

Issue: Group II Written Notice (excessive tardiness & failure to follow instructions), Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 05/09/12; Decision Issued: 05/10/12; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9801; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling requested 05/31/12; EDR Ruling No. 2012-3365 issued 06/08/12; Outcome: Untimely – request denied; **Administrative Review**: DHRM Ruling requested 05/31/12; DHRM Ruling issued 06/13/12; Outcome: Untimely – request denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9801

Hearing Date: May 9, 2012
Decision Issued: May 10, 2012

PROCEDURAL HISTORY

On January 30, 2012, Grievant was issued a Group II Written Notice of disciplinary action with removal for excessive tardiness and failure to follow a supervisor's instructions. On January 30, 2012, Grievant was issued a second Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions.

On February 28, 2012, 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 April 2, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this grievance due to the unavailability of a party. On May 9, 2012, 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?

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 employed Grievant as a Trades Tech III. He had been employed by the Agency for approximately 30 years prior to his removal effective January 30, 2012. The purpose of Grievant's position was:

To ensure that efficient and timely maintenance and repair services are performed in Recreational Sports Departments facilities and to equipment in order to maintain safety and operations. Plans, organizes, schedules, performs and/or supervises, and reports maintenance work (preventive, regularly scheduled, repair and emergency repair).¹

Grievant had prior active disciplinary action. On December 21, 2010, Grievant received a Group II Written Notice. On January 25, 2011, Grievant received a Group II Written Notice with a five workday suspension.

Grievant worked in the Center and it was "his building". Grievant reported to the Supervisor who worked in another building but frequently visited the Center.

¹ Agency Exhibit 6.

Agency employees used a time clock to record when they begin and ended their work shifts.²

Grievant had a history of being late to work without providing notification to the Supervisor. The Supervisor instructed Grievant to notify her or the Manager if he was going to be late to work. The Supervisor had a cell phone issued by the Agency to which Grievant could call 24 hours a day. On June 3, 2011, the Supervisor provided Grievant with a memorandum stating, in part:

This memo is to remind you of several expectations that have been communicated to you in the past. I feel these expectations need to be reiterated as several issues have persisted the last month or so.

When you are going to be late to work, my expectation is that you notify me 30 minutes prior to your expected arrival time (unless unforeseen issues arise).³

Grievant's regular work shift was from 8 a.m. to 4:30 p.m. From November 16, 2011 to January 23, 2012, Grievant "clocked in" more than 20 minutes late on multiple occasions as follows.

November 16, 2011 – arrived at 9 a.m.
November 22, 2011 – arrived at 8:22 a.m.
December 6, 2011 – arrived at 8:24 a.m.
December 9, 2011 – arrived at 8:26 a.m.
December 13, 2011 – arrived at 8:40 a.m.
December 15, 2011 – arrived at 8:25 a.m.
December 19, 2011 – arrived at 8:21 a.m.
December 20, 2011 -- arrived at 8:27 a.m.
December 21, 2011 – arrived at 8:34 a.m.
December 22, 2011 – arrived at 8:39 a.m.
January 5, 2012 – arrived at 8:25 a.m.
January 13, 2012 – arrived at 8:33 a.m.
January 20, 2012 – arrived at 8:34 a.m.
January 23, 2012 – arrived at 8:35 a.m.

He did not call the Supervisor or the Manager on any of those dates regarding his tardiness.

On occasion, contractors would come to the Center to perform various tasks. They arrive at the Center and perform their duties based on their own schedules and

² Grievant alleged that the time clock sometimes malfunctioned but he presented no evidence that the time clock had malfunctions on any of the dates the Agency contends Grievant was tardy.

³ Agency Exhibit 1.

without appointments. When Grievant walked around the Center, he could observe which contractors were working on particular days.

The Supervisor instructed Grievant to call her whenever he observed contractors in the Center. Knowing that contractors were working in the Center was important to the Supervisor so that she could speak with them if necessary and review their work once it was completed. The Supervisor had instructed Grievant to call her regarding contractors working at the Center even if Grievant had not been the person who had coordinated the contractor's work. The Supervisor sent Grievant a memorandum dated March 17, 2011 which stated that he was responsible for reporting any issues in the Center regardless of whether it was his responsibility to fix the problem. On March 30, 2011, the Supervisor sent Grievant an email stating:

To reiterate, any and all facility issues and concerns need to be properly brought to my attention; if you are not able to reach me please contact [the Manager]. If someone is performing work in the building that you have not been made aware of, please follow up with us to ensure this person has authority to be in the building and also to make us aware that the work has been completed. We rely on you to keep us informed of all maintenance issues in that building so communication is an essential part of your position.

