

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 10/11/11; Decision Issued: 10/25/11; Agency: W&M; AHO: Ternon Galloway Lee, Esq.; Case No. 9688; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9688

Hearing Date: October 11, 2011

Decision Issued: October 25, 2011

SUMMARY OF DECISION

The Agency had found Grievant violated the Standards of Conduct by failing to follow instructions. It therefore issued Grievant a Group II Written Notice. I found Grievant engaged in the conduct alleged and the Agency's discipline was warranted and appropriate.

PROCEDURAL HISTORY

On June 28, 2011, the Agency issued Grievant a Group II Written Notice for failing to follow instructions.

On July 11, 2011, Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the Third Resolution Step's outcome and requested a hearing. On September 20, 2011, the Department of Employment Dispute Resolution ("EDR") assigned me as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on September 20, 2011, and subsequently a scheduling order was issued.

I scheduled the hearing for October 11, 2011, the first date available between the parties. Prior to commencing the hearing, I held a subsequent PHC to address objections to certain witnesses and exhibits offered by Grievant. The hearing followed where admitted exhibits included Hearing Officer's exhibits one through five, the Agency's exhibits one through eight, and Grievant's exhibits one through 21.¹

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. Also during the proceeding, the Grievant represented herself and the Agency was represented by its attorney advocate.

APPEARANCES

¹ The Agency objected to three of the Grievant's proposed witnesses and Grievant's proposed exhibits 19 through 21. It later withdrew objections to those exhibits. After hearing arguments and through the course of the hearing, it was determined the testimony of three of Grievant's proposed witnesses was not needed. Two of Grievant's witnesses, including Grievant did testify.

Attorney Advocate for Agency
Witnesses for the Agency (2 witnesses, including the Agency's Representative)
Grievant
Witnesses for the Grievant (2 witnesses, including the Grievant)

ISSUE

Was the Group II Written Notice warranted and appropriate under the circumstances?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against 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 all the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

1. The College of William and Mary ("Agency") has employed Grievant as the Accounts Payable manager for about 30 months. Accounts Payable ("AP") is a department under the Financial Operations division of the Agency. The Agency/Financial Operations division maintains a satellite office and a main office. Grievant normally works four days in the main office on the campus in Williamsburg, Virginia. One day a week, as determined by management, she was scheduled to work from the satellite office in Gloucester Virginia. May 12, 2011, was a day she had been scheduled to work in the satellite office. On May 12, 2011, she reported to the satellite office to commence her work day. (Testimony of RG and Testimony of BB; G Exh. 1).
2. Grievant's job tasks, among others, include managing staff in AP. This department processes vouchers submitted for reimbursement of expenses incurred for the Agency by vendors, employees, and others. Among other vouchers, AP receives athletic travel reimbursement vouchers. The Agency has established a policy for AP to process all expense vouchers within 30 days of AP's receipt of them. Although Grievant manages AP, when necessary Grievant is also required to assist her staff in auditing² and processing vouchers. (Testimony of RG).

Grievant's immediate supervisor is RG, the Assistant Director of Financial Operations. BB is the Director of the Financial Operations division and RG's immediate

² Auditing includes reviewing vouchers before processing them for errors and omissions. The evidence shows that RG and Grievant had agreed that AP would perform this task soon after vouchers were received by AP to facilitate timely processing vouchers.

supervisor. On May 11, 2011, BB met with the Associate Athletic Director, SC, of the Agency who represented that AP was not timely processing its vouchers even though they had been timely submitted to AP. (Testimony of BB and Testimony of RG).

By the morning of May 12, 2011, BB had received reports regarding serious concerns about AP timely and accurately processing vouchers. Management believed the matter had reached a crisis level. Thus, by emails Grievant was instructed to return from her satellite work site in Gloucester, Virginia, to the main campus office in Williamsburg, Virginia, to assist in processing the vouchers. (Testimony of BB; Testimony of RG).

