

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow policy), and Termination; Hearing Date: 03/28/08; Decision Issued: 04/01/08; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8810; 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: 8810

Hearing Date: March 28, 2008
Decision Issued: April 1, 2008

PROCEDURAL HISTORY

On November 27, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions regarding absence from work. On November 27, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions regarding the submission of written timesheets. Grievant was removed from employment based on the accumulation of disciplinary action.

On December 19, 2007, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 25, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 28, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant's Representative
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:

Christopher Newport University employed Grievant as an Office Manager until her removal effective November 27, 2007. The purpose of her position was:

Positively and significantly affects customer service and the delivery of service of HR programs to CNU employees. Directly supports and assist in the delivery of comprehensive and complex human resources programs to employees including compensation services (payroll), benefits and recruitment. Effectively manages front-office operations serving 11 employees at all HR constituencies (CNU employees and numerous external populations). Effectively uses complex databases and spreadsheets. Serves as initial contact and resource of information for all employee and community inquiries and answers inquiries using considerable and complex knowledge of program requirements, policies, procedures and guidelines. Resolves problems as needed. Provides primary administrative assistance and direct, high-level secretarial support

to the principal executive in charge of human resources at CNU, the Associate Vice President of Human Resources.¹

Grievant submitted documents showing she received favorable evaluations in 1999 and 2003. Grievant had been employed by the Agency for approximately 11 years.

On July 26, 2006, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions. During the grievance step process, the discipline was reduced to a Group I Written Notice.²

On December 4, 2006, Grievant received a Group I Written Notice for failure to follow a supervisor's instructions and leaving the work site during work hours without permission.³ Grievant filed a grievance challenging the December 4, 2006 Written Notice. During the grievance step process, the Executive Vice President concluded that Grievant had not timely appealed the Written Notice. He also wrote,

However, there are several issues which should be noted and responded to in this case. [Grievant] has a history of being absent from work as evidenced by the fact that she has no accrued annual medical or family personal leave and only five hours of annual leave remaining. This fact is particularly extraordinary in the context of [Grievant's] many years of service. ***

[Grievant] is fully entitled to take advantage of whatever leave balances she has accrued. However, those balances must be accessed within the context of appropriate notification and other protocols surrounding office discipline. In my opinion, the situation highlights an on-going condition that exists where any absences from work create conflict and tension within the office because other employees are required to "cover" for [Grievant] during her absences. This is not a good or an appropriate use of their time and that they must give up the opportunity to do their work in order to perform [Grievant's] work.

Therefore, [Grievant] is advised and expected to follow the normal procedures and protocols of the University which require properly delivered and timely and excused absences from work under the Standards of Conduct. She is also advised to take appropriate action to limit the frequency of her absences and is hereby **required** to provide a

¹ Grievant Exhibit 1.

² Agency Exhibit 1.

³ Agency Exhibit 2.

doctor's certificate for all absences related to illness whether paid or unpaid leave is requested.⁴ (Emphasis added).

On August 17, 2007, Grievant received a Group I Written Notice for disruptive behavior.⁵

Grievant was having difficulty maintaining sufficient leave balances. The Supervisor assisted Grievant in preparing a spreadsheet to enable Grievant to track her leave. The Agency was in the process of converting from a paper to an automated leave system. The Supervisor instructed Grievant and other employees to continue submitting written leave forms to the Leave Coordinator as well as entering the information in the automated system.⁶

The Agency conducted an audit of Grievant's written timesheets beginning January 1, 2007. Grievant failed to submit seven written timesheets to the Leave Coordinator for the following periods of time:

1. June 24, 2007 through July 7, 2007
2. July 22, 2007 through August 4, 2007
3. August 19, 2007 through September 1, 2007
4. September 2, 2007 through September 15, 2007
5. September 16, 2007 through September 29, 2007
6. September 30, 2007 through October 13, 2007
7. October 14, 2007 through October 27, 2007⁷

For two of the timesheets, Grievant had obtained the signatures of managers yet failed to submit those timesheets to Leave Coordinator.

