

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 06/23/11; Decision Issued: 06/27/11; Agency: Southern Virginia Higher Education Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 9580; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 07/12/11; EDR Ruling No. 2012-3035 issued 10/07/11; Outcome: Remanded to AHO; Remand Decision issued 10/31/11; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9580

Hearing Date: June 23, 2011

Decision Issued: June 27, 2011

PROCEDURAL HISTORY

On December 8, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow a supervisor's instructions.

On January 6, 2011, 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 May 9, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On June 23, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Southern Virginia Higher Education Center employs Grievant as an Equipment Service and Repair Technician II. The purpose of this position is:

The Equipment and Student Service Tech II position is responsible for providing support for workforce assessment and advancement as well as the SVHEC by:

- Developing and maintaining a sustainable business model for the USA TopSolid Institute;
- Providing technical/mechanical/repair support for the machinery and equipment for the technology lab;
- Instructing CAD/CAM courses for professionals using TopSolid software;
- Assisting with projects requiring CAD/CAM and CNC router as designated;
- Working collaboratively with workforce department members and as part of other agency teams to achieve identified goals.

One of Grievant's Measures of Core Responsibilities under his Employee Work Profile was to "[i]dentify and recruit participants in Topsolid training at SVHEC."¹

¹ Agency Exhibit 4.

TopSolid is software used by professionals for CAD/CAM. The Project involved training people to use TopSolid software. The Project was originally funded through a grant from the Tobacco Commission. The Project required revenues from training fees to fund its operations once the grant monies ended.

Mr. N was a TopSolid software reseller. He had knowledge of individuals who may have purchased the software and be in need of training from the Agency. Grievant and Mr. N developed a friendship and sometimes had informal conversations.

Grievant began reporting to the Supervisor in July 2010. She instructed Grievant to contact Mr. N and attempt to obtain Mr. N's customer contact information so that the Agency could contact individuals who might need training.

On November 29, 2010, the Supervisor met with Grievant and instructed Grievant to send to Mr. N an email to obtain information regarding TopSolid customer contact information needed to support the Project. The Supervisor instructed Grievant to send her a copy of his original email to Mr. N along with a copy of Mr. N's response. The Supervisor wanted to know Mr. N's response so that she could update Agency Board members.

On November 29, 2010 at 3:30 p.m., Grievant sent Mr. N an email stating:

I hope that you had a great Thanksgiving!

When we spoke the week before last about customers and possibly other directions for the USA-TSI, you had mentioned that you could prepare a list of some of your clients that we could contact for our marketing and training. I'm getting pressure by others for that list, and if there are some names that you could provide to us, that would be great.

Also, I had a meeting this morning about exploring other opportunities and directions that the USA-TSI could go, and there is some optimistic forecasts on how we can look at some other avenues. I'll know more later this week.

Are you still planning on coming down to [location] soon?

On November 29, 2010 at 4:05 p.m., Mr. N replied to Grievant:

Let them pressure me, it will be more fun that way.

I hope to come down next week, I have a few balls in the air right now. Should know more in the next two days.

I have a new guy to fix the fourth axis issue with the onsrud post and to add the support valve, can you refresh me on what you thought the

problem was with the fourth axis. If I recall you thought that xy and yz needed to switch or something like that?

Grievant did not send the Supervisor a copy of his original email to Mr. N and a copy of Mr. N's response.

On December 1, 2010 at 9:20 a.m., the Supervisor sent Grievant an email stating:

Please forward a copy of your written request to [Mr. N] for TopSolid customer contact information as requested during our meeting Monday. I also would like a copy of his written response to your request for the info as well as the customer contact info you receive from him.

On December 1, 2010 at 11:56 a.m., Grievant replied by inserting a copy of his November 29th email to Mr. N into his reply to the Supervisor. He added:

I have received a reply to this request, and it reflects a conversational tone and manner that comes from our two years of dialogue and banter, and I am reluctant to forward this without having set proper context and background to the reply to keep any misunderstandings out of the conversation.

Please do note that [Mr. N] is planning to come to [location] in the next few weeks, and I will have some time scheduled with the TSI team while he is here. I still do not know of the details of his trip here and will keep you apprised.

