

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow policy), and Suspension; Hearing Date: 05/17/11; Decision Issued: 05/18/11; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9584, 9585; Outcome: Partial Relief; **Administrative Review**: DHRM Ruling Request received 05/31/11; DHRM letter sent 06/28/11; Outcome: Declined to review; **Judicial Review** – Appealed to Richmond Circuit Court on 07/27/11; Circuit Court ruling issued 09/28/11; Outcome: AHO’s decision affirmed [CL11-3582-7].



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9584 / 9585

Hearing Date: May 17, 2011

Decision Issued: May 18, 2011

PROCEDURAL HISTORY

On December 21, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. On January 25, 2011, Grievant was issued a Group II Written Notice of disciplinary action with suspension for failure to comply with written policy.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On April 26, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 17, 2011, 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?
5. Whether the Agency discriminated against or retaliated against Grievant?

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:

Virginia Commonwealth University employs Grievant as a Trade Tech III. He has been employed by the Agency for over 15 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant reported to the Supervisor who reported to the Manager. Grievant's regular work hours were from 7:30 a.m. to 4 p.m. Grievant works at a location away from the main campus where the Manager and Supervisor worked.

Grievant had a key to a locked box with tools inside. The Manager wanted access to the tools while the Agency was closed for winter break and when Grievant was not working. On December 15, 2010, the Manager met with Grievant and told Grievant that he wanted a key to the toolbox. Grievant was resistant to providing the key because he feared he would be blamed for tools missing from the box over the winter break. The Manager assured Grievant that Grievant would not be blamed if any tools were missing. Grievant failed to give the Manager a key by the end of the day December 15, 2010. The Manager and the Supervisor went to Grievant's location in the morning on December 16, 2010 and Grievant was not there. The Manager paged Grievant several times to call him, but Grievant did not respond. After about 45 minutes, they left and returned to the main office. Later in the day, Grievant called the

Manager and told the Manager he had left the key with another employee. Manager went to Grievant's location and found the key hanging from a walkie-talkie in the employee's office.

In September 2010, Grievant had accumulated a large annual leave balance. He calculated that he would lose approximately 140 hours of annual leave if he did not use it prior to December 31, 2010. Grievant met with the Manager and they agreed that Grievant could take his annual leave on a regular basis every week for the rest of the year. Grievant submitted the dates he would be absent from work into the Agency's electronic leave system. Grievant's leave requests were approved by the Manager. The Manager and Supervisor did not expect Grievant to report to work on those days he was scheduled to be on vacation. Grievant came to work on days he was scheduled for vacation but did not obtain prior approval from the Supervisor or Manager. In December 2010, Grievant notified the Agency that he had worked on days he originally had planned to be on vacation. He sought to have approximately 61 days of leave returned.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force."¹ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

Written Notice Issued December 21, 2010

Failure to follow a supervisor's instruction is a Group II offense. On December 15, 2010, Grievant was instructed to provide the Manager with a key to a locked toolbox. He did not do so. On December 16, 2010, Grievant provided a key to the toolbox by placing it on a walkie-talkie at his work location. The Manager had to go to another location to retrieve the key.

When the facts of this case are considered, Grievant's behavior is best described as unsatisfactory job performance. Grievant ultimately complied with the Manager's instruction to provide a key. This undermines the Agency's assertion that Grievant should receive a Group II Written Notice for failure to follow a supervisor's instruction. What Grievant failed to do was to deliver the key timely and to deliver the key directly to the Manager. There exists a basis to take disciplinary action against Grievant; however, a Group II level of disciplinary action has not been established by the Agency's

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

evidence. Accordingly, the Group II Written Notice should be reduced to a Group I Written Notice.

Written Notice Issued January 21, 2011.

Failure to follow policy is a Group II offense. DHRM Policy 1.60 sets forth the Employee Standards of Conduct. Employees are expected to:

Report to work as scheduled and seek approval from their supervisors in advance for any changes to the established work schedule, including the use of leave and late or early requirements and departures. (Emphasis added).

