

Issues: Group I Written Notice (unsatisfactory job performance) and Group I Written Notice (exercising poor judgment); Hearing Date: 11/02/09; Decision Issued: 11/04/09; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9200, 9201; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9200 / 9201

Hearing Date: November 2, 2009
Decision Issued: November 4, 2009

PROCEDURAL HISTORY

On May 20, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to maintain appropriate management of the Student Work study Program and failure to timely deliver a variance analysis. During the step process, the Written Notice was reduced to a Group I Written Notice for inadequate job performance.

On July 23, 2009, Grievant was issued a Group I Written Notice of disciplinary action for allowing a former employee access to a building and assisting with the operations talks without an official requests. During the step process, the issuance of this notice was based on Grievant exercising poor judgment.

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On September 15, 2009, the EDR Director issued Ruling No. 2010-2410, 2010-2411 consolidating the two grievances for a single hearing. On September 30, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 2, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
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 disciplines were 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 actions, 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 Community College System employs Grievant on one of its campuses as an Associate Controller in the Controller's Office of the College. Grievant reported to the Controller until the Controller retired. During the relevant time period, Grievant served as the de facto Controller. He was expected to assume the duties of the Controller along with his duties as Assistant Controller. Grievant reported to the Vice President for Finance and Administration. The Vice President for Finance and Administration is responsible for several Agency departments including the Controller's Office and the Police Department. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency hired work study students to work in the Controller's office. The compensation to these students could be reimbursed as part of federal financial aid. Students were to work for a specific number of hours at a set hourly rate. Grievant was responsible for executing the contract with each student and overseeing the student work study program.

On April 2, 2009, the Agency discovered that it had a student working without an award and students who continued to work even though their contracts had expired. The additional cost was being charged to the Controller's Office budget.

The Auditor of Public Accounts audits the Agency. On February 3, 2009, an APA auditor asked the former Controller for further clarification regarding information provided by the Agency. The former Controller forwarded the request to Grievant. Grievant responded to the APA auditor on February 16, 2009. On April 21, 2009, the APA auditor asked for further analysis of the information provided by Grievant. Grievant and his staff researched the questions asked by the APA auditor. On May 14, 2009, the APA auditor informed the Compliance Officer that the information was needed by May 19, 2009. Grievant provided the information as requested on May 18, 2009.

The Former Employee began working for the Agency in 1973. She retired from her position as Reconciliation Manager on April 1, 2009. One of her responsibilities was to conduct a reconciliation of CARS/AIS. This involved comparing the information contained in the State's central database with the Agency's database. The process was complex and required specialized knowledge. She completed reconciliations on a monthly basis. Prior to the Former Employee's retirement, she trained Mr. W to perform her duties.

The Vice President assigned Grievant a special project to conduct a reconciliation of CARS/AIS because Mr. W had to leave the country unexpectedly. In May 2009, Grievant spoke with the Former Employee by telephone when he had questions about the reconciliation process. Because he was often interrupted by other tasks and requests, Grievant was unable to effectively interact with the Former Employee. Grievant and the Former Employee decided that it would be better for them to work together at the office. The Former Employee had scheduling conflicts during the week and asked to work on the weekends. Grievant also preferred that time to work since he could focus his attention on the reconciliation. The Former Employee had volunteered her services without cost to the Agency. On two Saturdays, May 16, 2009 and May 23, 2009, Grievant went to his office to work. He let the Former Employee into the building. He logged onto his computer and they both sat at his computer to work on the reconciliation. The Former Employee was able to view the contents of the Agency's database and assist with the reconciliation. At one point, they had a question regarding how to handle an entry. Grievant permitted the Former Employee to use his email account to send an email to an employee at the Central Office to seek guidance. Grievant did not give the Former Employee his password to enter the computer system. He entered the computer system. After he was already logged in, he permitted the Former Employee to type an email to another employee. The Former Employee's email identified herself as the Former Employee and indicated she was using Grievant's email.

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.”¹ 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.”

