

Issue: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 08/19/09; Decision Issued: 08/24/09; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9138; Outcome: Full Relief;
Administrative Review: AHO Reconsideration Request received 09/08/09;
Reconsideration Decision issued 10/30/09; Outcome: Original decision affirmed;
Attorney Fee Addendum issued 11/06/09.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9138

Hearing Date: August 19, 2009
Decision Issued: August 24, 2009

PROCEDURAL HISTORY

On April 22, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. Grievant was removed from employment effective April 22, 2009 based on the accumulation of disciplinary action.

On May 21, 2009, 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 July 7, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 19, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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:

Virginia Commonwealth University employed Grievant as a Cash Operations Manager until her removal effective April 22, 2009. She had been employed by the Agency for approximately 26 years. Grievant had prior active disciplinary action. On January 26, 2009, Grievant received a Group I Written Notice for excessive absenteeism. On March 19, 2009, Grievant received a Group II Written Notice failure to follow written policy.

Grievant worked in the unit that operated as the "bank" for several independent foundations and organizations affiliated with VCU. The Unit Director joined the Agency in February 2009 and desired to enhance the quality of the unit's customer service to the various foundations it serviced.

Grievant sent several emails to customers that the Unit Director considered to be inappropriate in terms of tone and content. On February 11, 2009, Grievant sent an email to the CFO of the MCV Foundation that the Unit Director considered to be unprofessional. When the Unit Director asked Grievant about the email, Grievant responded that she "knew it was wrong, but wanted to send it while mad to be heard and that this is done about once a year to get the CFO's attention."¹ In order to improve the quality of Grievant's customer service, the Unit Director decided Grievant should not

¹ Agency Exhibit 3.

send emails to executive level staff without having the email approved by the Unit Director or Grievant's direct Supervisor.

On March 6, 2009, the Unit Director gave Grievant a Notice of Improvement Needed describing Grievant's specific performance deficiencies and improvement needed. Item 2 of the Improvement Plan stated:

You have been asked to continue to have any written communications to executive personnel be reviewed prior to sending to help train on the appropriate communication techniques.²

Mr. B is the Executive Director of the Foundation and also a development director for the Program.³ The Program is a part of VCU. The Foundation, however, is not a part of VCU but is affiliated with VCU. The Foundation is a non-profit corporation intended to serve VCU.

Grievant needed a form in order to establish an account in the Unit's database program called Millennium. Without the form, Grievant could not properly process a gift. Grievant sent an email to Ms. R on April 14, 2009 to obtain the form but did not receive a response from Ms. R.

On April 14, 2009 at 3:35 p.m., Mr. B sent Grievant an email with the subject line stating "Fw: New Index [Program] [number]". Mr. B wrote, "Here is the information that was sent to me from [the Program]."⁴ On April 15, 2009 at 8:20 a.m., Grievant sent Mr. B a reply email stating:

I e-mailed [Ms. R] about the Index Create Form yesterday and I haven't heard anything yet. I really need that to set it up in Millennium. Since we have a \$10,000 gift to apply to it, I really don't want to put it in Suspense unless we have to. Can you please ask [Ms. K] to get [Ms. R] to either e-mail it or fax it to me?⁵

Grievant sent a copy of the email to the Unit Director and to Grievant's Supervisor. Grievant did not obtain the Unit Director's approval or Supervisor's approval prior to sending the email.

² Agency Exhibit 3.

³ The Hearing Officer sent Mr. B an order compelling his attendance at the hearing. Mr. B did not appear at the hearing to testify.

⁴ It appears that Mr. B attaches as a matter of course a signature line to his emails identifying himself as the Executive Director of the Foundation. Even though his April 14th email to Grievant was not about the Foundation, his signature line appeared.

⁵ Agency Exhibit 3.

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.”⁶ 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.”

The Agency contends Grievant should receive a Group II Written Notice for failure to follow a supervisor’s instructions. Grievant lacked sufficient intent to support the issuance of a Group II Written Notice. Grievant believed she was responding to Mr. B in his capacity as a development director and not in his capacity as Executive Director of the Foundation. There is insufficient evidence to show that Grievant should have known she was responding to Mr. B in his capacity as an executive of the Foundation. For example, the email Mr. B sent to Grievant specifically addressed the Program in the subject line and in the text of the email. Grievant’s response to Mr. B was about a form needed for the Program and not for the Foundation. Grievant testified that she sometimes sent emails to other development directors without obtaining prior review by the Unit Director. In the absence of sufficient intent to prove a Group II offense, the Written Notice must be rescinded.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because she is to be re-instated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant’s former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

⁶ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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
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.⁷

⁷ 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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9138-R

Reconsideration Decision Issued: October 30, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The Agency submitted Amended and Restated Articles of Incorporation for the Foundation. This document is not new evidence because it was in existence at the time of the hearing and known to the Agency. The Agency has a close relationship with the Foundation which was established to support the Agency. Clearly the Agency knew of the Foundation’s Articles and could have presented them during the hearing.

The Agency submitted organizational charges as new evidence. These documents are not new evidence because they were in existence at the time of the hearing and known to the Agency.

The Agency submitted the statement of the Vice President of University Advancement. This person could have testified at the hearing but was not called as a witness. The Vice President's statement is not new evidence.

The Agency contends Mr. B did not know he was scheduled to testify during the hearing. The Hearing Officer sent Mr. B an order to Mr. B's email address⁸ on August 14, 2009 in advance of the hearing scheduled for August 19, 2009. A copy of the witness order was sent to Grievant's attorney and the Agency's Advocate. Mr. B had adequate notice of the hearing and should have attended.

The Agency argues that Mr. B was an executive in his capacity as a development officer for the Agency. Because Mr. B did not testify, this factual conclusion has not been established. If the Hearing Officer were to consider this conclusion for the sake of argument, the importance of that fact is unclear. The context of the Unit Director's initial instruction was Grievant's interaction with external customers (CFO of the MCV Foundation) of the Agency and not just whether the individual held an executive level position. Because Grievant was asking Mr. B for assistance regarding an employee of the Agency, Grievant did not believe she was contacting an external customer and did not realize the Unit Director expected her to have the email pre-approved. Grievant lacked sufficient intent to disregard the Unit Director's instruction. There remains insufficient evidence to support the issuance of a Group II Written Notice.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

⁸ The Agency has not disputed the accuracy of the email address provided by Grievant's Counsel.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 9138-A

Addendum Issued: November 6, 2009

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁹ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.¹⁰

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant Attorney's petition contains a request for hours devoted to the Step Process. This time is not related to the hearing. Only time related to the hearing can be awarded as attorneys' fees.

The Hearing Officer finds that Grievant should be awarded attorney's fees for 18.28 hours at the rate established by the EDR Director of \$131 per hour for a total of \$2,394.68.

⁹ Va. Code § 2.2-3005.1(A).

¹⁰ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

AWARD

The grievant is awarded attorneys' fees of \$2,394.68.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

Carl Wilson Schmidt, Esq.
Hearing Officer