Grievant sought to use his annual leave and obtained his supervisor's approval to do so. He completed the necessary electronic forms to identify the dates with which he intended to take the leave. Instead of using the leave for which he was approved on the dates for which he was approved, Grievant worked. Agency managers were not aware that Grievant was working. Grievant was obligated to seek approval from his supervisor for any change to his work schedule including the use of leave. Grievant failed to obtain approval from his supervisor thereby justifying 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 five workday suspension 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..."² 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 argued that he was unaware of the Standards of Conduct. The Standards of Conduct was available to Grievant through the Agency's Internet. He should have been made aware of the existence of the Standards of Conduct as part of his orientation with the Agency. Grievant received adequate notice of the basis for disciplinary action against him. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

² *Va. Code § 2.2-3005.*

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;³ (2) suffered a materially adverse action⁴; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁵

Grievant engaged in a protected activity by filing a grievance to challenge the disciplinary action. He suffered an adverse action because he received disciplinary action. Grievant has not established a connection between the protective activity and the materially adverse action. The Agency took disciplinary action against Grievant because it believed he engaged in inappropriate behavior and not as a form of retaliation.

Grievant argued that the Agency took action against him as a form of age discrimination because the Agency wanted to bring in younger employees to work in his place. No credible evidence was presented to support this allegation. The Agency took disciplinary action against Grievant because it believed he engaged in inappropriate behavior and not because of any objective to discriminate against him based on his age.⁶

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action issued on December 21, 2010 is **reduced** to a

³ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁴ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁵ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

⁶ Grievant also alleged in his grievance documents that the Agency violated its code of ethics, engaged in fraud, defamation, and slander, and violated the Civil Rights Acts of 1964 and 1991. No credible evidence was presented to support these allegations.

Group I Written Notice. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension issued on January 25, 2011 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.⁷

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

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

June 28, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9584/9585. The grievant is challenging the decision because he believes the hearing decision omits several important facts of the case and does not recognize that his civil rights were violated. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In the **PROCEDURAL HISTORY**, the hearing officer stated the following, in part:

On December 21, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. On January 25, 2011, Grievant was issued a Group II Written Notice of disciplinary action with suspension for failure to comply with written policy.

In his **FINDINGS OF FACT**, the hearing officer, in part, stated the following:

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

Virginia Commonwealth University employs Grievant as a Trade Tech III. He has been employed by the Agency for over 15 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant reported to the Supervisor who reported to the Manager. Grievant's regular work hours were from 7:30 a.m. to 4 p.m. Grievant works at a location away from the main campus where the Manager and Supervisor worked.

Grievant had a key to a locked box with tools inside. The Manager wanted access to the tools while the Agency was closed for winter break and when Grievant was not working. On December 15, 2010, the Manager met with Grievant and told Grievant that he wanted a key to the toolbox. Grievant was resistant to providing the key because he feared he would be blamed for tools missing from the box over the winter break. The Manager assured Grievant that Grievant would not be blamed if any tools were missing. Grievant failed to give the Manager a key by the end of the day December 15, 2010. The Manager and the Supervisor went to Grievant's location in the morning on December 16, 2010 and Grievant was not there. The Manager paged Grievant several times to call him, but Grievant did not respond. After about 45 minutes, they left and returned to the main- office. Later in the day, Grievant called the Manager and told

the Manager he had left the key with another employee. Manager went to Grievant's location and found the key hanging from a walkie-talkie in the employee's office.

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CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

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When the facts of this case are considered, Grievant's behavior is best described as unsatisfactory job performance. Grievant ultimately complied with the Manager's instruction to provide a key. This undermines the Agency's assertion that Grievant should receive a Group II Written Notice for failure to follow a supervisor's Instruction. What Grievant failed to do was to deliver the key timely and to deliver the key directly to the Manager. There exists a basis to take disciplinary action against Grievant; however, a Group II level of disciplinary action has not been established by the Agency's evidence. Accordingly, the Group II Written Notice should be reduced to a Group I Written Notice.

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DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action Issued on December 21, 2010 is **reduced** to a Group I Written Notice. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension issued on January 25, 2011 is upheld.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his request to this Department for an administrative review, the grievant asserts that the hearing officer was arbitrary and capricious in making his decision in that he left out certain points of interest. He further contends that his version of what he was charged with was not printed in the hearing decision. Finally, he feels that his civil rights were violated during the whole disciplinary procedure and not addressed during the hearing.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, the grievant's request does not identify any such policy. Rather, it appears that the grievant is

disagreeing with how the hearing officer assessed the evidence and with the resulting decision. In addition to the above issues, the grievant appears to raise an issue related to how the hearing officer conducted the hearing. This Agency has no authority to interfere in matters related to how a hearing is conducted, what evidence is considered, or how it is evaluated. We therefore must respectfully decline to honor the request to conduct this review.

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services