

Issue: Group III Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 03/02/10; Decision Issued: 03/05/10; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9275; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9275

Hearing Date: March 2, 2010
Decision Issued: March 5, 2010

PROCEDURAL HISTORY

On November 18, 2009, Grievant was issued a Group III Written Notice of disciplinary action for with removal for failure to follow a supervisor's instructions.

On December 11, 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 February 3, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 2, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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:

Christopher Newport University employed Grievant as an Information Technology Specialist II. His working title was Systems Administrator. The purpose of this position was:

To assist in maximizing the value derived from the University's information systems by designing, implementing, and supporting UNIX and Windows systems infrastructure.¹

Grievant was employed by the Agency for approximately 5 years prior to his removal effective November 18, 2009.

The Agency has approximately 90 computer servers.² Several of the servers perform separate functions but are interrelated in that accessing one of the servers affects the other servers. For example, changes made to the server known as Detroit may affect servers entitled Kidd, Savannah, and Colombia (also referred to as production servers). Grievant was aware of this interaction because he played a role in creating the link between the servers.

¹ Agency Exhibit 1.

² Grievant had responsibility for approximately 13 of those computer servers.

On September 2, 2009, Grievant made unauthorized configuration changes on the Agency's production web server. As a result of these actions, the Agency experienced 17 hours of unscheduled server downtime. On September 4, 2009, the Supervisor met with Grievant to discuss the action taken on September 2, 2009 and to develop an action plan for Grievant. The action plan included a warning not to make any changes which might impact production systems without prior approval from the Supervisor. In addition, Grievant was directed by the Supervisor not to continue working on the LDAP³ service that resided on the server called detroit.cnu.edu. The Agency decided to issue Grievant disciplinary action. On September 29, 2009, Grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions after making unauthorized changes to a production server on September 2, 2009 which resulted in 17 hours of unscheduled downtime. Grievant did not file a grievance to challenge this Group II Written Notice.

On September 24, 2009, the Supervisor sent Grievant an email. On September 25, 2009, they met to discuss that email. During that meeting, the Supervisor repeated his instruction to Grievant that Grievant should not make changes to the Detroit server. The Supervisor told Grievant to "leave Detroit alone".

On September 29, 2009 at approximately 8:30 a.m., Grievant implemented a configuration change on the detroit.cnu.edu server.⁴ He did so at his own initiative without having received a work order and without obtaining the Supervisor's prior approval. This change caused limited access to at least three university production servers (Savannah, Kidd, and Columbia) for at least five hours. Those servers interacted to support database functions such as admissions, accounts payable, and billing. Approximately 20 Agency employees were adversely affected by Grievant's action. These users included employees working in the admissions office, business office, Registrar's office, and advancement office.

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."

³ Lightweight Directory Access Protocol.

⁴ On September 28, 2009, Grievant changed the directory server's configuration files to remove the dictionary word check from the Sun Solaris LDAP Directory Server. On September 29, 2009, Grievant changed the directory server's password attribute and the server service was restarted.

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

Failure to follow a supervisor's instructions is a Group II offense.⁶ The Supervisor instructed Grievant on at least two occasions not to make changes to the Detroit server without the Supervisor's prior approval. On September 29, 2009, Grievant disregarded that instruction and made changes to the Detroit server. Those changes affected at least three other servers which resulted in the inability of at least 20 employees to access those servers for least five hours. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency contends that Grievant should receive a Group III Written Notice. The nature of Grievant's behavior and the impact of his actions on the Agency are insufficient to raise the level of disciplinary action from a Group II to a Group III Written Notice.

Grievant denies that he failed to comply with the Supervisor's instructions. There is sufficient evidence to support the conclusion that Grievant in fact failed to comply with the Supervisor's instructions. The Supervisor's testimony was credible. That testimony alone is sufficient to support the conclusion that Grievant failed to comply with the Supervisor's instructions.

Upon the accumulation of two active Group II Written Notices, an employee may be removed by an agency. In this case, Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

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...."⁷ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to further reduce the disciplinary action.

DECISION

⁶ See Attachment A, DHRM Policy 1.60.

⁷ *Va. Code § 2.2-3005.*

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. Based upon the accumulation of disciplinary action, Grievant's removal 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.⁸

⁸ 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