3. The initial instruction was sent by RG, Grievant's immediate supervisor and Assistant Director of Financial Operations, at 9:33 a.m. on May 12, 2011. (A Exh. 7)

4. The e-mail reads as follows

[Grievant],

I tried calling the numbers at VIMS in trying to reach you but the ladies are not answering.

[Grievant], there are a lot issues and complaints in regards to AP performance that have reached the higher levels of management here at the College. In response, [BB] has asked me to request your return to WM today and curtailed your VIMS visits until further notice.

You are to report here at WM and work on production processes. You will audit, and enter invoices in the system until further notice. I would like to start with the Athletics group.

Let me know when you get here even if I have my door closed, come see me. See you in a few.

[RG]

(A Exh. 7/124 -25)

4. Grievant's supervisor sent a second e-mail to Grievant at 9:50 a.m. which reads

[Grievant],

Upon your arrival her today, prepare an spreadsheet with all the details requested by BB on the e-mail below and provide **BOTH** of us the spreadsheet.

Your first production assignment is to work the travel vouchers on this list

and continue to offer assistance to [LO] with Athletics vouchers.

[RG]

Assistant Director Finance

[xxx-xxx-xxxx]

(A Exh. 7/128)

5. Grievant responded to RG's email at 10:27 a.m. It reads as follows:

From: [Grievant]

To: [RG]

Just saw your message. Unfortunately I won't be able to come to college due to gas. I wish you would have informed me yesterday that you didn't want me to come to VIMS and come directly to the college.

But I have submitted your spreadsheet request to [LO] and requested she submit it to you.

I will be there tomorrow to address your concern.

Thanks,

[Grievant]

Accounts Payable Manager

(A Exh. 7/124)

6. Because RG was following instructions she had received from her boss when she directed Grievant to return to the main office and begin processing vouchers, RG forwarded Grievant's response to BB. BB then sent the following e-mail to Grievant at 12:32 p.m. on May 12, 2011:

[Grievant]

[RG's] direction to you this morning to relocate to the College and specifically address my assignment of yesterday afternoon concerning athletics was not an option, but a job related requirement. Your response is unacceptable. I expect you to immediately relocate to your office at William and Mary and begin working on the athletic travel vouchers. Failure to do so will be formally recognized as provided for by the College's

personnel management policies.

Upon arriving at the College, you will report to [RG] to confirm your presence and review the specifics of the assignment.

If you are unwilling to comply with this requirement, I expect a written explanation immediately.

[BB]

(A Exh. 7)

7. Grievant did not report to her William and Mary Office on May 12, 2011. Instead she responded to BB's e-mail at 1:10 p.m. on May 12, 2011 as shown below:

[BB],

My response to [RG] was not that I would not, I can not due to gas. I simply do not have the gas in my car to turn around and now go directly to the College. There is absolutely no other reason than what I expressed to [RG]. I must have enough gas to make it home from VIMS as well as the college. I simply cannot do both. My response was not a failure to comply but simply a failure to have enough gas to make it to the College and then make it home, after driving to VIMS and paying the Toll.

This is unfortunate but [RG] was very much aware that I was going to VIMS and that I go to VIMS weekly, per her direction. If this was a day she did not want me to go, as I indicated in my email to her, I wish she would have informed me of such prior to my coming, perhaps yesterday as [RG] has done in the past. This day, along with other days are on the calendar and have been for weeks, months. I also indicated in my email to [RG] I wished she would have informed me yesterday and I would have followed the direction as I have followed all directions in the past.

Yes I do understand that emergencies do occur, but even in the event of emergencies circumstances, such as mine occur also, preventing the immediate assistance. But as I also advised [RG], [LO] is creating and submitting your requested spread sheet. And I will be there tomorrow.

I simply do not have the gas to make it there once I've made it here. No other reason.

[Grievant]

Accounts Payable Manager

(A Exh. 7; G Exh. 1).