On December 1, 2010 at 4:35 p.m., the Supervisor sent Grievant an email stating:

This message serves to restate my initial verbal (Nov. 29th) and follow-up written (Dec. 1st) and now 3rd (Dec. 1st) request and expectations regarding TopSolid customer information that is essential to the mission of the USA TopSolid Institute. These are request that follows several previous requests for the same information since July 2010. Please provide the following to me no later than 11:30 a.m. on Thursday, December 2, 2010:

1. A forwarded copy of your original email message sent on 11/29/10 per your message below to [Mr. N] requesting a listing of USA TopSolid customers and their contact information.
2. A forwarded copy of [Mr. N's] response to your email request for the customers and customer contact information.

Grievant did not respond to the Supervisor's request by the deadline. As part of his grievance documents, Grievant provided a copy of his original email to Mr. N and Mr. N's original response.

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 send an email to Mr. N to ask for customer contact information. The Supervisor instructed Grievant to send her a copy of his original email to Mr. N. The Supervisor instructed Grievant to send her a copy of Mr. N’s response to his original email. The Supervisor’s instruction to Grievant was clear. It was within her of authority to instruct Grievant to provide her with a copy of the emails. Grievant complied with the Supervisor’s instruction to send an email to Mr. N seeking customer contact information. Grievant failed to comply with the Supervisor’s instruction to provide her with a copy of his original email to Mr. N. Grievant failed to comply with the Supervisor’s instruction to provide her with a copy of Mr. N’s response to Grievant’s original email. 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 instruction.

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 consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant knew that he was obligated to follow the instructions of the Supervisor. The DHRM’s Standards of Conduct are available to State employees through the

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.

⁴ *Va. Code § 2.2-3005.*

DHRM website. During Grievant's orientation, the Agency provided Grievant with copies of important State policies such as DHRM Policy 1.75 governing the Use of Internet and Electronic Communication Systems and DHRM Policy 1.05 governing Alcohol and Other Drugs. These policies refer to DHRM Policy 1.60 thereby providing Grievant with some knowledge of the existence of the DHRM Standards of Conduct. The Agency, however, failed to provide Grievant with a copy of the DHRM Policy 1.60, Standards of Conduct. Grievant testified that he was unaware that his failure to follow a supervisor's instructions could result in a suspension. The Hearing Officer finds that although Grievant had knowledge that his behavior could result in some disciplinary action, he did not have adequate knowledge regarding the level of disciplinary action that could be imposed and that the reason Grievant lacked adequate knowledge was due to the failure of the Agency to provide Grievant with a copy of the Standards of Conduct during his orientation. The Agency's failure to provide Grievant with a copy of DHRM Policy 1.60 Standards of Conduct is a mitigating circumstance justifying a reduction of the Group II Written Notice with suspension to a Group I Written Notice of disciplinary action.

Grievant argued that the Agency failed to provide him with 24 hours to respond to the initial notice that he might receive disciplinary action. To the extent the Agency failed to provide Grievant with adequate time to respond to the Agency's allegations, the Agency's failure to do so is harmless error. Grievant had the opportunity to present to the Hearing Officer any information that he would otherwise have presented to the Agency had it afforded him a sufficient time to respond to its allegations.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **reduced** to a Group I Written Notice of disciplinary action. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9580-R

Reconsideration Decision Issued: October 31, 2011

RECONSIDERATION DECISION

On October 7, 2011, the EDR Director issued EDR Ruling No. 2012-3035 remanding this matter to the Hearing Officer. The EDR Director wrote:

A hearing officer must consider all relevant factors relating to notice raised by the grievant and raised by the agency in determining whether a lack of notice exists. If the hearing officer so finds, he is to further consider whether due to the lack of notice, and in light of all other surrounding facts and circumstances, the agency's discipline exceeds the limits of reasonableness and should be mitigated. Accordingly, in this case, the hearing decision is remanded for an explanation and/or reconsideration of the issue of notice and the mitigation standard, consistent with this Ruling.

Upon consideration of the EDR Director's Ruling, the outcome of this case does not change.

If an employee has no actual or constructive notice of the existence of a policy and the terms of the policy, it is unreasonable for an agency to expect that employee to comply with the policy and to sanction the employee for failing to comply with the unknown policy.

