

Issues: Group II Written Notice (failure to follow instructions and disruptive behavior) and Termination (due to accumulation); Hearing Date: 08/30/10; Decision Issued: 09/16/10; Agency: JMU; AHO: Lorin A. Costanzo, Esq.; Case No. 9398; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
JAMES MADISON UNIVERSITY**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 9398

Hearing Date: August 30, 2010
Decision Issued: September 16, 2010

PROCEDURAL HISTORY

Grievant filed a timely appeal from a Group II Written Notice with termination issued on June 16, 2010 for "Failure to follow instructions and/or policy" and "Disruptive behavior". Following failure to resolve the matter at the resolution steps, the grievance was qualified for hearing on 7/27/10. The undersigned was appointed hearing officer on August 16, 2010. Hearing was held on August 30, 2010.

APPEARANCES

Agency Attorney (who was also the Agency Party Representative)
Director
Dean
Grievant (who was also a witness)

ISSUES

Whether Grievant's removal from employment was warranted and appropriate under the 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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.¹

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

¹ Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

Grievant was employed by Agency as an Administrative & Program Specialist III/Program Support Technician. Grievant has been employed with Agency since on or about August 8, 2002.² Grievant was supervised by Director.

Director met with Director of Human Resources and Dean and reviewed matters prior to the issuance of a Written Notice. Mitigating and aggravating circumstances were taken into consideration. Issuance of a Group II Written Notice was approved by the Director of Human Resources.³

On June 15, 2010 Grievant was given a memorandum providing notice of Agency's intent to issue a Group II Written Notice under Agency Policy 1317, Standards of Conduct and Performance for Classified Employees, for "failure to follow supervisors' instructions" and "disruptive behavior". The memorandum provided Director would consider any information Grievant would like to share, including reasons why she might believe the action should not be taken. The memorandum further set a meeting with Grievant on June 16, 2010 to discuss this information with her.⁴

On June 16, 2010, Grievant met with Director. On this date Grievant was issued a Group II Written Notice with termination (Offense dates 4/14/10 - 4/16/10, 4/30/10, 5/10/10, 5/13-10, 5/21/10, 5/28/10, 6/7/10, 6/11/10) for "Failure to follow instructions and/or policy" and for "Disruptive behavior". As of the time of issuance Group II Written Notice (i.e. 6/16/10) Grievant had one active Group II Written Notice (issue date: June 25, 2008) for "Failure to follow instructions and/or policy".⁵

As a part of her job responsibilities, Grievant was required to process, in a timely manner, end of semester student evaluation of faculty forms. Grievant was to have the numerical information separated from the student comments and have this numerical information analyzed/processed. The processed information was to be provided to the individual faculty member. The Fall semester (ending in December of 2009) student evaluation of faculty forms were not processed and available to faculty members until June of 2010.⁶

A "PAR" (Personnel Action Request) form is required to be prepared and submitted upon a faculty member's changes in employment status. Grievant told a faculty member, who was resigning to take another job, that she would take care of the PAR separation form. Director determined Grievant did not submit the PAR separation form for the faculty member. On May 15th Director instructed another Agency employee to prepare and submit the PAR separation form for the faculty member. The other staff member assigned the task completed it in approximately thirty minutes.⁷

As a part of her job responsibilities, Grievant was required to process, in a timely manner, end of semester student evaluation of faculty forms for the Spring semester of 2010. Director determined that the Spring semester student evaluation of faculty forms were not being timely processed by Grievant. Director instructed Grievant that another staff member was to work with her processing these Spring semester evaluation forms. After Grievant was told by Director to

² A. Ex. VIII.

³ Testimony

⁴ A. Ex. I and III and testimony.

⁵ A. Ex. VII.

⁶ Testimony.

⁷ Testimony.

work with the other staff member, Grievant refused to allow the other staff member to work with her and assist her in processing the Spring semester student evaluation of faculty forms.

Grievant was asked by a faculty member for his end of semester student evaluations. Grievant told the faculty member she didn't have anything for him. Grievant knew that the end of semester student evaluations of faculty are required to be treated as confidential and she is required to properly secure confidential information. Grievant had placed the student evaluations on a table/credenza next to her desk and not in a secured area with other student evaluations of faculty. The table/credenza next to her desk was not secure and was in a high traffic area. Another staff member saw the evaluations on the table/credenza next to Grievant's desk. The other staff member provided the faculty member copies of his end of semester student evaluations.⁸

On 9/1/03 Grievant received copy of Agency Policy 1317-Standards of Conduct and Performance for Classified Employees Standards of Conduct. This policy was applicable to Grievant and Grievant understood she was responsible for its content.⁹

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

"It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

Agency has promulgated Agency Policy 1317: Standards of Conduct and Performance for Classified Employees (date of current revision: December 2009). Policy 1317 provides guidance related to the Virginia Department of Human Resources Management Policy 1.60: Standards of Conduct and was published in compliance with the Virginia Department of Human Resources Management Policy 1.60: Standards of Conduct.¹⁰

Offenses are organized into three groups according to the severity of the behavior, with Group I Offenses being the least severe. Group II Offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy" is listed in Policy 1317 as an example of a Group II offense.¹¹

⁸ Testimony.