8. Because Grievant did not report to the main office on May 12, 2011, her supervisor issued her a Group II Written Notice for failure to follow instructions. (A Exh. 6; G Exh. 4),

9. Grievant began processing the vouchers at the main office on May 13, 2011. (Testimony of BB).

10. Weeks before May 12, 2011, Grievant had been scheduled by her immediate supervisor to work from the satellite office. After she reported to work at that office on May 12, 2011, management directed her to relocate to the main office. (G Exh. 1).

11. Grievant is responsible for getting herself to and from work. (Testimony of BB).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act, VA. Code §§2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. GPM § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the

Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

On June 28, 2011, Agency management issued Grievant a Group II Written Notice for failure to follow instructions.

I examine the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

A. Did the employee engage in the behavior described in the Group II Written Notice and did that behavior constitute misconduct?

The Written Notice asserts that Grievant failed to follow instructions. The evidence shows that on May 12, 2011, Grievant's immediate supervisor instructed her to return from the satellite office to the main one at the college. Grievant responded that she could not "due to gas." After being informed of her response, more senior management again instructed her to report to the main office. Similarly Grievant responded that she did not have the gas to relocate. Grievant did not follow the directives of either supervisor. Thus, she committed the conduct described in the written notice.

Having found Grievant engaged in the cited conduct, now I address whether her behavior established misconduct.

Management has the authority to run its affairs. And inherent in that authority is its right to instruct an employee to relocate from one of the employer's offices to another. The evidence established that the Director of Financial Operations, one of Grievant's superiors, had received complaints on May 11, 2011, about Accounts Payable failing to timely and accurately process vouchers that had been timely submitted to AP. Further, the evidence demonstrated a back log of unprocessed vouchers existed and were housed at the main office. The referenced complaints had reached the college President's office. In light of this situation, which senior management deemed a crisis, at 9:33 a.m. on May 12, 2011, Grievant's supervisor instructed her to return to the main office and among other things commence processing vouchers. Equally as important, the evidence showed that under past practices, Grievant was included in staff utilized to address a crisis in the office. Hence, I find management's multiple directives were not capricious or arbitrary.

Grievant argues that she was experiencing a hardship and did not have gas to make it to the main office. She also argues that management presented her with no options once she informed them that she could not relocate. To be fair to Grievant, I note that the evidence does establish that five days after the incident and thereafter, Grievant explicitly asserted that she had a hardship and could not follow her supervisors' instructions. But I

find that a literal reading of Grievant's responses to her supervisors' instructions on the day of her conduct does not convey she did not have the means to acquire more gas so that she could travel to the main office. What is more, based on Grievant's reporting to work the next day and silence about any hardship, I find it reasonable to conclude Grievant was not in such difficulty on May 12, 2011, that she could not relocate to the main office.

Accordingly, having had the opportunity to consider all the evidence as well as the demeanor of the witnesses I am not swayed by Grievant's claim of hardship. Also, assuming for the sake of argument that Grievant was experiencing a hardship on May 12, 2011, the evidence shows that the Agency was not obligated to resolve it.

Further, Grievant contends that she had been scheduled for weeks in advance to work at the satellite office on May 12, 2011. And that it was not until she reported to the satellite office that her supervisor instructed her to return to the main office. She argues in effect that management should have informed her the day before that she should report to the main office on May 12, 2011. While it is understandable that Grievant would not be pleased to learn after starting her work day at the satellite office that she needed to relocate, under the Standards of Conduct, she is expected to follow her supervisor's directive. Further, by e-mail she had been advised of the critical problem facing the Agency and the evidence shows that historically when the Agency faced a crisis she was expected to provide substantial help in resolving the problem. Yet she failed to follow instructions that would have enabled her to give this degree of help.