DHRM Policy 1.60, Standards of Conduct authorizes agencies to take corrective action such as counseling an employee. Corrective action does not include issuing a written notice. The policy also authorizes agencies to take disciplinary action such as issuing Group I, Group II, or Group III Written Notices.

Grievant testified that no one trained him on the Standards of Conduct and that no one made him aware of the Standards of Conduct. His testimony was credible. No evidence was presented to show that Grievant knew of the details of the Standards of Conduct. No credible evidence was presented to establish that Grievant knew by word

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of mouth that he could be suspended under the Standards of Conduct. There is no reason to believe that Grievant knew he could receive a Group I, Group II or a Group III Written Notice depending on the severity of his behavior. No credible evidence was presented to show that Grievant's behavior was so severe that he should have known he could receive a Group II Written Notice with suspension.⁶

Agencies are not required to provide employees with orientation of the Standards of Conduct. Despite not having an obligation to do so, the Hearing Officer is unaware of any agency in State government other than the Agency in this case that has failed to provide its newly hired employees with an orientation to the Standards of Conduct. Remarkably, the Agency provided Grievant with an orientation to some of the policies governing his employment but failed to provide him with orientation on the one policy that could serve as the mechanism to end his employment. An important reason to orientate an employee to an agency's policies and DHRM policies is to ensure the employee knows about the policies and can take action to comply with the policies.

Because the Agency provided Grievant with orientation to some policies that referred to the Standards of Conduct, Grievant knew or should have known that a policy called Standards of Conduct existed.

Implicit in the relationship between a supervisor and a subordinate is the expectation that a subordinate will comply with the instructions of a supervisor. Grievant knew he reported to the Supervisor and knew he was obligated to comply with her instructions.

Given that Grievant knew he was obligated to comply with the instructions of his Supervisor and he knew of the existence of the Standards of Conduct, it is reasonable to apply the Standards of Conduct to Grievant's behavior.

The Standards of Conduct sets forth at least two methods for an agency to address inappropriate behavior by an employee. One method is through counseling. Counseling is typically the first level of corrective action. Counseling does not involve issuing a written notice. A second method is through disciplinary action. Disciplinary action includes issuing a Group I, Group II, or Group III written notice. Disciplinary action of a Group II or Group III can justify suspension. Disciplinary action of a Group III can support removal.

The Agency contends that the disciplinary action should not be reduced from a Group II to a Group I Written Notice. Prior to addressing whether the disciplinary action should be reduced from a Group II to a Group I, the question of whether the action taken should be corrective action (no written notice) or disciplinary action (a written notice) must be addressed. One could argue that the most appropriate action to take against Grievant would involve counseling. Grievant knew his behavior was inappropriate and counseling would address that inappropriate behavior. Grievant did not know that the level of action taken against him would be elevated to disciplinary

⁶ Grievant's behavior was annoying to the Supervisor but it did not impede the Agency's ability to perform its program duties or deliver services consistent with its mission.

action including a Group I or Group II. Only if the Hearing Officer gives deference to Agency managers is there a basis to elevate the action taken by the Agency from a corrective action to a disciplinary action. The Hearing Officer is willing to give deference to the Agency's decision as to whether corrective action or disciplinary action should be taken because "[c]ounseling is typically the first level of corrective action but is not a required precursor to the issuance of Written Notices." The Hearing Officer is not willing to give deference to the Agency's selection of a Group II Written Notice with suspension as the appropriate disciplinary action because that level of disciplinary exceeds the limits of reasonableness.

A Group I Written Notice is materially different from a Group II Written Notice. An employee without prior active disciplinary action who receives a Group I Written Notice may not be suspended. An employee receiving four Group I Written Notices may be removed from employment. An employee without prior active disciplinary action who receives a Group II Written Notice may be suspended for up to ten workdays. Upon the receipt of a second Group II Written Notice, an employee may be removed. Grievant did not have notice of any of these distinctions. It is unreasonable for the Agency to apply these distinctions to Grievant without first having given him adequate notice.⁷

APPEAL RIGHTS

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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ It is "common sense" that an employee who fails to follow a supervisor's instructions may be disciplined for failing to do so. It is not "common sense" to a newly hired employee that an agency has three levels of disciplinary action available from which to choose and that two of those levels may involve suspension.