⁹ A. Ex. IX.

¹⁰ A. Ex. X., Policy 1317, Standards of Conduct and Performance for Classified employees

¹¹ Agency Ex. X., Policy 1317, Standards of Conduct and Performance for Classified employees.

The offenses set forth in Policy 1317 are not all-inclusive. Policy 1317 provides, in pertinent part:

The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any action, which, in the judgment of the university, undermines the effectiveness of the university's activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

During her meeting on June 15, 2010 with Director, Grievant was informed of the intent to issue a Group II Written Notice. Grievant was given a written memorandum providing notice of Agency's intent to issue a Group II Written Notice under Agency Policy 1317, Standards of Conduct and Performance for Classified Employees, for "failure to follow supervisors' instructions" and "disruptive behavior".¹² Grievant was given an explanation of the Agency's evidence.

On June 16, 2010, Grievant met with Agency. A Group II Written Notice for "Failure to follow instructions and/or policy" and "Disruptive behavior" was issued after Grievant had been provided a reasonable opportunity to respond.

The Written Notice, under Nature of Offense and Evidence, stated:

[Grievant] has on multiple occasions failed to complete assignments, created a disruptive work environment through insubordinate and unprofessional communications to students and staff. The unprofessional communication included use of profanity and raised voice.

The "Nature of Offense and Evidence" described evidence as to:

INCOMPLETE ASSIGNMENTS ... WITH FIVE SPECIFIC INSTANCES SET FORTH
INSUBORDINATE AND DISRUPTIVE BEHAVIOR ... WITH ONE INSTANCE OF 5/28 SET FORTH
FAILURE TO FOLLOW POLICY ... WITH ONE INSTANCE OF JUNE 11 SET FORTH

Failure to follow instructions and/or policy:

Agency alleged that Grievant failed to follow instructions and/or policy. The Written Notice indicates that Grievant has on multiple occasions failed to complete assignments as she was instructed. A number of incidents are raised indicating Grievant's failure to follow instructions and/or policy including:

1. *January 2010 to June 2010: Did not complete scanning of numerical results from Fall evaluations to be provided to the faculty in a timely manner.*
2. *April to June 11th: Did not complete researching the cost of purchase and installation of a television for the 2nd floor of Harrison Hall in a timely manner.*
3. *May 10th: Did not submit separation PAR for a terminating assistant professor.*
4. *May 15th: Did not follow instructions to work on Spring evaluations with another staff member.*
5. *June 11th: Did not comply with request from a faculty member for copies of evaluations.*
6. *June 11th: Did not properly secure confidential information.*

1. January 2010 to June 2010: Did not complete scanning of numerical results from fall evaluations to be provided to the faculty in a timely manner.

¹² A. Ex. I and III.

The Fall semester concluded in December of 2009. Students complete faculty evaluations at the conclusion of each semester. It was a responsibility of Grievant to timely process faculty evaluation forms. Grievant was to have the numerical information separated from the student comments, have this numerical information analyzed/processed elsewhere on campus, and have this provided to the faculty member. The faculty member would utilize this information in reports and/or documentation concerning his/her position. Typically the information would be processed and available to faculty by the month after the end of semester.

Grievant admitted that from January 2010 to June 2010 she did not complete the scanning of numerical results from the Fall semester student evaluations of faculty. Grievant indicated other requests interfered with her being able to do this.

In January 2010 Director inquired of Grievant as to the status of the Fall semester evaluations. Grievant told Director they were not completed but would be completed soon. She also told Director there was a delay in getting the analysis of the numerical data.

In a faculty meeting of April 30, 2010 a faculty member inquired when he would be getting the numerical information from the Fall semester student evaluations of faculty. Director inquired of Grievant the status of matters. Grievant indicated the information was not ready but would be completed by May 7, 2010. However, on May 7, 2010 the evaluations were not ready. On May 15, 2010 Grievant still had not processed the Fall semester student evaluations of faculty.

Management was concerned with the effect Grievant's failure to timely process and have available the evaluations had on faculty and others. Faculty members utilize both the numerical information and the student comments from these evaluations in documenting their work throughout the year. At the end of each academic year the academic faculty is required to submit a report to the Director documenting teaching performance over the year. This information can affect merit raises, tenure, promotion, and other job matters. As a result of the evaluations not being processed timely, the report to the Director by faculty had to be postponed.