Grievant also argues that the only reason management issued the Group II Written Notice was because it believed Grievant lied about her reason for not reporting to the main office. The evidence does establish senior management believed Grievant had contrived a reason not to report as directed and had no hardship. In making his assessment Supervisor BB commented that Grievant drives a "\$50,000 plus luxury car." While I do not condone BB's comments about the vehicle Grievant may drive, I also note that BB testified he had a fair amount of contact with Grievant and found she had made misrepresentations in the past. Thus, he did not believe her on May 12, 2011. That witness went on to say, Grievant was given the Group II Written Notice because she failed to follow instructions. As noted previously, I had the opportunity to observe the demeanor of this witness and further considered in addition to his testimony all other evidence. Having done so, I find him credible and have determined that the reason for the Group II Written Notice was Grievant's failure to report as instructed.

Considering the above, I find the Agency has shown by a preponderance of the evidence that Grievant failed to follow instructions legitimately issued by her superiors. Thus, Grievant's behavior was unacceptable.

B. Was the Agency's Discipline consistent with law and policy?

The evidence shows that Grievant failed to follow her supervisors' instructions on May 12, 2011. Such under the Standards of Conduct constitutes a Group II offense. Thus, the Agency's discipline was consistent with law and policy.

II. Mitigation

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.”³ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a ‘super-personnel officer’” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁴ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency’s discipline was consistent with law and Policy, the agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁵

Thus the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

I have found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency’s discipline was consistent with law and policy. A focus on whether the discipline was reasonable is now undertaken.

Grievant contends that she does not deserve a Group II. She argues that she had a hardship and her managers did not offer her any options once she informed them that she did not have the gas to report to the office. Grievant further contends that even though she did not report to the main office on May 12, 2011, the vouchers were processed the next day.

In addition to Grievant’s arguments, I note that the evidence shows that even though Grievant did not report to the main office as instructed, she took at least one step to address the concerns of her boss and the assignments. Specifically, she instructed her subordinate to prepare the spreadsheet that her boss had requested of her on May 12, 2011. Also, the evidence shows that in the 30 months Grievant had been employed by the Agency, she had never been called back to the main office from the satellite one. And on May 12, 2011, she reported to the satellite office per her immediate supervisor’s previous instructions

³ Va. Code Section 2.2-3005 (c)(6)

⁴ *Rules for Conducting Grievance Hearings* VI(A)

⁵ *Rules for Conducting Grievance Hearing* VI(B)

Considering Grievant's arguments and all the evidence, I am guided by the Rules for Conducting Grievance Hearings. They require a Hearing Officer to give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Under these rules, only if under the record evidence, the Agency's discipline exceeds the limits of reasonableness is a Hearing Officer permitted to mitigate the discipline.⁶

The evidence shows that in issuing the Group II Written Notice, the Agency expressed that Grievant's conduct was aggravated by her recent behaviors of not following directives. Further, the Agency noted that leading up to the May 12, 2011 incident, Grievant's disregard of instructions was occurring more frequently. Specifically, the Agency noted that in the recent past contrary to her supervisor's instructions, Grievant had failed to communicate whether she would attend or not attend meetings; underreported leave time; and failed to consistently provide weekly staff voucher counts. The evidence shows that Grievant's supervisor had instructed her regarding the areas mentioned above and on several occasions Grievant did not comply with those directives. I do note, Grievant presented evidence asserting that forgetfulness and/or confusion caused her to not accept a few meetings, report leave time, and provide the weekly staff voucher counts. I have considered Grievant's arguments and any evidence presented to support them as well as all other evidence. Having done so, I find no reason to disregard the Agency's assessment regarding mitigating the discipline and find the Agency's discipline did not exceed reasonableness.

DECISION

Hence, for the reasons noted here, the Agency's discipline is upheld.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This review is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decisions is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management.

⁶ *Id.*

This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th floor Richmond, VA 23219 or faxed to (804) 371-7401.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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 final decisions, a party may appeal on the ground 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 Directory before filing a notice of appeal.

ENTERED this 25th day of October, 2011.

_____/s/_____

Ternon Galloway Lee, Hearing Officer

cc: Agency Attorney Advocate

Agency Representative

Grievant

EDR's Hearings Program Director