

Issues: Two Group II Written Notices (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 09/08/11; Decision Issued: 09/13/11; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9670; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9670

Hearing Date: September 8, 2011
Decision Issued: September 13, 2011

PROCEDURAL HISTORY

On July 18, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions on June 16, 2011. On July 18, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions on June 23, 2011. Grievant was removed from employment effective July 18, 2011 based on the accumulation of disciplinary action.

On July 18, 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 she requested a hearing. On August 9, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 8, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 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:

Christopher Newport University employed Grievant as a Housekeeping Crew Lead. She had been employed by the Agency for approximately 5 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Supervisor was responsible for supervising several Lead employees who, in turn, supervised other employees. Grievant worked as a Lead and was responsible for supervising a crew of approximately eight employees. Once rooms are cleaned by employees, the Lead may inspect the room or the Supervisor may inspect the room to make sure that the cleaning was in accordance with the Agency's expectations. On some occasions, the Supervisor may inspect a room after it has been inspected by the Lead.

On June 16, 2011, the Supervisor held a staff meeting on the East Campus. Approximately 35 employees were present during the meeting. Grievant and two other Leads were also present. The Supervisor informed staff they would be doing some

touchup work in some of the buildings. Touchup work referred to additional cleaning in areas that were inadequately cleaned the first time. The Supervisor discussed how the rooms would be inspected. Grievant spoke up and said that if the Supervisor was going to inspect the room after Grievant had inspected the room, then the Supervisor could inspect the room herself because Grievant was not going to do any inspections. The Supervisor told Grievant that her comment was inappropriate and that her duties required that she conduct inspections in order to help the Supervisor.

Touchup work was to be conducted at Building WY. While staff were working at that building, the Supervisor approached Grievant and began talking to Grievant. Grievant knew that the Supervisor was speaking to her but she walked away. Another employee came to speak with the Supervisor and they had a conversation. The Supervisor again then walked to where Grievant was located. Grievant knew that the Supervisor was attempting to speak with her. Grievant walked away a second time. Grievant went to the second floor of the building. The Supervisor took Grievant's crew with her to the second floor of the building. The Supervisor approached Grievant in the hallway and said that they needed to get together to make assignments for that day. Grievant knew that the Supervisor was attempting to speak with her, but Grievant walked away leaving the Supervisor with Grievant's crew. The Supervisor took Grievant's crew to the lobby and placed them under the leadership of Ms. S, another Lead. Ms. S gave the crew members their assignments.

On June 23, 2011, the Supervisor spoke with Grievant by telephone. The Supervisor asked Grievant to inform her staff of their assignments. The telephone conversation ended. Grievant then sent the Supervisor a text message saying "You Tell Them." The Supervisor understood Grievant's text message to mean that Grievant would not inform Grievant's staff of their assignments but rather Grievant was telling the Supervisor to inform Grievant's staff of their assignments.

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."¹ 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.² Insubordination is a Group II offense.³ On June 16, 2011, Grievant refused to

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

² See, Attachment A, DHRM Policy 1.60.

³ DHRM Policy 1.60(B)(2)(b).

acknowledge the Supervisor's authority to give instructions. Grievant knew that the Supervisor was trying to speak with her and give her instructions regarding assignments for her crew. Grievant walked away from the Supervisor thereby preventing the Supervisor from informing Grievant of Grievant's responsibilities with respect to Grievant's crew and the crew's assignments. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for Grievant's behavior on June 16, 2011.

Grievant argued that she worked on June 16, 2011 with her crew and participated in giving them their assignments. The evidence showed that Grievant clearly refused to communicate with the Supervisor and that Grievant's crew completed their assignments under the control of Ms. S, and not Grievant.

On June 23, 2011, the Supervisor instructed Grievant to inform her crew of their assignments. Grievant refused to do so. Grievant informed the Supervisor that the Supervisor should inform Grievant's crew of their assignments. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for Grievant's behavior on June 23, 2011.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant as accumulated to Group II Written Notices. Accordingly, the Agency's removal of 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...."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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency retaliated against her. She presented no credible evidence of any protective activity. She presented no credible evidence to suggest that the Agency took disciplinary action against her as a form of retaliation.

⁴ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of two Group II Written Notices of disciplinary action is **upheld**. Grievant's removal based upon 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 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.