

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 12/16/10;
Decision Issued: 12/17/10; Agency: DCJS; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9452; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9452

Hearing Date: December 16, 2010
Decision Issued: December 17, 2010

PROCEDURAL HISTORY

On July 21, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On August 17, 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 November 9, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision due to the unavailability of a party. On December 16, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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:

The Department of Criminal Justice Services employs Grievant as a General Administration Manager II. He had been employed by the Agency for approximately 17 years. The purpose of his position is "to manage and supervise all staff and activities associated with the Certification Center of the Office of Regulatory Affairs."¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant supervises employees in one of the Agency's sections. One of those employees is the Program Specialist. Grievant reports to the Division Director who reports to the Agency Head.

The Program Specialist received additional duties beginning in 2008 when other staff left the Agency. To compensate him for his additional duties, the Agency began paying him temporary pay. He wanted to have his compensation increased on a permanent basis instead of receiving temporary pay. In order to determine the appropriate level of compensation for the Program Specialist, the Agency had to evaluate his duties using several criteria established by the Department of Human Resource Management.

¹ Agency Exhibit 5.

On May 26, 2010, the Agency Head met with the Program Specialist and Grievant to discuss the Program Specialist's job duties and to address his concern regarding his level of compensation. The Agency Head instructed Grievant to review the Program Specialist's position and draft a report regarding the appropriate action for the Agency to take in response to the Program Specialist's concerns. Although the Agency Head did not set a specific due date for Grievant to complete his report, Grievant understood that he was to respond without unnecessary delay.

On May 27, 2010, the Human Resource Manager sent Grievant an email stating, in part:

The Director met with me this morning and has briefed me on yesterday's discussion regarding [the Program Specialist's] job in a review of his compensation.

Toward that end, you will need to prepare an assessment of his job, duties, performance, current compensation, and provide your recommendation based upon the work being formed and relevant compensation factors.

On June 9, 2010, the Division Director sent Grievant an email stating:

What's the status of this? It is firmly on [the Agency Head's] radar based upon his meeting with [the Program Specialist]. Please advise.

Grievant replied on June 9, 2010:

May 27 was our final day in the office last week. I was preparing to be gone for the following week. May 31 was a holiday on which I flew to San Antonio. June 1 -- 3, I was at a conference. June 4th I returned to work but took some sick time. [The Program Specialist] and I have not had any time to proceed with this task this week as I am trying to catch up from last week and he is preparing for the COT meeting. So the status remains -- pending.

On June 9, 2010 at 7:22 p.m., the Agency Head sent the Division Director an email stating:

Make sure you get a progress report from [Grievant] regarding his review of [the Program Specialist's] salary structure. This is on a timeline and needs to be dealt with.

The Division Director replied "Will do" to the Agency Head.

On June 10, 2010 at 7:33 a.m., the Division Director sent Grievant an email stating:

Morning [Grievant],
You and I need to meet on this matter after the CJSB meeting.

Attached to the Division Director's email to Grievant was a copy of the Agency Head's June 9, 2010 email to the Division Director stating that the project was on a timeline and needed to be dealt with.

During the week of June 14, 2010, Grievant and the Division Director met to discuss the project. During that meeting the Division Director told Grievant to complete the review by June 23, 2010. Grievant did not complete the review by June 23, 2010. On June 25, 2010, the Division Director sent Grievant an email stating, in part:

What is the status of the review, I asked you to have the review completed by Wednesday, June 23. Please advise.

On June 25, 2010, Grievant replied, in part:

[The Program Specialist] has prepared a document of his duties and responsibilities for him and I to go over and make some decisions from. His is a very complicated situation and straightening it out is not easy. I have had a number of unexpected meetings to attend during this time and have had to cancel a couple of sessions in which we were to discuss his employment. I have two meetings today with the field reps, but will try again to meet with [the Program Specialist] this afternoon.

I hope to complete this task by the end of next week.

July 2, 2010 would have been the "end of next week". The Division Director did not expect to be available on that date.

