

Issue: Group III Written Notice (unsatisfactory performance, failure to follow instructions) and Termination (due to accumulation); Hearing Date: 02/24/10; Decision Issued: 03/05/10; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9267; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 03/19/10; Reconsideration Decision issued 04/02/10; Outcome: Original Decision Affirmed; Administrative Review: EDR Ruling Request received 03/19/10; EDR Ruling #2010-2577 issued 05/18/10; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9267

Hearing Date: February 24, 2010
Decision Issued: March 5, 2010

PROCEDURAL HISTORY

On October 30, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions.

On November 30, 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 he requested a hearing. On January 19, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the 35 day time period for issuing a decision because of the unavailability of the parties. On February 24, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
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 State University employed Grievant as and Administrative & Program Specialist III. His working title was Payroll Technician. His Position Objective was to, "provide accurate and timely payments to Hourly and Student Employees."¹ He had been employed by the Agency for approximately 19 years prior to his removal effective October 30, 2009.

Grievant had prior active disciplinary action. On January 16, 2009, Grievant received a Group II Written Notice with a five work day suspension.²

In November 2008, Grievant was issued a Notice of Improvement Needed/Substandard Performance due to his continued payroll errors, continued failure to follow a supervisor's instructions, and for not following Agency and State payroll policies and procedures.

The Supervisor gave Grievant numerous instructions relevant during the time period of February 2009 through July 2009. The Supervisor instructed Grievant that time sheets for students and hourly workers should be submitted by the employee's

¹ Agency Exhibit 4.

² Agency Exhibit 5.

supervisor or submitted in a sealed envelope. Grievant accepted timesheets directly from students contrary to the Supervisor's instructions.

The Supervisor instructed Grievant to submit weekly reports in a timely manner every Monday. Grievant submitted some but not all of his weekly reports on Mondays.

The Supervisor instructed Grievant to review timesheets to ensure that the hours were calculated correctly and that a supervisor had signed each timesheet. Grievant did not always do this.

The Supervisor instructed Grievant to make deposits within two business days of receiving money. Grievant did not always timely deposit the money

A spreadsheet was developed and given to Grievant as a tool to assist him in managing the manual processing associated with hourly payrolls. If properly used and maintained, the spreadsheet would (1) provide a reconciliation of variances between the amount indicated on the individual hourly timesheets and the amount that would be certified to the DLA, (2) provide a mechanism to track employee's end date and (3) provide a tool for tracking student contracts and A-21s. The Supervisor instructed Grievant to use the spreadsheet. When one of Grievant's coworkers told him the spreadsheet was not helpful, Grievant discontinued using the spreadsheet without obtaining the approval of the Supervisor.

The Supervisor instructed Grievant to organize his work area to set up a folder and put payroll information into it so that anyone in the office could access the folder and see what Grievant was working on. Grievant did not comply with this instruction.

The Supervisor instructed Grievant that after he processed the payroll he was to review the payroll to ensure that everything was keyed into the computer system properly and processed correctly. Grievant complied with this instruction sometimes, but not always.

The Supervisor instructed Grievant that when a student employee's contract ended, Grievant was to terminate that contract in the Agency's computer system. Otherwise the student would be overpaid. Grievant did not always do this on a timely basis.

On July 29, 2009, the Agency discovered that an hourly employee, Mr. S, had been receiving overpayments from an Adjunct Faculty assignment that should have ended on December 13, 2006. Mr. S was receiving a payment of \$365.63 per pay period for teaching a lecture class from August 2006 to December 2006. Mr. S's payments continued until July 16, 2009 because his Adjunct Faculty payments were not manually turned off by Grievant in the Agency's accounting system. The overpayments made since January 2007 totaled \$20,840.91.

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.”

Failure to follow a supervisor’s instruction is a Group II offense.⁴ Grievant was given numerous instructions by the Supervisor. He failed to comply with those instructions. For example, the Supervisor instructed Grievant to utilize a spreadsheet tool in order to improve his work performance. Grievant unilaterally decided to stop using that tool and his performance suffered. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency argued that Grievant should receive a Group III Written Notice. Although there are many examples of Grievant failing to follow the Supervisor’s instructions, none of those examples independently rise to the level of a Group III offense. The Agency could have issued several Group II Written Notices. Instead, it chose to issue one Written Notice.

Upon the accumulation of two active Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency’s removal of grievant must be upheld.

Grievant argued that the Agency should have transferred him to another available position within the Agency in light of his longevity with the Agency. This argument fails. Nothing in State policy requires that the Agency transfer Grievant to another position in lieu of removal. The Agency has discretion regarding whether to transfer Grievant to another position. In this case, the Agency concluded it would not be appropriate to transfer Grievant to another position.

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

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

⁴ See Attachment A, DHRM Policy 1.60.

⁵ *Va. Code § 2.2-3005.*

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's length of service is not sufficient in itself to serve as a mitigating circumstance. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal from employment is **upheld** based on the accumulation of disciplinary action.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9267-R

Reconsideration Decision Issued: April 2, 2010

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 request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing or that could have been presented during the hearing. Grievant argues that he was singled out for disciplinary action. There is no credible evidence to support this allegation. The fact that Grievant brought to the Agency’s attention his error does not make that error any less of an error. The Agency presented sufficient evidence to support its issuance of disciplinary action. 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.

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