On October 13, 2011, the Supervisors sent Grievant a memo stating:

Today when I was meeting with you, I noticed two contractors completing work on the basketball courts. When I asked if you had tried to contact me regarding their presence, you said you did not because [Mr. T] was working with them. I then re-clarified my expectation that you notify myself or [the Manager] any time a contractor is in the facility, no matter who coordinated the work. This expectation has been communicated several times and it is my hope that it will be met [in] the future.

On October 10, 2011, the Supervisor and Grievant met to discuss his annual performance evaluation. The Supervisor wrote in the evaluation, "He needs to ensure that he communicates with a supervisor when contractors have arrived and what he has communicated to them. Several instances occurred this year when contractors arrived and completed work and [Grievant] did not notify his supervisor."

On January 10, 2012, the Supervisor arrived at the Center where Grievant work. She found notices posted that there was no hot water in the aquatic locker rooms. She located Grievant to discuss the lack of water. During their conversation, Grievant stated that contractors had been in the building that morning and on the prior day to perform work in the aquatic Center. The Supervisor asked Grievant why he had not contacted her to notify her that the contractors were in the building. Grievant responded that Mr. T and Mr. B were the ones who coordinated the work, so it was not his responsibility.

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.”⁴ 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 instruction is a Group II offense.⁵

First Group II Written Notice

The Supervisor instructed Grievant to notify her when he was going to be late to work. Grievant’s work shift began at 8 a.m. Grievant was late to work 14 times from November 16, 2011 through January 23, 2012. Grievant did not call the Supervisor or the Manager on those days regarding his being late to work. Grievant failed to comply with the Supervisor’s instruction thereby justifying the issuance of a Group II offense.

Grievant had prior active disciplinary action consisting of two Group II Written Notices. When an employee accumulates two or more Group II Written Notices, an employee may be removed from employment. With the accumulation of the first Group II Written Notice in this grievance, Grievant’s removal must be upheld.

Second Group II Written Notice

The Supervisor instructed Grievant to call her whenever he observed contractors working in the Center. On January 9, 2012, Grievant observed contractors working in the Center. In the morning at January 10, 2012, Grievant observed contractors working in the Center. Grievant failed to call the Supervisor to inform her that contractors were working in the building thereby justifying the issuance of a Group II Written Notice.

Grievant had prior active disciplinary action consisting of two Group II Written Notices. When an employee accumulates two or more Group II Written Notices, an employee may be removed from employment. With the accumulation of the second Group II Written Notice in this grievance, Grievant’s removal must be upheld.

Grievant argued that he did not know that the contractors were in the building because he had not coordinated the work. The evidence showed that Grievant knew there were contractors working on January 9, 2012 and in the morning of January 10,

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See, Attachment A, DHRM Policy 1.60.

2012 because that is what he told the Supervisor on January 10, 2012. On several occasions, the Supervisor informed Grievant that he was obligated to inform her when contractors were working at the Center regardless of who coordinated the contractors' work.

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...."⁶ 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 held to a different standard from other employees. He argued he was singled out for disciplinary action. Grievant failed to present sufficient credible evidence to support these allegations. The evidence showed that the Agency took disciplinary action against Grievant because the Supervisor believed he had engaged in inappropriate behavior.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant alleged that the Agency retaliated and discriminated against him. He argued that the Agency violated several state and federal laws and conspired against him by taking disciplinary action against him. He presented no credible evidence to support these allegations.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the first Group II Written Notice of disciplinary action with removal is **upheld**. The Agency's issuance to the Grievant of the second Group II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

⁶ *Va. Code § 2.2-3005.*

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

[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].

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

June 13, 2012

[Grievant]

RE: **Grievance of [Grievant]. v Virginia Commonwealth University**
Case No. 9801

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In the above referenced case, we note that the hearing officer issued his decision on May 10, 2012. We note further that you submitted your appeal to DHRM by letter dated May 29, 2012, and received by the DHRM on May 31, 2012. According to our calculations, your request was received on the twenty-first day after the decision was issued, thus exceeding the allowable time by six days. Therefore, because your request exceeded the 15-day timeframe, we will not honor your request to conduct an administrative review.

Sincerely,

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