

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 05/19/10;
Decision Issued: 05/25/10; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9319; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9319

Hearing Date: May 19, 2010

Decision Issued: May 25, 2010

PROCEDURAL HISTORY

On January 15, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On February 8, 2010, 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 April 28, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 19, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 employs Grievant as a Computer Operations Technician II. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency uses computer disks to store information regarding its operations. The disks are of various sizes and some are protected by a metal casing. Periodically the Agency needs to destroy computer disks by crushing them so that the information contained on the disks cannot be accessed.

The Supervisor borrowed a disk crushing machine from another unit within the Agency. He wanted Grievant to crush many disks using the machine while the machine was available to the unit. The Supervisor instructed Grievant to read "high-level" instructions and to read the Operating Manual for the disk crusher. The "high-level" instructions stated:

1. Read and follow the instructions Manual before you use the machine.
2. Always wear goggles. They are truly needed.
3. Use the proper size height adapters. Again read the instructions.
4. Put the disk with the circuit board side down. It makes less mess and bends the disk better. Bending the disk platters is the sole

- purpose of this job. If they are bent the data on them cannot be read.
5. Place the disk that does not fit in the crusher in a separate box or disassemble the housing and then crush the disk.
 6. Stack as efficiently as you can in the boxes to save space. Extra boxes have been provided.
 7. Do NOT mix (in the boxes) crushed disk with disks that have not been crushed.
 8. Use the vacuum cleaner when needed. We want to keep the floor clean at all times.

The operations manual included an instruction that, "If processing drives other than 1-inch or 1.65 inch-thick drives, be sure to install the proper drive height adapters as described in the Drives Height Adapter Installation section."

Grievant used the machine and broke it. Grievant did not install the proper adapter to accommodate the size disk he was crushing. Grievant did not remove the metal protective covering of the disk before crushing it. Pieces of the protective covering were found in the drawer of the machine designed to collect pieces of crushed disks.

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."

Failure to follow a supervisor's instructions is a Group II offense.² The Supervisor instructed Grievant to read the operation manual and comply with that manual. Although Grievant argued that he read the manual, it is clear that he did not comply with that manual. Grievant inserted into the machine disks that were too large for the adapters inside the machine. He did not remove those adapters and install the correct ones. In the high-level instructions, the Supervisor told Grievant to use the proper height adapters. Grievant failed to do so. In addition, the high-level instructions stated to "[p]lace the disk that does not fit in the crusher in a separate box or **disassemble the housing** and then crush the disk." Grievant did not remove the metal housing protecting the disks before crushing them. This fact was established by the

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

² See, Attachment A, DHRM Policy 1.60.

debris found in the drawer of the machine. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

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...."³ 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 that the disciplinary action is too harsh and that a Group I Written Notice would be more appropriate. The Hearing Officer is not a "super personnel officer" who can impose his opinion regarding the appropriate level of discipline in cases where the Agency has met its burden of proof to establish a level of discipline authorized by the Standards of Conduct and where mitigating circumstances do not exist.

Grievant argued that the Supervisor also used the machine and broke the machine but did not receive disciplinary action. Grievant argued that the Agency engaged in the inconsistent application of disciplinary action. The evidence showed that when the Supervisor used the crank on the machine, the ratcheting system of the crank broke. The reason the system broke was because of a manufacturing error. When the manufacturer was notified of the problem, the manufacturer provided a correctly made handle. The Supervisor did not break the machine due to operator error. Grievant broke the machine due to operator error. The Agency did not inconsistently take disciplinary action.

In light of the standard set forth in the Rules, 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 II Written Notice of disciplinary action is **upheld**.

³ *Va. Code § 2.2-3005.*

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.⁴

⁴ 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