

Issues: Three Group II Written Notices (failure to follow policy) and Termination (due to accumulation; Hearing Date: 06/10/10; Decision Issued: 06/15/10; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9337, 9338, 9339; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9337 / 9338 / 9339

Hearing Date: June 10, 2010
Decision Issued: June 15, 2010

PROCEDURAL HISTORY

On January 22, 2010, Grievant was issued a Group II Written Notice of disciplinary action with removal for failing to follow instructions and policy regarding department reimbursements. Grievant also received a Group II Written Notice of disciplinary action with removal for failure to reconcile reports of petty cash funds on a monthly basis. Grievant received a third Group II Written Notice of disciplinary action with removal for failure to review telephone bills and making personal long-distance calls.

On February 19, 2010, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On April 29, 2010, the EDR Director issued Ruling No. 2010-2616, 2010-2617, 2010-2618 consolidating the three grievances for a single hearing. On May 12, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 10, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 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 employed Grievant as an Executive Secretary until her removal effective January 22, 2010. The purpose of Grievant's position was:

The person in this position organizes and manages administrative activities for the Chair of the department by answering telephone calls, greeting visitors and students and determining the disposition of their request, schedules appointments, makes travel arrangements, and independently completes assigned tasks relating to the department. She manages all departmental budgets, including the grant accounting and reconciliation of external grants. This person compiles the records of enrolled students including grades. Finally, she prepares clinical affiliation contracts and tracks them for the VCU legal administration until approval.¹

¹ Agency Exhibit 8.

One of Grievant's performance measures was to manage all departmental budgets. The Agency's expectation of Grievant was:

Approves expenditures under \$500, types purchase orders and travel vouchers without error, records all expenditures and revenues, and reconciles low-budget and inventory reports in order to submit accurate information and suggestions concerning the budget to the Chair on the 15th of each month. Reconciles all budget reports for outside grants and reports them to the primary investigator as required.

Grievant was expected to:

have the credit card accounts reconciled by the 15th of each month, the phone bill organized and circulated to the faculty on a monthly basis, and a general budget report ready for the Chair by the 15th of each month -- all activities at 95% accuracy within three months.²

Grievant received an overall rating of Fair Performer on her 2008 and 2009 annual evaluations.

In order to make long-distance telephone calls using the Agency's telephone system, Agency's employees must enter an access code authorizing the call. Each employee has a unique code.

When Grievant received her access code to make long-distance telephone calls, she received written notification that long-distance telephone calls were to be made only for Agency business. In addition, Grievant drafted a memorandum to Agency faculty that she circulated on a monthly basis with the Unit's telephone bill attached. This memorandum stated, in part:

Please review your charges and verify that all calls made with your authorization number are business related **only**. Once verified, **please sign your name** detailing calls made with your authorization number and forward to the next person on the list. Please return to me as soon as routing has been completed. (Emphasis original.)³

On January 11, 2010, the Supervisor showed Grievant the log of her long-distance telephone calls and asked if she had made personal long-distance telephone calls. Grievant admitted doing so and said that she would reimburse the Agency. Grievant reimburse the Agency in the amount a \$17.03.

² Agency Exhibit 8.

³ Agency Exhibit 7.

Grievant was absent from work from October 31, 2009 until January 4, 2010. She was on Family Medical Leave during that period of time. On January 4, 2010, Grievant began reporting to the Supervisor.

The Agency kept Petty Cash in a safe located in Grievant's work area. Grievant became the custodian of Petty Cash for the Unit effective June 1, 2008. On May 30, 2008, Grievant signed a Request for Petty Cash or Change Fund stating, in part:

By signing this Request for Petty Cash or Change Fund, I agree that I have read and understand the Petty Cash Policies and Procedures as stated in Section 5.30 of the Financial and Budget Administration Policies and Procedures Manual. I agree that I will notify Treasury Reporting of any overage or shortage and of a changing custodian. I understand that I am solely responsible for the safekeeping of the petty cash funds and for the reimbursement of the petty cash funds. I understand that I shall close the petty cash fund as soon as possible when it is no longer needed.⁴

The document Grievant signed on May 30, 2008 showed that \$1000 was in the petty cash fund. On June 3, 2009, Grievant signed a document certifying that \$1000 was in the petty cash fund. Grievant was obligated to reconcile the petty cash fund on a monthly basis but she failed to do so. In December 2009, Mr. B attempted to verify the amount of funds held in the petty cash fund in the safe. He unlocked the safe but found nothing for the petty cash fund.

