

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 05/11/09;
Decision Issued: 05/14/09; Agency: VDEM; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9044; 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: 9044

Hearing Date: May 11, 2009

Decision Issued: May 14, 2009

PROCEDURAL HISTORY

On October 29, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On November 17, 2008, Grievant timely filed a grievance to challenge the Agency's action. She also alleged that the Agency retaliated against her, the Supervisor created a hostile work environment, and that the Agency failed to comply with policy. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. The matter was qualified for hearing by the Agency Head who only qualified the disciplinary action. Grievant did not appeal that decision to the EDR Director and, thus, the only evidence related to the disciplinary action would be relevant at the hearing. On March 11, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 11, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 Department of Emergency Management employs Grievant as an Accounting Manager. The purpose of her position is:

To manage a team of professionals in Accounting to ensure accuracy & timeliness of processes and compliance with state and federal regulations and generally accepted accounting principles. Develop policies and procedures for all areas of responsibility.¹

Grievant reports to the Supervisor who reports to the Deputy of Administration. The Deputy of Administration reports to the State Coordinator.

Grievant received an overall rating of "Contributor" on her 2007 performance evaluation.²

¹ Agency Exhibit 1.

² Grievant Exhibit 11.

Grievant had prior active disciplinary action. On August 13, 2007, Grievant received a Group I Written Notice for unsatisfactory work performance and disruptive behavior.³

Grievant was hired, in part, because of her experience with converting financial systems. The Agency was in the process of converting its files to the Financial Management System (FMS). In addition, the Agency was in the process of adopting the Agency Risk Management & Internal Control Standards (ARMICS) initiative of the Department of Accounts.

Grievant was assigned responsibility for the ARMICS project in April 2007. She was provided with training from the Department of Accounts. The project had three phases. Phase I was due on September 30, 2007. Grievant was unable to complete Phase I because she was absent due to illness from August until October 2007.⁴ Grievant was not disciplined for her inability to timely complete Phase I. Phase II was due on March 31, 2008. The State Coordinator was able to request and receive an extension for Phase II until May 30, 2008. Grievant began working on the documentation process of the assignment in January 2008. Grievant was slow to complete Phase II. Because of her delays, the Deputy of Administration and the State Coordinator lacked sufficient time to review the required documents before they were submitted on May 30, 2008. Grievant did not complete three of the SOPs on time and the State Coordinator sent a letter to the Department of Accounts indicating that the agency had completed 95% of its internal control activities and that the other SOPs would be completed in 15 business days. Grievant had not completed the three SOPs as of June 20, 2008, the Supervisor sent Grievant an email on June 23, 2008 reminding her that the SOPs needed to be placed in the ARMICS binder. On July 10, 2008, Grievant and the Supervisor met. Grievant told the supervisor she had not yet finished the SOPs. Grievant and the Supervisor met on July 24, 2008 and again the Supervisor reminded Grievant that she needed to complete the SOPs by the end of July 2008. Grievant did not complete the remaining SOPs in July and did not complete them in August. On September 11, 2008, the Supervisor gave Grievant a memorandum directing her to finish the remaining SOPs by September 16, 2008. Grievant did not complete the SOPs until the last week of September 2008.

Phase III was originally due on June 30, 2008 but the Agency was granted an extension by DOA until September 30, 2008 to finish the project. On July 10, 2008, Grievant and the Supervisor began planning for Phase III. Grievant indicated she would need several staff members to assist her with the project. The Deputy of Administration and the Supervisor authorized Grievant seek assistance from other staff.

³ Agency Exhibit 6.

⁴ The Supervisor assumed responsibility for completing Phase I of the project along with her other duties.

One of Grievant's tasks, namely payroll ATVs, was re-assigned in May 2008 in order for Grievant to concentrate on FMS and ARMICS.

Grievant was advised by email of the due dates for Phase III. In a memorandum dated September 11, 2008, Grievant was advised of the dates by which the Deputy of Administration and the State Coordinator were to receive the final Phase III documents. The memorandum stated, in part:

Based on the above information, you are being directed to do the following:

1. The information needed for the ARMICS is still outstanding and you have until Tuesday, September 16 to finish the Grants Section write-up.
2. During the week of September 8, you need to move forward with the testing of Phase III of ARMICS and work on the SEFA report. In addition, [the Deputy of Administration] needs to be provided with the final ARMICS Stage III report no later than Friday, September 19.

Grievant did not provide the documents by the due dates. On September 24, 2008 the Supervisor took over Phase III because Grievant was unable to meet the established deadlines.

The Agency received assistance from the FMS Consultant on a part-time basis. The FMS Consultant typically worked at the Agency on Mondays. During the week of August 21, 2008 through August 28, 2008, the Supervisor sent emails to Grievant requesting the status of a number of projects. The Supervisor also reminded Grievant to send the FMS Consultant daily status reports. Grievant did not send daily status reports to the FMS Consultant. This caused the FMS Consultant to be very concerned about the FMS project. On September 11, 2008, the Supervisor sent Grievant and memorandum stating, in part:

The Consultant reminded me last week that she sent you an e-mail on August 19 asking for the [General Ledger Accounts] and when you would be able to provide that information to her. As of Monday, September 8, you had not responded to the request. Please provide the Consultant with an answer today when this request will be completed. Your dilatory efforts are causing frustration for the Consultant who is trying to move our agency forward with this critical project.⁵

Grievant responded to the FMS Consultant that she would have the information by September 16, 2008. Grievant did not provide that information on September 16, 2008.

⁵ Agency Exhibit 5.

The Supervisor approached Grievant again and told Grievant that the FMS Consultant had not yet received the information. On September 29, 2008, Grievant sent the FMS Consultant an email with the subject glablance.xls and a spreadsheet attached.⁶

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.”⁷ 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.”

Failure to follow a supervisor’s instructions is a Group II offense. On September 11, 2008, Grievant was instructed in writing by the Supervisor to provide the final ARMICS Stage III report on September 19, 2008. Grievant did not provide the report as directed. Because Grievant was unable to complete the task, the Supervisor took over the responsibility on September 24, 2008. Grievant failed to comply with the Supervisor’s instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

The Agency also presented other evidence regarding Grievant’s work performance. Inadequate or unsatisfactory job performance is a Group I offense. That evidence amounted to inadequate or unsatisfactory job performance and is not necessary to support the Agency’s issuance of a Group II Written Notice.

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....”⁸ 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.

⁶ Grievant Exhibit 27, p. 53.

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ *Va. Code § 2.2-3005.*

Grievant contends that her workload was so great that the Agency's expectations for her performance were unreasonable. There is no question that Grievant's workload was great and that the Agency's expectations of her were high. With respect to many of Grievant's tasks, the Supervisor removed duties from Grievant to enable her to complete the priority assignments. When all of the fact of this case are considered,⁹ the evidence is insufficient for the Hearing Officer to conclude the Agency's expectations of Grievant were so unreasonable to render the Agency's disciplinary action against exceeds the limits of reasonableness.

Grievant argued that the contentious relationship between her and the Supervisor impeded Grievant's ability to perform her job. Although the relationship between Grievant and the Supervisor was often difficult the difficulties arose because Grievant was not meeting the Supervisor's expectations and not for other reasons unrelated to the Agency's business. Grievant could have minimized the conflict by meeting the Agency's expectations.

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.
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:

⁹ For example, when Grievant requested assistance the Agency authorized Grievant to obtain an intern from a local college. She selected an intern but the intern quit after working approximately three days. On one of the days the intern was scheduled to work, Grievant had not provided any tasks for the intern to perform. Grievant asked the Supervisor to find the intern something to do.

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 St. STE 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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.