

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 11/17/08;
Decision Issued: 11/20/08; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8962; 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: 8962

Hearing Date: November 17, 2008
Decision Issued: November 20, 2008

PROCEDURAL HISTORY

On July 1, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction.¹

On July 31, 2008, 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 September 30, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 17, 2008, a hearing was held at the Agency's regional office.

¹ On July 1, 2008, the Supervisor sent grievance a memorandum stating:

I have considered the mitigating documentation you submitted on June 30, 2008. I have considered the impact of your actions on the agency, management and staff of First Level Appeals.

In consideration of the foregoing, I am holding the five day suspension without pay in abeyance, pending satisfactory completion of the Corrective Action Plan for the Improvement Needed/Substandard Performance Notification Form issued separately and for the active life of the Group II Written Notice. ***

Agencies are not authorized to hold a suspension in abeyance pending further action by an employee. A Group II Written Notice may be issued either with or without suspension. In this case, the Hearing Officer finds the Written Notice was issued without suspension. Grievant may not be suspended on a subsequent date for his actions giving rise to the July 1, 2008 Group II Written Notice.

APPEARANCES

Grievant
Grievant's Representatives
Agency Representatives
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 Employment Commission employs Grievant as a Legal Services & Hearing Officer II at one of its Facilities. He has been employed by the Agency for approximately 25 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 23, 2008, Grievant sent the Supervisor an email stating:

I would like to request leave from 06/09 through 06/13 to attend the [Professional Conference] we are hosting this year in Richmond.

On April 24, 2008, the Supervisor responded by email:

Approved, subject to your heard but not decided backlog being cleared.

On April 24, 2008, Grievant replied by email, "I understand".²

The Agency maintains a database showing the number of cases outstanding at the end of each week. Grievant had 16 cases outstanding for the week ending April 27, 2008 -- the week the instruction was given. Grievant had cases outstanding for subsequent weeks as follows:

For the week ending:	Date:
May 4, 2008	20
May 11, 2008	24
May 18, 2008	26
May 25, 2008	25
June 8, 2008	17

On Sunday, June 8, 2008, Grievant began working at the Professional Conference. He was coordinating the opening ceremonies scheduled to begin on Monday, June 9, 2008 at 7 a.m. Grievant continued working at the conference for the remainder of the work week.

The Agency performed a manual count on Monday, June 9, 2008, and concluded that Grievant had 15 cases that he had heard but not yet decided.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."³ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

² The phrase "heard but not decided" refers to those cases in which Grievant has held a hearing with the parties but not yet issued his decision.

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

"Failure to follow supervisor's instructions" is a Group II offense.⁴ The Supervisor granted the Grievant's request to receive administrative leave to attend a conference contingent upon Grievant eliminating his case backlog. Both the Supervisor and Grievant understood the Supervisor's contingency to mean Grievant was instructed not to attend the conference unless he had eliminated his case backlog at the time of the conference. When Grievant attended the Professional Conference he had a backlog of approximately 15 cases. Grievant acted contrary to the Supervisor's instruction because he attended the conference without first having eliminated his case backlog. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

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 for several reasons. Grievant argued that after his leave was approved he held 137 hearings for which decisions had to be prepared. He reduced his backlog to 16 cases.⁶ Of these 16 cases, 12 were for cases heard after May 28, 2008. Grievant had worked on Memorial Day, weekends and days he had arranged to be off for his son's graduation in order to eliminate the backlog. This argument fails. Grievant had approximately 16 cases outstanding at the end of the week he made his request for leave. He had approximately 16 cases outstanding at the end of the week before he attended the conference. Although Grievant's efforts increased, his backlog did not change materially. The Supervisor's instruction focused on a result, not merely on effort.

Grievant argued that one of the Agency's computer systems was not operating on June 7, 2008 and he was unable to retrieve necessary information to complete his remaining cases. This argument is unpersuasive. No credible evidence was presented to show that had Grievant been able to retrieve the information contained in the

⁴ See Attachment A to the DHRM Standards of Conduct.

⁵ *Va. Code § 2.2-3005.*

⁶ Grievant contends one of the 17 cases counted by the Agency was continued to another date and should not have been considered as a case heard but not yet decided.

malfunctioning computer system, he would have been able to reduce his backlog to zero. Grievant could not have completed that many cases in one day.

Grievant argued that his attendance at the Professional Conference benefited the Agency. The Professional Conference dealt with issues directly relating to the Agency's business. Grievant "worked as one of the conference support workers to set up, take down, facilitate transportation service for conference attendees, moderate workshops, and provide general assistance each day of the conference."⁷ In order to acknowledge Grievant's hard work at the Professional Conference, he was given a "Go the Extra Mile Recognition Form". To the extent Grievant's action benefited the Agency and was a mitigating factor, there exists an aggravating factor. Although Grievant may have "helped" the Agency, he also "harmed" the Agency by continuing a backlog of undecided cases. Grievant could have worked on those cases during the week of the conference. The Supervisor testified that the Agency's operations including its Federal funding could be affected by the untimeliness of case decisions.⁸ The Agency retains the right to allocate staff resources and to determine how its employees will best benefit the Agency's mission.

Grievant argues that his work performance and length of service are mitigating circumstances. Grievant is a long term employee and is considered by the Agency to produce quality work. Under the facts of this case, these factors are not sufficiently mitigating to reduce the Agency's disciplinary action.

In light of the standard set forth in the *Rules*, 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 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.

⁷ Grievant Exhibit 1.

⁸ The Federal government could impose a corrective action plan on the Agency depending on the quality and timeliness of the Agency's hearing decisions.

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
600 East Main Street, Suite 301
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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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