

Issues: Group II Written Notice (failure to follow instructions), Termination (due to accumulation), and Misapplication of Policy regarding timesheets; Hearing Date: 08/10/10; Decision Issued: 08/12/10; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9370, 9375; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9370 / 9775

Hearing Date: August 10, 2010
Decision Issued: August 12, 2010

PROCEDURAL HISTORY

On May 26, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. She was removed from employment effective May 26, 2010 based on the accumulation of disciplinary action.

On June 1, 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 she requested a hearing. Grievant filed a separate grievance on May 19, 2010 regarding her timesheets. On June 30, 2010, the EDR Director issued Ruling No. 2010-2687, 2010-2688 consolidating the two grievances. On July 7, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 10, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel

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?
5. Whether the Agency failed to comply with policy regarding Grievant's timesheets?

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. The burden of proof with respect to the grievance regarding timesheets is on Grievant. 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 a Housekeeping Worker. The purpose of her position was to "insure cleanliness of the campus here at Christopher Newport University that attracts, motivates & inspires people or students to come to Christopher Newport University."¹ Grievant had prior active disciplinary action. On April 13, 2010, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions.

Grievant's customary work hours were from 5 a.m. until 2 p.m. Monday through Friday. On occasion, she was expected to work weekends to clean following special events. Grievant reported to the Supervisor. The Supervisor instructed Grievant not to report to work on Thursday March 18, 2010 because she was expected to work on Saturday March 20, 2010 instead. Grievant was given a memo dated February 26, 2010 stating:

[Grievant] at this time we are putting everyone on the schedule for the weekends of March 6th, March 20th, & March 27th. We need a better coverage over the weekend with the shows and the upcoming admissions.²

¹ Agency Exhibit 2.

² Agency Exhibit 11. Several other housekeeping employees received similar memorandums.
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Grievant received a staff schedule showing that she would be “off” on Thursday March 18, 2010 and should work on Saturday March 20, 2010.³

On March 18, 2010, Grievant arrived at the workplace at 5 a.m. and began working even though she was not scheduled or expected to work that day. The Supervisor arrived at 7 a.m. and observed that Grievant was working contrary to his instruction. He contacted human resource staff regarding what actions to take. After consulting with human resource staff, the Supervisor met with Grievant and instructed her to leave the workplace immediately. Grievant refused to leave and became argumentative. Grievant stated that she would not leave and that she would “only be working for four hours on Saturday” instead of the eight hours scheduled. After much disruption to the workplace and after working approximately four hours on March 18, 2010, Grievant left the Facility.

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.”⁴ 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 supervisor’s instructions” is a Group II offense.⁵ Grievant was instructed by the Supervisor not to report to work on March 18, 2010. Grievant disregarded that instruction and appeared at the Agency’s office on March 18, 2010 and began working. Doing so placed her in an overtime status contrary to the Agency’s practice of avoiding overtime. Once the Supervisor realized Grievant was working on March 18, 2010, he instructed Grievant to leave immediately. Grievant disregarded that instruction and continued to work. The Agency has established that Grievant failed to follow a supervisor’s instruction thereby justifying the issuance of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant had a prior active Group II Written Notice. Accordingly, the Agency’s decision to remove Grievant from employment must be upheld.

Grievant argued that she only agreed to be transferred to her current location on the condition that she not be expected to work on weekends. This argument fails. Grievant’s employee work profile states that she is obligated to work “Special Events”

³ Grievant Exhibit 1.

⁴ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ See Attachment A, DHRM Policy 1.60.

and that “at times there will be schedule changes where later hours or weekends may be required.”⁶ Agency managers have the authority to dictate the work hours of Agency employees.

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 reduce the disciplinary action.

Grievant did not present any testimony to support her grievance regarding timesheets. The Agency argued that it had considered Grievant’s grievance and been unable to identify any inaccuracies or problems with Grievant’s timesheets calculations and compensation payments. Based on the evidence presented, Grievant’s request for relief regarding her timesheets must be denied.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant’s removal based on the accumulation of disciplinary action must be **upheld**. Grievant’s request for relief regarding her timesheets is **denied**.

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.

⁶ Agency Exhibit 2.

⁷ *Va. Code § 2.2-3005.*

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

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.