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."

Failure to follow written policy is a Group II offense.

Group II Written Notice -- Reimbursements

The Agency argued that Grievant should receive a Group II Written Notice for failing to follow reimbursement policies. The Agency's position is unsupported by the evidence. It is not clear that the Agency presented all the policies upon which it relied in

⁴ Agency Exhibit 5.

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

making its decision. Part of the Agency's disciplinary action appears to be based on Grievant's failure to perform tasks shortly before she stopped working. For example, the Agency contends that Grievant failed to timely process reimbursement for Ms. RH who submitted reimbursement receipts that were "postdated October 21, 2009." Grievant's last day of work was October 23, 2009. Grievant was on Family Medical Leave beginning October 31, 2009. It is unclear that Grievant had adequate time to process the receipts prior to her last day of work. Although Grievant should have notified Agency managers that she had received the receipts, her failure to do so would not be a failure to follow instructions or written policy. Based on the evidence presented, the Agency's Group II Written Notice must be reversed

Group II Written Notice -- Petty Cash Fund

The Agency's Treasury Reporting policy governs the establishment and oversight of Department Petty Cash funds. This policy provides, in part, that the "[c]ustodian is required to prepare a written reconciliation of funds monthly, but can be more frequent due to the size of fund or operating cycle of Department."⁶ Grievant was the custodian of the petty cash fund. She was obligated under the Agency's policies to perform monthly reconciliations of that fund but failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to follow written policy.

Grievant argued that she had not received adequate training regarding the petty cash fund. This case is not about how well Grievant performed the reconciliations. This case is about Grievant's failure to timely perform reconciliations. Grievant received adequate notification of her obligation to timely perform reconciliations. Training regarding how to conduct reconciliations would not have enhanced the written notification she already received to perform reconciliations on a monthly basis.

Group II Written Notice -- Telephone Calls

When Grievant received her telephone access code she was notified of the Agency's policy as follows:

Your LDAC should not be shared with anyone. LDAC's assigned by VCU Telecommunications Services are restricted to University and VCUHS business ONLY.⁷

Grievant drafted a memo to other faculty advising them of the Agency's policy that calls made using an access number were to be for business purposes only. In 2008 in 2009, Grievant made several personal long-distance telephone calls using the Agency's telephone system. The Agency has presented sufficient evidence to support the

⁶ Agency Exhibit 5.

⁷ Agency Exhibit 7.

issuance of a Group II Written Notice of disciplinary action for failure to follow written policy.

Grievant argued that she was not using the Agency's telephone system to make social contacts with friends but rather was making telephone calls to address unique and serious matters of concern. Although it is clear that Grievant's long-distance telephone calls were to address important personal issues, the Agency's policy does not create an exception simply because an employee believes the telephone calls are important. If Grievant wish to vary from the Agency's policy, she should have obtained approval from her supervisor.

Grievant contends the disciplinary action should be mitigated. *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..."⁸ 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 reduce the disciplinary action.

Upon the accumulation of two or more active Group II Written Notices, an employee may be removed from employment. Grievant has received two Group II Written Notices thereby justifying the Agency's decision to remove her from employment.

Grievant asserted that the Agency's disciplinary action resulted from discrimination and harassment. No credible evidence was presented to support this allegation. The Agency did not take disciplinary action against Grievant as a form of discrimination or harassment.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow reimbursement policies is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow written policy regarding reconciling petty cash

⁸ *Va. Code § 2.2-3005.*

funds is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow written telephone use policies is **upheld**. Grievant's removal from employment is **upheld** based upon 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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.