The evidence indicates that from January of 2010 until June of 2010 Grievant did not, as instructed, complete the scanning of numerical results from the Fall semester student evaluations. The Fall evaluations were not processed and provided to faculty members in a timely manner.

2. April to June 11th: Did not complete researching the cost of purchase and installation of a television for the 2nd floor of Harrison Hall in a timely manner.

A faculty meeting on August 19, 2009 indicated a need to have monitors in a certain hall way. In late March/early April notice is received of the annual deadline to make certain purchases. Management has to review the school budget to determine if there is money to make purchases of large scale items (above \$5000.00) and management needs to make the purchase by the established deadline for the fiscal year.

Director assigned Grievant the task of doing the research and provide him the costs factors of purchasing and installing two monitors in a designated hall way. In her June 30, 2010 Grievance Form A Grievant contended she was asked in April 2010 to get the cost of purchasing a television and, "It took a little time to get the cost, but I did verbally report the cost of the television to him."

Director indicated he asked Grievant several times the status of determining the costs and Grievant said, on more than one occasions, she was waiting on information and that she was doing the research. Late April/early May, 2010 brought on more concern as the deadline to submit large item purchases was fast approaching. As of June 7 or 8, 2010 Director did not receive from Grievant the cost information she was assigned to research and provide. Director re-tasked to another staff member the responsibility of doing the research and provide him the costs factors of purchasing and installing two monitors. The other staff member provided the information to Director within a day of being given the task. Within two days matters were lined up and, ultimately, the monitors were purchased and installed.

There are conflicting statements of Grievant and Director as to these matters. Consideration was given to the burden of proof, testimony, and surrounding circumstances testified to by both Grievant and Director, including the timeline of events. The evidence indicates that from April to June of 2010 Grievant did not complete the task assigned her. The other employee provided the cost information to Director and two monitors were then able to be purchased and installed.

3. May 10th: Did not submit separation PAR for a terminating assistant professor.

In her "Grievance Form A" Grievant indicated there was confusion about the PAR (Personnel Action Request) form. She acknowledged that a faculty member asked her to prepare the PAR form, but she indicated that she was supposed to get her work instructions from Director, not faculty members. She further contends that her calendar shows that Director never asked her to prepare the PAR form. However, Director indicated that on June 16, 2010 Grievant stated to him that she let these matters "slip through the crack". Additionally, Dean indicated in his July 16, 2010 memo that Grievant admitted that she did not submit a separation Par. The Memo further indicated:

.... Your employee Work Profile Part II #12 indicates that the "Chief Objective" of your position is to support the program's vision by providing administrative....support to the department and director..." while #13 makes clear that you are also expected to "Assist faculty and students with academic procedures." As you acknowledge in your response, processing a separation PAR is an important academic procedure"

Grievant is charged with assisting faculty with academic procedures. This was further indicated in a prior E.W.P. that was admitted into evidence which indicated Grievant's position involved providing administrative, secretarial, accounting, and public relations support to the department and director.¹³

When a faculty member changes status a PAR form is required to be prepared and submitted. It is sent to the Dean's office, through channels, and ultimately goes to Human Resources. A faculty member resigned to take a job at elsewhere. Grievant told the faculty member she would take care of the PAR form concerning the faculty member's separation. Approximately one week later Director discovered the separation PAR form was not done.

On May 15, 2010 the separation PAR had not been processed. The faculty member was trying to determine when she would receive her last pay check and determine insurance

¹³ Grievant's Ex. A.- Employee work Profile.

and other matters. However, due to the delay in preparing and transmitting the separation PAR she couldn't determine these matters.

Another staff member had offered twice to Grievant that she would do the separation PAR but Grievant had refused. On May 15th Director instructed the other staff member to handle the separation PAR for the faculty member. Per the Director's testimony, the matter was accomplished within thirty minutes by the other staff member.

Director's office has the responsibility to timely respond to faculty requests. The evidence indicates that, though it was a part of her responsibilities, Grievant did not submit the separation PAR for a terminating assistant professor/faculty member.

4. May 15th: Did not follow instructions to work on Spring evaluations with another staff member.

Grievant indicated she cannot recall Director instructing her to work with another staff member on the Spring semester student evaluations of faculty. She also indicated that Director said the other staff member was available to help if she needed it. She further contends she told Director she did not need help as the time spent showing a person how to work would use up the time that could be spent actually completing the process.¹⁴

Director testified that, at the June 16, 2010 meeting with Director, Grievant admitted she did not follow instructions on the Spring evaluations. Dean's memo of July 16, 2010 stated that Grievant admitted that she did not follow Director's instructions to train another staff member to work on spring evaluations.¹⁵ Also, Dean testified that Grievant told him that she had not followed the Director's instructions.

