (also known as "common cores"). She prepared the cores and then placed them in a box. She prepared cores for several suites including one for suite 5308. Grievant handed the box to the Maintenance Tech that morning. The Maintenance Tech was responsible for handing out the cores to a private contractor who actually installed the locks into the doors.

At approximately 3:15 p.m. on June 1, 2007, the Supervisor called the Maintenance Tech on the radio to check the status of the lock installations. The Maintenance Tech told the Supervisor that he would install the locks for suite 5308 before the close of business that day. The Supervisor instructed the Maintenance Tech to install locks up to suite number 5307 and then to stop.

The Maintenance Tech did not have a sufficient number of common core locks. He went to find Grievant to obtain more common core locks. The Maintenance Tech told Grievant that the Supervisor told him to stop at suite 5307. Grievant said that according to her list they were to install locks through suite 5308. Grievant instructed the Maintenance Tech to install locks in suite 5308. Grievant added that she would talk to the Supervisor if there was a problem. Based on Grievant's statements, the Maintenance Tech provided the core for suite 5308 to the private contractors who changed the locks for suite 5308.

Grievant presented the Agency with a note dated May 23, 2007 from her doctor indicating she should be placed on light duty for four weeks.² On June 1, 2007, the Supervisor instructed Grievant not to work overtime because of her light duty status.

On Sunday, June 3, 2007, the Associate Director went to the Campus to work. Inside one of the Agency's buildings, the Associate Director saw Grievant. He knew that Grievant was on light duty and should not be working overtime. He asked her why she was there at work. Grievant said she was checking to see if all the lock changes had been done. Based on Grievant's comment, the Associate Director concluded Grievant was at the Agency's Campus and engaging in work duties.

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

¹ Agency Exhibit 5. The email was sent to Grievant and to the Associate Director. It was not sent to the Maintenance Tech.

² Agency Exhibit 5.

require correction in the interest of maintaining a productive and well-managed work force.”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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.”

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.

Part of Grievant's job duties included being aware of the last suite to be scheduled for lock replacement on a particular day. Grievant was given a schedule by email from her Supervisor showing that Suite 5307 was the last suite to have locks installed on June 1, 2007. She disregarded that schedule and instructed the Maintenance Tech to install the lock for Suite 5308. By disregarding the work schedule, Grievant's failed to follow a supervisor’s instruction.

Grievant argues that the Maintenance Tech did not report to her and thus he was free to disregard her comments. The evidence showed, however, that although the Maintenance Tech may not have reported directly to Grievant, he regularly relied upon her expertise, knowledge, and direction. The Maintenance Tech's daily duties involved resolving maintenance problems with buildings to which he was assigned. The Maintenance Tech's role on June 1, 2007 was to provide assistance to Grievant as she directed as needed. For all practical purposes, Grievant was in charge of lock installation for the Agency on June 1, 2007.

On June 1, 2007, the Supervisor instructed Grievant not to work any overtime hours while she was on light duty. Grievant was not scheduled to work on Sunday, June 3, 2007. Nevertheless, she went to the work site and checked to see if all the lock changes had been done. Although she did not include that time on her Time and Attendance Report, she was performing overtime work contrary to the Supervisor's instructions. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argues she was not working overtime on June 3, 2007. Instead she was visiting a friend who was working at the Agency's Campus. She believed it was not appropriate for the Associate Director to ask her what she was doing on the Campus, so she falsely represented to him that she was there to check on lock changes. Grievant's argument fails. The Agency is entitled to rely upon the statements made by Grievant. The Agency cannot be expected to guess regarding Grievant's unstated motive for being on the Campus.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency chose to mitigate the disciplinary action based on

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

Grievant's exemplary work performance and to issue a Group I Written Notice. That disciplinary action must be upheld.

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...."⁴ 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.⁵

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I 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:

⁴ Va. Code § 2.2-3005.

⁵ Grievant expressed concern regarding the method the Supervisor used to criticize her for her performance on June 1, 2007. According to Grievant, the Supervisor used the Agency's radio system to question her and complain about her failure to stop installing locks at suite 5307. Other Agency employees were able to overhear the Supervisor's heated comments. Although it may have been the better practice for the Supervisor to counsel Grievant in person instead of commenting over the Agency's radio, doing so would not be a basis to mitigate the disciplinary action against Grievant.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.