

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 11/22/10; Decision Issued: 11/24/10; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9451; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9451

Hearing Date: November 22, 2010
Decision Issued: November 24, 2010

PROCEDURAL HISTORY

On August 24, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed from employment based upon the accumulation of disciplinary action.

On September 24, 2010, Grievant 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 October 27, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 22, 2010, a hearing was held at the Agency's 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:

The University of Virginia employed Grievant as a Trades Tech III until his removal effective August 24, 2010. Grievant had been employed by the Agency for approximately 9 years. Grievant had prior active disciplinary action. On January 14, 2010, Grievant received a Group II Written Notice with a five work day suspension for failure to follow a supervisor's instructions or comply with written policies. The January 14, 2010 Written Notice stated, in part, "it has been clearly explained to him that as a non-exempt employee according to FLSA guidelines, that he is required to obtain prior supervisory approval for overtime hours work regardless of whether he claims such hours in the course of his time reporting."

The Agency's practice was to avoid having its employees work overtime hours whenever possible. Employees were not permitted to work overtime hours without prior approval from a supervisor. Grievant often worked overtime hours without obtaining prior approval from the Supervisor. On August 24, 2009, the Manager sent Grievant a memorandum stating, in part:

Work Schedule: You are entitled to a 15 minute break in the morning. You are also provided with a 30 minute break for lunch. It is expected that you will take these breaks. Likewise, unless you have requested and received authorization to work over-time, your workday ends at 3:30 p.m. each day. We expect that you will stop working and leave the building at that time. While you have, on occasion, remained behind to handle

“personal matters”, these will have to be handled on your own time and off-premises in the future.

Grievant’s work schedule was changed later so that his workday ended at 4:30 p.m.

With the exception of the facts giving rise to this disciplinary action, Grievant’s work performance was satisfactory to the Agency. He had received recognition for his outstanding work performance.

On August 18, 2010 at approximately 3:50 p.m., Grievant called the Supervisor and asked to work past his 4:30 p.m. quitting time to complete work on a project. The project involved creating signs for incoming students. The Supervisor denied Grievant’s request and said that any work Grievant had could be completed on the following day. The Supervisor then asked Grievant if he had completed his self-assessment form. The due date for completing the self-assessment form was approximately one week earlier.¹ Once the due date passed, the Supervisor assigned Grievant responsibility for completing the self-assessment form by noon on August 18, 2010. The Supervisor had informed Grievant that completing the self-assessment form was Grievant’s top priority. Grievant told the Supervisor that he had not completed his self-assessment form. After ending his conversation with the Supervisor, Grievant stopped working on the “sign project” and began working on his self-assessment form. Grievant continued to work beyond 4:30 p.m. At 5:07 p.m., Grievant sent the Supervisor an email with the subject line of “self eval” and stating:

I worked on the first part and am in mid stream. I will finish tomorrow. I’m already late leaving and concerned that [the Manager] will come along. (Hostile work environment.) So I am out of here.²

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.”³ 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.”

¹ Grievant had been out of state during the previous week and was unable to complete the self-assessment.

² Agency Exhibit 2.

³ 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 supervisor’s instructions” is a Group II offense.⁴ Grievant was instructed by the Manager to stop working and leave the building at the end of his work shift unless he had obtained prior approval from the Supervisor. On August 18, 2010, Grievant sought approval from the Supervisor to work beyond his normal work shift which ended at 4:30 p.m. The Supervisor denied that request and told Grievant that his work could be completed on the following day. Grievant continued to work until 5:07 p.m. thereby acting contrary to the Manager’s and Supervisor’s instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argues that when the Supervisor questioned him regarding the status of the self-assessment, Grievant inferred that he had permission to work on the self-assessment beyond 4:30 p.m. Grievant’s inference was unreasonable. The Supervisor told Grievant that any work he needed to complete could be completed on the following day. The Supervisor did not amend that statement. Grievant did not present any evidence to establish that his interaction with the Supervisor was such that when the Supervisor asked a question about a work duty that merely asking a question constituted authorization to work overtime. To the extent Grievant assumed that the Supervisor had granted him authorization to work overtime, he did so at his own risk.

Upon the accumulation of a second active Group II Written Notice, an agency may remove an employee. With the Written Notice giving rise to this disciplinary action, Grievant has accumulated two Group II Written Notices of disciplinary action. The Agency’s decision to remove Grievant must be upheld.

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...”⁵ 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.⁶

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ Va. Code § 2.2-3005.

⁶ Grievant argued that the Manager had created a stressful and hostile work environment for him. In addition, he argued that his diagnosis of the onset of Parkinson’s disease affected his typing speed. He presented a letter from his medical doctor indicating that his disease “makes it difficult for patients to perform tasks that require numerous sequential steps.” The doctor added, “we have prescribed

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 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

medication for the treatment of [Grievant's] Parkinson's disease that can cause drowsiness and obsessive-compulsive behaviors." No credible evidence was presented that either of these alleged facts had any effect on Grievant's ability to follow a supervisor's instructions.

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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.