

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow instructions), Termination, Retaliation; Hearing Date: 10/07/08; Decision Issued: 10/10/08; Agency: DMA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8911, 8944, 8945; Outcome: No Relief – Agency Upheld in Full; **Administrative Review**: EDR Admin Review Request received 10/24/08; EDR Admin Review #2009-2171 issued 12/01/08; Outcome: Hearing Decision affirmed; **Administrative Review**: DHRM Admin Review Request received 10/24/08; DHRM Admin Review issued 12/22/08; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8911 / 8944 / 8945

Hearing Date: October 7, 2008
Decision Issued: October 10, 2008

PROCEDURAL HISTORY

On April 17, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. On April 23, 2008, Grievant received a second Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed from employment based on the accumulation of disciplinary action.

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 August 19, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 7, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Counsel
Witnesses

ISSUES

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?
5. Whether the Agency retaliated against Grievant?

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 Department of Military Affairs employed Grievant as a Math/Science Teacher at one of its Facilities. She was removed from employment effective May 5, 2008. Although Grievant had received prior active disciplinary action, the Agency did not introduce that discipline into evidence during the hearing.

Grievant smelled gas fumes around and inside the building containing her classroom. On March 18, 2008, Grievant filed a complaint with the Department of Labor and Industry asking that agency to investigate the gas leak. The Inspector visited the building where Grievant's classroom is located.¹ The Inspector did not detect a gas leak in the building. The Inspector said that the air fresheners located in Grievant's classroom would prohibit someone from smelling a gas leak and thus they should be removed. In addition, several Cadets with asthma had complained to the Agency that the odor from the air fresheners in Grievant's classroom adversely affected them.²

¹ The Inspector visited the Facility for two continuous weeks and use gauges to measure for gas leaks. The Inspector did not find any poisonous gas leaks. The Inspector mentioned that the air fresheners were over-powering.

² Grievant had at least three oil-burning air fresheners in electrical outlets of her classroom.

On April 7, 2008, the Medical Staff Member informed Grievant's Supervisor that the multiple air fresheners in Grievant's classroom needed to be removed because the perfumes in them aggravated asthmatic cadets and could mask the dangers odors such as gas.

On April 8, 2008, the Supervisor visited Grievant's classroom and gave her a written note with a copy of the note from the Medical Staff Member. The Medical Staff Member's note was addressed to the Supervisor and stated:

The multiple air fresheners in [the classroom] need to go away. The perfumes in them are aggravating asthma cadets and masked odors such as gas. Thanks.

The Supervisor's note to Grievant stated:

Per [the Medical Staff Member's] note dated 4-7. Immediately remove all air fresheners. Hazardous to [the] health of cadets. Non-negotiable.

On April 10, 2008, the Supervisor wrote a second memo to Grievant reiterating the need to remove the fresheners that had not yet been removed. The memorandum provided additional reasoning and explanations regarding the health need and the comment from the Inspector that the air fresheners were over-powering. The Supervisor again directed Grievant to remove the air fresheners from her classroom.

On April 14, 2008, the Supervisor and the Medical Staff Member visited Grievant's classroom. The Medical Staff Member explained to Grievant why the air fresheners needed to be removed. Grievant disagreed with the Medical Staff Member. Grievant's Supervisor again instructed Grievant to remove the air fresheners. When Grievant did not make any attempt to remove the air fresheners, the Supervisor began removing air fresheners. Grievant informed the Supervisor that the air fresheners were her personal property and that if the Supervisor took them, Grievant would complain to the Colonel. The Supervisor told Grievant to remove all the air fresheners and take them to Grievant's car. Grievant placed the air fresheners on her desk and refused to move or talk.

On April 16, 2008, the Supervisor visited Grievant's classroom and learned that Grievant had placed all of the air fresheners back into the electrical outlets in the room. The Supervisor left the classroom and notified the Lieutenant Colonel. The Lieutenant Colonel asked Grievant why she had not removed the air fresheners. Grievant answered that when she asked the Cadets, they said the air fresheners did not bother them. The Lieutenant Colonel explained that the air fresheners needed to be removed. Grievant again refused to remove air fresheners. The Lieutenant Colonel and the Supervisor removed the air fresheners. The Lieutenant Colonel informed Grievant that the air fresheners would be placed in an envelope in her headquarters mailbox where she could take them home at the close of business.

In the morning of April 17, 2008, the Lieutenant Colonel visited Grievant's classroom and discovered that Grievant had placed all of the air fresheners back into the electrical outlets. Grievant was called into a meeting with the Lieutenant Colonel, Supervisor, and Business Manager. Grievant was notified that the Lieutenant Colonel recommended to the Agency that a Group II Written Notice of disciplinary action with two work day suspension be issued to Grievant for repeated failure to follow the Supervisor's instructions. During this meeting, the Lieutenant Colonel again instructed Grievant to remove the air fresheners by the close of business on April 17, 2008.

At the end of the workday on April 17, 2008, the Lieutenant Colonel and the Supervisor went to Grievant's classroom to verify that she had removed the air fresheners. Grievant had not left for the day. Since the air fresheners were still in the electrical outlets, the Lieutenant Colonel removed the air fresheners and placed them all on Grievant's desk in front of Grievant and gave instruction to Grievant to take them home.

