

Issues: Group I Written Notice (unsatisfactory performance) and Suspension (due to accumulation); Hearing Date: 11/23/09; Decision Issued: 11/24/09; Agency: VMI; AHO: Carl Wilson Schmidt, Esq.; Case No. 9226; 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: 9226

Hearing Date: November 23, 2009
Decision Issued: November 24, 2009

PROCEDURAL HISTORY

On September 15, 2009, Grievant was issued a Group I Written Notice of disciplinary action with a three day suspension for failure to file a purchase request pursuant to Agency purchasing procedures.

On September 24, 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 November 10, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 23, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
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 Military Institute employs Grievant as an Administrative Assistant with one of its departments. Grievant was the person in the Department with expertise in the procurement process. The Major also works in the Department.

Grievant had prior active disciplinary action. On May 12, 2008, she received a Group I Written Notice for unsatisfactory performance. On May 14, 2008, she received a Group I Written Notice for abuse of State time, disruptive behavior, and interference with State operations. On August 25, 2009, Grievant received a Group I Written Notice for disruptive behavior.¹

On October 9, 2008, Grievant received an email from the Supervisor indicating that "[a]ll purchases over \$1,000, regardless of funding source, require authorization in advance by the appropriate program head."²

Grievant was expected to purchase items in accordance with the Colleague Finance Departmental Manual. Section 90220 stated:

Procurements that exceed \$2,000 are encumbered in the Datatel Colleague system through the entry of purchase orders and are in addition

¹ Agency Exhibit 10.

² Agency Exhibit 1.

to eVA purchase orders. All purchases exceeding \$2,000 must be submitted to the Purchasing Office on a requisition form for processing unless exempted in advance by the Director of Purchasing or designee.³

Managers in Grievant's Department wanted to purchase licenses for an online alcohol course for students to view. On August 11, 2009, the Lieutenant Colonel sent Grievant an email stating:

[The Major] will be working with you later today on a PR for alcohol software – please bill to 52175. We will be receiving grant funds in September so these will be replenished.

Grievant replied "Ok".

On August 13, 2009, Grievant was on leave and was not at work. The Major sent Grievant an email stating:

Attached is the Invoice for [Vendor software]. Let's work on the Purchase Request tomorrow.

The attached invoice showed the cost of the software to be \$4,750.00.

When Grievant and the Major met in the morning of August 14, 2009, the Major said that "we are ready for the purchase request". The Major also told Grievant that she had the invoice. Grievant told the Major she could not "move forward" until she had received proof of receipt of the items. Later that day, the Major received confirmation that the vendor had created the necessary accounts for students to begin accessing the online course. The Major notified Grievant. Grievant did not complete a purchase request and obtain the necessary approvals prior to paying the vendor. Instead, she processed the necessary paperwork to have the vendor paid and sent those papers to the Agency's Comptroller's Office.

On August 19, 2009, the Procurement Officer sent the Major an email stating:

I have received the requisition along with the invoice in the amount of \$4,750 to [Vendor] for enrollment in the Alcohol-Wise Prevention Course and Online Alcohol Course. Please be advised that all procurements exceeding \$1,000 have to be approved in advance by the Deputy of Finance and Administration ([the General]). We should have had his approval on a requisition and a purchase order created before this order was placed.

I will take the paperwork I have to [the General's] office to seek his approval for payment.⁴

³ Agency Exhibit 2.

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.”⁵ 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.”

Unsatisfactory work performance is a Group I offense. Grievant was responsible for implementing the purchasing process for her department. She was asked to assist the Major with creating a purchase request and ensuring that the appropriate managers approved the purchase in writing. Grievant failed to ensure completion of a purchase request for the purchase of online courses with a cost exceeding \$2,000. Her failure to do so was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

Upon the accumulation of four Group I Written Notices, an agency may remove an employee. In lieu of removal, an agency may suspend an employee for up to 30 workdays. Accordingly, Grievant’s suspension for three workdays must be upheld.

Grievant argues there was no need to draft a purchase request because the product had already been ordered and that the customary purchase procedure had already been circumvented. This argument fails. The Major did not have expertise in the Agency’s purchasing process. She was relying on Grievant for that expertise. Although the Major sent Grievant an invoice from the vendor, that invoice did not confirm that the sale had been completed. Grievant should have known to draft a purchase request based on the emails she received. The Lieutenant Colonel’s email asked Grievant to work on a purchase request with the Major. The Major’s August 13, 2009 email stated, “Let’s work on the Purchase Request tomorrow.” Grievant simply processed the order without working on a purchase request because she assumed the item had already been purchased. Grievant failed to work with the Major to ensure that a purchase request was drafted and then properly processed.

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....”⁶ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

⁴ Agency Exhibit 6.

⁵ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁶ *Va. Code § 2.2-3005.*

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. In light of this standard, 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 I Written Notice of disciplinary action with a three workday suspension 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:

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

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.