The evidence indicates that Grievant was responsible for processing the Spring semester student evaluations of faculty. Management had concerns that these evaluations were not being processed in a timely manner. Director instructed Grievant that another staff member was to assist her with the evaluations. Several days later the Spring evaluations had not been processed. Grievant had, after being instructed by Director to have another staff member assist her processing the evaluations, refused to allow the other staff member to so assist/work with her on processing the Spring evaluations.

The evidence indicates that Grievant, on or about May 15th, did not follow instructions to work on Spring evaluations with another staff member.

5. June 11th: Did not comply with request from a faculty member for copies of evaluations.

The evidence indicates that on or about June 11th, a faculty member asked Grievant for his student evaluations. Grievant told him she didn't have them. However, his evaluations were on a table/credenza next to her desk where she had placed them. Another staff member saw the faculty member's student evaluations on the table/credenza next to Grievant's desk, and provides the copies of the evaluations to the faculty member as he requested.

6. June 11th: Did not properly secure confidential information.

¹⁴ Agency Ex. III.

¹⁵ Agency Ex. IV.

Agency has separate locked room with locked file cabinets for storing confidential information. As discussed above, on or about June 11th, 2010, a faculty member asked Grievant for his student evaluations. His evaluations, which were confidential, were being kept by Grievant on a table/credenza next to her desk. This information was being kept in a high traffic area and was not kept in a manner to maintain confidentiality. Another staff member saw the evaluations on the table/credenza next to Grievant's desk and provided copies of these evaluations to the faculty member. Grievant admitted to Director that she vaguely remember laying the documents on the credenza.

Dean's Memo of July 16, 2010 referenced his meeting on July 12, 2010 with Grievant and her acknowledgement that student evaluations were placed in a file tray on a credenza next to her desk rather than in a secure area with the rest of the faculty's student evaluations.¹⁶

The evidence presented at hearing indicates student evaluations of faculty are confidential, are required to be maintained in a manner protecting that confidentiality, and that Grievant did not properly secure confidential information.

Disruptive behavior:

Grievant is charged with disruptive behavior in the Written Notice and was alleged therein to have created a disruptive work environment through insubordinate and unprofessional communication to students and to staff. Unprofessional communication was alleged to have included use of profanity and raised voice. Upon the evidence admitted at hearing it is determined that:

Director was concerned about an incident where Grievant was approached by a student and asked a question by the student. Grievant told the student, " How in the hell am I supposed to know. I just work here."

Grievant stated in her "Grievance Form A."

There are times that I have slipped and said words not appropriate in the work place. Profane words are used privately, for the most part. Our workplace is informal, I hear faculty members using profanity often. I thought it was ok. After ___ (***name set forth in Grievant's Form A but redacted here***), spoke with me, I stopped. As for my raised voice, at times, especially under stress, I have a loud tone of voice. I need to improve here. ___ (***name set forth in Grievant's Form A but redacted here***), never notified me in writing about my voice.¹⁷

Grievant testified as to an incident where a student notified her a computer had gone down in one of the computer labs. She stated she looked at the student and said, "Oh shit it's not what I have time for today". Grievant testified she tried to limit outbursts and profane words and she limited her outbursts with profane language around students and always has, unless a catastrophe or something gets to your last nerves.

Grievant admits Director met with her about what he claimed was an unprofessional communication that she had with a student. However, she raises concern that this was done orally and Director did not communicate to her in writing. Dean indicated Grievant admitted that

¹⁶ Agency Ex. IV.

¹⁷ Agency Ex. III.

she had met with Director to discuss her "unprofessional communication" with a student an admitted using profane language in the workplace.¹⁸

Testimony was received concerning an incident on May 28, 2010 in which Grievant was at Director's office. Director told Grievant he felt the delays in Grievant's handling of student evaluations of faculty, providing requested information about the monitors, and other matters were unreasonable and unacceptable. Grievant leaned against the door, closed her eyes, began speaking to Director very rapidly. If Director tried to say anything she would talk over him not allowing him to say anything. Director told her that if she didn't let him talk she would be written up, she came forward to his desk and he was concerned she became emotional. Director tried to speak to her to determine why the delays occurred in doing assignments but Grievant would not give him a chance to talk and would talk over him.

The evidence indicates that Grievant exhibited unprofessional communications and exhibited disruptive behavior.

CONCLUSION

For the reasons stated above, based upon the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice and has "Failed to follow instructions and/or policy" and has exhibited "Disruptive behavior".
2. The behavior constituted misconduct.
3. Agency's discipline was consistent with law and policy.
4. Mitigating circumstances justifying a reduction or removal of the disciplinary action are not found.
5. The disciplinary action of issuing a Group II Written Notice with termination was warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, the action of the Agency in issuing a Group II Written Notice with termination is **UPHELD**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

¹⁸ Agency Ex. IV.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state policy or Agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main St., Suite 301
Richmond, VA 23219.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Lorin A. Costanzo, Hearing Officer