On June 25, 2010, the Division Director sent Grievant an email stating, in part:

First of all [Grievant], I can relate to the large amount of work you have on your plate, however, in the future I need you to come to me before the fact and lay out why you can't complete something I asked you to do on time.

*** I will be out of the office on July 2, 2010, so I would like to review your findings by COB on July 1, 2010.

Grievant failed to provide the Division Director with a report on July 1, 2010. On July 6, 2010, the Division Director sent Grievant an email stating:

Status please. OVERDUE. I told the Director you would be reviewing this with me by July 1.

On July 6, 2010, Grievant replied:

I am still working on this task. I was not able to commit the time to it last week, when [the Program Specialist] was available. Should be able to finish this week.

Following Grievant's repeated failure to provide the report, the Agency decided to present Grievant with an Advance Notice of Discipline advising him that the Agency intended to take disciplinary action against him. The Agency presented him with this pre-disciplinary notice on July 21, 2010. On July 22, 2010, the Agency presented Grievant with a Group II Written Notice of disciplinary action. Grievant presented the report to the Division Director on approximately July 30, 2010.

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."² 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 a Group II offense.³ The Agency Head instructed Grievant to complete an assessment of the Program Specialist's position and provide a report. The Division Director instructed Grievant to complete the task by June 23, 2010. Grievant failed to comply with that instruction. On June 25, 2010, the Division Director instructed Grievant to complete the assignment by July 1, 2010 and to notify him "before the fact and lay out why you can't complete something I have asked you to do on time." Grievant did not complete the assignment by July 1, 2010 and did not notify the Division Director in advance that the assignment would not be completed on time. At that time disciplinary action was taken, Grievant had not completed the assignment. 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.

Grievant argues that he was never given a due date for the assignment. If this were true, it was suggested Grievant was free to submit a report within a timeframe he deemed appropriate given his other work duties. The evidence is overwhelming that Grievant was given a specific time to complete the task. The Division Director testified that he instructed Grievant complete the assignment by June 23, 2010. His testimony was credible. The Division Director testified that after Grievant failed to meet the June

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

23, 2010 deadline, he instructed Grievant to complete the assignment by July 1, 2010. The Division Director's testimony was credible and is supported by his June 25, 2010 email to Grievant in which the Division Director states, "I would like to review your findings by COB on July 1, 2010" and his July 6, 2010 email in which the Division Director states "OVERDUE". To the extent Grievant assumed that he had not been given a specific deadline to complete the project, he made that assumption at his own risk. No credible evidence was presented showing that Grievant was given a "mixed message" or otherwise provided with a basis to be confused regarding the Division Director's expectations regarding his timeliness.

Grievant argued that after he submitted the report, the Agency has taken little action in response. He argued this shows the Agency did not establish a deadline for him. Grievant's argument fails. What the Agency did with report does not show that he was not given a deadline for the report. The Agency's decision making process can be affected by many factors. The Agency's decision making process does not reveal whether Grievant was given a deadline to complete his responsibility to provide Agency managers with a tool to enable the Agency to address the Program Specialist's concern.

Grievant argued that his heavy workload prevented him from completing the tasks sooner. Although it is clear that Grievant carried a heavy workload and the Agency expected much of him, the evidence is insufficient to show that Grievant was unable to complete the report on a timely basis. No evidence was presented showing that Grievant was prohibited from working more than 40 hours a week. No evidence was presented showing the Grievant had sought clarification from the Division Director regarding his priorities and been denied the opportunity to give the other work duties a lower priority.

Grievant argued that his lengthy work history and level of professionalism show that it was unnecessary for the Agency to issue him a Group II Written Notice when the matter could have been resolved by counseling. Grievant presented evidence of an impressive career and establish that he is well regarded for his management and other abilities. The Hearing Officer is not a "super personnel officer" who can substitute his opinion regarding how the Agency manages its employees. Once an agency decides to take disciplinary action, the issue before the Hearing Officer is whether the agency can meet its burden of proof, not whether the agency should have decided to take disciplinary action in the first place.

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...."⁴ 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

⁴ Va. Code § 2.2-3005.

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice 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 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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.