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."⁸ Group II offenses "include acts and behavior which are more severe in nature

⁴ Agency Exhibit 3.

⁵ Agency Exhibit 14.

⁶ The Supervisor also reminded Grievant by email of her obligation to timely submit written timesheets. For example on August 20, 2007, the Supervisor sent Grievant and other employees an email stating, "[t]o ensure timely and accurate pay, we would like you to submit your paper timesheet the way you have been submitting it" The Supervisor sent several similar emails. See, Agency Exhibit 22.

⁷ Agency Exhibit 17.

⁸ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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” is a Group II offense. On December 4, 2006, the Executive Vice President, a supervisor, instructed Grievant that she was “required to provide a doctor’s certificate for all absences related to illness whether paid or unpaid leave is requested.”⁹ On October 17, 2007, Grievant was absent from work. The Supervisor reminded Grievant to bring a doctor’s note upon her return to work. When Grievant returned to work, the Supervisor again reminded Grievant to bring in a doctor’s note to excuse her absence from work on October 17, 2007. Grievant never produced a doctor’s note excusing her absence October 17, 2007 thereby acting contrary to a supervisor’s instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice referred to follow a supervisor’s instruction.

Grievant argues that her absence on October 17, 2007 resulted from a work-related injury. She and an Agency employee completed an Employer’s Accident Report. On October 19, 2007, went to a doctor selected by the Agency in accordance with the Agency’s policies governing workers compensation claims. Grievant attained an excuse slip from that doctor dated October 19, 2007 stating:

This is to certify that [Grievant] had an appointment at this office for professional attention on October 19, 2007 at 2 p.m. Please excuse this absence.¹⁰

Grievant argues that the October 19, 2007 doctor’s excuse also excuses her absence on October 17, 2007. This argument fails. The October 19, 2007 doctor’s note does not refer to October 17, 2007. It does not express an opinion that Grievant’s October 17, 2007 absence should be excused. In short, the October 19, 2007 doctor’s note is not sufficient to excuse Grievant’s absence on October 17, 2007.

Grievant was instructed by the Supervisor to continue to submit her written timesheets to the Leave Coordinator on a timely basis. From June 24, 2007 through October 27, 2007, she failed to submit seven written timesheets to the Leave Coordinator thereby acting contrary to the Supervisor’s instructions. Given the length of time that had passed since the first timesheet was not submitted and the number of timesheets not submitted, it is clear that Grievant did not intend to submit the seven timesheets.

⁹ DHRM Policy 4.55, Traditional Sick Leave, provides: “An employee who wishes to use sick leave must comply with management’s request for verification of the appropriateness of using sick leave.” DHRM Policy 4.57, VSDP, provides, “An employee who uses [sick leave] must comply with management’s request for verification of the appropriateness of using [sick leave].”

¹⁰ Grievant Exhibit 1.

Accumulation of a second active Group II Written Notice “normally should result in discharge.”¹¹ Grievant has accumulated three active Group I Written Notices and two Group II Written Notices. The Agency’s removal of Grievant from employment must be upheld based on the accumulation of disciplinary action.

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....”¹² 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’s representative argued that Grievant should have been demoted or transferred or had her pay reduced rather than removed from employment. He argued the Agency did not engage in progressive discipline. This argument is untenable. The Standards of Conduct do not require progressive discipline as a condition to taking disciplinary action. Under the *Rules for Conducting Grievance Hearings*, once the Agency has presented sufficient evidence to support the level of disciplinary action taken, the Hearing Officer must give deference to the terms of that discipline unless mitigating circumstances exist. In other words, if an agency presents evidence sufficient to show a Group III offense occurred, the Agency’s selection of removal instead of demotion or suspension must be upheld by the Hearing Officer unless mitigating circumstances exist. In this case, no mitigating circumstances exist. In light of the standard set forth in the *Rules for Conducting Grievance Hearings*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor’s instruction regarding absence from work 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

¹¹ DHRM § 1.60(VII)(D)(2)(b).

¹² *Va. Code § 2.2-3005*.

instruction with respect to written timesheets is **upheld**. Grievant's removal from employment based on the accumulation 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:

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.¹³

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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