

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 12/21/10; Decision Issued: 12/27/10; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9462; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9462

Hearing Date: December 21, 2010
Decision Issued: December 27, 2010

PROCEDURAL HISTORY

On October 4, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a three work day suspension for failure to follow a supervisor's instruction.

On October 4, 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. On November 30, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 21, 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 employs Grievant as a Program Support Technician. She began working for the Agency's Department in January 2008. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant had demonstrated a practice of leaving her desk without notifying the Supervisor where she was going or for how long she would be away from her desk. On several occasions, the Supervisor or other Agency employees went to Grievant's desk to speak with her but were unable to do so because she was elsewhere. After counseling Grievant without success, the Supervisor met with Grievant on May 21, 2010 and instructed Grievant regarding the action she should take whenever she left her desk. The Supervisor told Grievant that if Grievant anticipated being away from her desk for no more than 10 minutes, Grievant could post a note on her door indicating where she had gone. The Supervisor instructed Grievant that if Grievant anticipated being away from her desk for more than 10 minutes, she was to speak with the Supervisor before leaving.

On May 21, 2010, the Supervisor and Grievant signed a document stating:

[Grievant] and [Supervisor] met and agreed to the following:

[Grievant] agrees she is responsible for letting [Supervisor] know where she's going when she leaves the [Building].

Given the nature of [Grievant's] position, there are understandably some occasions that require a quick trip to the dean's office/Thornton Hall. These trips should normally be less than 10 minutes. For these trips, [Grievant] will simply post a sign on her door indicating where she went. This way, faculty, staff and students will be clear on when [Grievant] will return and [Grievant] will not need to constantly check in with [Supervisor].

For longer trips away from [the Building], [Grievant] agrees to let [Supervisor] know where she's going and the purpose of her visit.¹

On September 17, 2010, Grievant left her desk at approximately 1:30 p.m. and walked to another part of the Campus. She left a note on her door that read "Thornton Hall-Rotunda." Grievant did not speak with the Supervisor prior to leaving the Building. Grievant returned to the Building at approximately 2:40 p.m.

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" is a Group II offense.³ The Supervisor instructed Grievant to speak with the Supervisor prior to leaving on those occasions for which she expected to be away from her desk for more than 10 minutes. On September 17, 2010, Grievant was away from her desk for more than 10 minutes. She failed to speak with the Supervisor before leaving thereby acting contrary to the Supervisor's instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's three work day suspension must be upheld.

Grievant argued that it was sufficient for her to leave a note on her door when she left her desk. The evidence showed the Grievant was instructed to speak with the Supervisor prior to leaving her desk for those occasions when Grievant would be away for more than 10 minutes. Leaving a note on her door would not be sufficient for Grievant to comply with the Supervisor's instruction.

¹ Agency Exhibit 2.

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.

Grievant argued that she walked to the Supervisor's office to speak with the Supervisor prior to leaving but the Supervisor's door was closed and the light inside the office was turned off. Grievant argued that she assumed that the Supervisor was not working that day or had left early. The Supervisor testified that she was at work that day and did not leave the office until approximately 2:40 p.m. The Supervisor testified that at approximately 2:40 p.m. she asked the Fiscal Tech if she knew where Grievant was located. The Fiscal Tech testified that the Supervisor approached her and asked if she knew Grievant's location. The Supervisor's testimony was credible and confirmed by the Fiscal Tech. The Hearing Officer does not believe that Grievant went to the Supervisor's office and found the door closed and the lights inside turned off.

Grievant argued that she was being unfairly singled out. She argued that other employees were engaging in similar behavior but not being disciplined. Grievant's argument fails. Grievant demonstrated a pattern of being away from her desk without justification. It was appropriate for the Supervisor to single out Grievant to ensure that Grievant was not away from her desk without reason. No credible evidence was presented to show that other employees were behaving in a manner similar to Grievant's behavior without being disciplined.

Grievant argued that she was away from her desk on September 17, 2010 to perform her customary work duties for the Agency. Whether Grievant was away from her desk perform work duties or to perform personal errands is not relevant. In either case, she was supposed to notify the Supervisor prior to leaving her desk.

Grievant argued that the May 21, 2010 agreement was in effect only until her annual evaluation was given, a date prior to September 17, 2010. The Supervisor denied telling Grievant that the agreement would expire at the time of Grievant's annual evaluation. The agreement does not state an expiration period. The Supervisor's testimony was credible. The Hearing Officer does not believe Grievant and the Supervisor decided that the agreement would end at the conclusion of the annual performance cycle.

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 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

⁴ Va. Code § 2.2-3005.

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 with a three workday suspension 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.