On the morning of April 18, 2008, the Lieutenant Colonel visited Grievant's classroom and discovered that all air fresheners had again been placed in the electrical outlets. The Lieutenant Colonel removed the air fresheners and informed Grievant that he would keep them in his office.

In the morning of April 22, 2008, the Lieutenant Colonel and the Supervisor entered Grievant's classroom. Grievant had installed new air fresheners into electric outlets of the classroom. The Agency issued Grievant the second Group II Written Notice.

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."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. On April 16, 2008, the Lieutenant Colonel, a supervisor, instructed Grievant that she could not have air fresheners in the electrical outlets of her classroom. When Grievant refused to remove the air fresheners, the Lieutenant Colonel and the Supervisor removed the air fresheners and placed them in an envelope in her mailbox for her to take home. On

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

April 17, 2008, Grievant reinstalled the air fresheners thereby acting contrary to the Lieutenant Colonel's instruction. The Agency is presented sufficient evidence to support the issuance of the first Group II Written Notice for failure to follow a supervisor's instruction.

On April 17, 2008, the Lieutenant Colonel instructed Grievant to remove the air fresheners from the electrical outlets in her classroom before the close of business that day. Grievant failed to comply with that instruction. The Lieutenant Colonel and the Supervisor removed the air fresheners and placed them on Grievant's desk and instructed Grievant to take the air fresheners home. Grievant did not take the air fresheners home. Instead, Grievant reinstalled the air fresheners in her classroom. On April 18, 2008, the Lieutenant Colonel removed the air fresheners and took them to his office. Grievant installed new air fresheners. The Agency has present sufficient evidence to support the issuance of the second Group II Written Notice for failure to follow a supervisor's instructions.⁴

Upon the accumulation of two active Group II Written Notices, the Standards of Conduct authorizes an employee's removal. Accordingly, the Agency's decision to remove Grievant from employment 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...."⁵ 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 there were air fresheners in other buildings at the Facility. The evidence showed that the Lieutenant Colonel was not aware of those other air fresheners. In addition, no evidence was presented suggesting that those other air fresheners were masking the odor of a gas leak. Even if the Lieutenant Colonel had been aware of the other air fresheners, it would have been appropriate for the Agency to remove air fresheners from Grievant's classroom based on the cadets' complaints and the risk that the air

⁴ When Grievant installed new air fresheners in the electric outlets of her classroom, she demonstrated insubordination. Insubordination is a Group II offense and would also provide a basis to support issuance of the second Group II Written Notice.

⁵ *Va. Code § 2.2-3005.*

fresheners in Grievant's classroom were masking the odor of gas fumes. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁶ (2) suffered a materially adverse action⁷; 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 shows by a preponderance of the evidence that 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.⁸

Grievant filed a grievance with the Agency thereby engaging in a protected activity. She suffered a materially adverse action by receiving disciplinary action. Grievant has not established any causal link between the adverse action and the protected activity. The evidence is overwhelming that the Agency took disciplinary actions against Grievant because of her blatant disregard of a supervisor's instructions. The Agency did not retaliate against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the first Group II Written Notice of disciplinary action for failure follow a supervisor's instruction is **upheld**. The Agency's issuance to the Grievant of the second Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction is **upheld**. Grievant's removal from employment is **upheld**.

APPEAL RIGHTS

⁶ See Va. Code § 2.2-3004(A)(v) and (vi). 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.

⁷ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁸ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.⁹

[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].

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

December 22, 2008

RE: **Grievance of XXX v. Department of Military Affairs**
Case Nos. 8911, 8944, 8945

Dear Grievant:

The Agency head, Ms. Sara Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced cases. In your request for such a review, you presented the following:

- (1). The hearing officer failed to address certain information in his findings of facts which you felt validated your claims of retaliation and harassment. You felt that this omission resulted in a decision that was inconsistent with law.
- (2). The hearing officer failed to mention a piece of information (a technician from a gas company came out to fix a gas leak that was connected to your former classroom building) that you deemed important in the support of your retaliation and harassment argument.
- (3). You had been issued five written notices by a former supervisor. You apparently filed grievances related to two of the written notices.
- (4). The agency representative presented no evidence to support that air fresheners in your classroom were detrimental to the health of your students.
- (5). You have an active equal employment opportunity complaint at the Office of Equal Employment Opportunity.

Please note that, pursuant to Section 7.2(a) of the Grievance Procedure Manual, a hearing officer's decision is subject to three types of review:

- (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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
- (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.

In order for the Department of Human Resource Management (DHRM) to address your request for an administrative review, Item #2 above requires that the party requesting the review identify any state or agency policy with which the hearing decision is inconsistent or violates. We have reviewed carefully your request for an administrative review and note that you have not identified any state or agency policy with which the hearing decision is inconsistent. Rather, it appears that you are contesting the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts that he chose to include in his decision. The authority of DHRM is restricted to reviewing issues related to the application and interpretation of policy. Because you failed to identify any specific policy violation committed by the hearing officer in making his decision, this Agency has no basis to interfere with the application of this decision.

Sincerely,

Ernest G. Spratley,
Assistant Director,
Office of Equal Employment Services