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Group I Work Study Program and Variance Analysis

Grievant failed to properly manage the Federal Work Study Program student contracts. One student did not have a financial aid contract in place yet the student was working for the Controller’s Office. At least two other students continued to work for the Controller’s Office even though their federal award had ended. This adversely affected the budget of the Controller’s Office. The Agency has presented sufficient evidence to support the issuance of a Group I 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....”² 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 argues the disciplinary action should be mitigated. He asserts that it was common practice for students to work in excess of their contracts. He showed that other departments in the Agency had over twenty students who had been paid in excess of their work study award. This argument does not support a reversal of the disciplinary action against Grievant. The Vice President of Finance and Administration did not supervise the other Agency departments and, thus, he did not single out Grievant for disciplinary action. In addition, no evidence was presented that the managers of those other departments knew they had students who were working in excess of their awards. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² *Va. Code § 2.2-3005.*

The Agency argued that the Group I Written Notice is also supported by Grievant's failure to timely process the variance analysis requested by the APA. The Agency presented evidence it should have been completed correctly in three weeks and that Grievant took too long to finish. Grievant presented evidence showing that he quickly responded to the APA's request within a week. Grievant presented evidence that several weeks passed without contact from the APA regarding the analysis. Once the APA sought additional information, Grievant provided that information within two weeks. The difficulty with the Agency's case is that there was not objective standard by which to measure whether Grievant's responses were timely. In addition, it appears that Grievant's initial response was timely but that some of the information was incorrect. In other words, the Agency's actual objection to Grievant's work performance is not a lack of timely response but a lack of timely and correct response. It is unclear why the Agency considered Grievant's initial response to be inadequate as opposed to merely a situation where the APA was seeking follow up information in the form of a second response. The Agency has not presented sufficient evidence to show that Grievant's variance analysis was unsatisfactory. Although the Agency has not established the second portion of its basis to issue Grievant a Group I Written Notice, the Group I Written Notice must be upheld based on Grievant's failure to properly manage the Federal Work Study student contracts.

Group I for Allowing Former Employee Access

The Agency contends Grievant acted without authority to admit the Former Employee into the work facility on a weekend and that doing so reflected poor judgment given the sensitive financial information and resources.

As the de facto Controller, Grievant had the authority to allow the Former Employee to enter the workplace on weekends. The Agency failed to present any credible evidence that Grievant knew or should have known he needed to obtain the permission of the Vice President before admitting the Former Employee into the office. Grievant's objective was to complete an assignment given to him for which he had no training. The Former Employee was an expert in completing the assignment and had volunteered to help Grievant complete the assignment and show Grievant how to do it correctly the first time. Grievant's decision to obtain the assistance of an expert reflects good judgment, not poor judgment. Grievant's decision to work with the Former Employee on the weekend was not poor judgment. Grievant and the Former Employee could work on the task without interruption.

The Agency argues permitting the Former Employee to enter the office placed the Agency at risk of theft or destruction of important financial information. The Agency's point may have been valid had the person Grievant let into the office been someone of a lesser or unknown reputation. The Former Employee had dedicated her career to service with the Agency. She was held in high esteem by many Agency employees. She had expertise no other Agency employee had. Grievant and another employee remained with her while she was working except when she went to the restroom. Grievant provided adequate oversight of the Former Employee even though such oversight may not have been needed. The Agency argues security cameras show

that the Former Employee left with several pages of a document that she did not bring in with her when she entered the building. The Former Employee testified that the document she took out with her were the notes she brought in with her to help her assist the Grievant. Her testimony was credible. There is no reason for the Hearing Officer to believe the Former Employee stole anything of value from the Agency or took anything that did not belong to her.

The Agency argues Grievant left the Former Employee unattended for approximately one hour when he left work on a Saturday. Although Grievant left the building approximately one hour before the Former Employee left, the Former Employee remained at the request of the Accountant Senior who was also working Saturday. Ms. F needed assistance regarding an issue she was researching and the Former Employee agreed to help. There is no reason to believe the Former Employee engaged in behavior harmful to the Agency or presented any risk of such harm while the Former Employee was working with the Accountant Senior. The Former Employee left the office with the Accountant Senior.

The Agency argues that Grievant should have notified the Agency's police department that he and the Former Employee were working in the office on the weekend. No credible evidence was presented to show that Grievant was obligated to inform the Agency's police department of his presence or that of the Former Employee on campus during the weekend.

Based on the evidence presented, Grievant did not engage in behavior giving rise to disciplinary action by permitting the Former Employee to enter the Agency's office outside of customary work hours.³

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action regarding the Work Study Program is **upheld**. The Agency's issuance to Grievant of a Group I Written Notice for permitting the Former Employee to enter the Agency's office is **rescinded**.

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:

³ The Agency argues Grievant was not forthcoming when asked by the Vice President on June 2, 2009 as to whether Grievant let any non-employees in the office building. Grievant argues he did not understand the Vice President's question because Grievant assumed the Vice President was talking about someone having no affiliation whatsoever with the Agency. This dispute is not significant because the Agency did not take disciplinary action against Grievant based on a claim that he was untruthful.

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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.