

Issues: Group II Written Notice (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 06/07/12; Decision Issued: 06/28/12; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 9814; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9814

Hearing Date: June 7, 2012
Decision Issued: June 28, 2012

PROCEDURAL HISTORY

On February 16, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed from employment based the accumulation of disciplinary action.

On March 11, 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 25, 2012, 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 due to the unavailability of a party. On June 7, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

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 Virginia Department of Health employed Grievant as a Program Administration Specialist II. He had prior active disciplinary action. On September 16, 2011, Grievant received a Group I Written Notice for failure to report to work without notice, unsatisfactory work performance, and failure to follow instructions and/or policy regarding leave reporting. On November 16, 2011, Grievant received a Group II Written Notice for unsatisfactory work performance and failure to follow a supervisor's instructions and/or policy. On January 6, 2012, Grievant received a Group II Written Notice with a six workday suspension for unsatisfactory work performance, failure to work as scheduled, and failure to follow a supervisor's instruction.

The Subordinate reported to the Grievant who reported to the Supervisor. Grievant began reporting to the Supervisor in October 2009.

After the disciplinary action issued on January 6, 2012, the Supervisor instructed Grievant that "Leave slips must be submitted without prompting by me and must be accurate (contain all required data elements and reflect the hours, dates, and type of leave taken)."

On November 30, 2011, the Supervisor instructed Grievant to complete a website map project. The Supervisor also instructed Grievant not to delegate responsibility for the project to the Subordinate. The Supervisor did not want Grievant to delegate the project to the subordinate because the Supervisor believed that the Subordinate already had a high work load and the Supervisor believed that Grievant

would be better suited to complete the project given his background in the subject matter of the project. On January 27, 2012, the Supervisor spoke with the Subordinate who complained that Grievant had given her the project and expressed concern about whether she could complete the project given her existing workload.

On January 24, 2012, Grievant reported to work 30 minutes late. He left early that day and submitted a leave slip for 30 minutes of sick leave. He did not submit a leave slip to account for his tardiness.

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 instruction is a Group II offense.² Grievant was instructed to complete a project by the Supervisor and not to delegate the project to the Subordinate. Grievant disregarded that instruction and delegated the project to the Subordinate.

Grievant argued that he completed the project and did not delegate the project to the Subordinate. Grievant did not testify and did not present any credible evidence to support his assertion. Based on the evidence presented, it appears that Grievant delegated the project to the Subordinate contrary to the Supervisor’s instructions.

On January 6, 2012, Grievant was instructed by the Supervisor to submit accurate leave slips. On January 24, 2012, Grievant reported to work 30 minutes late and left work 30 minutes. He submitted a leave slip accounting for his early departure but not for his late arrival. Grievant failed to comply with the Supervisor’s instruction.

The Agency alleged that Grievant failed to comply with the Supervisor’s instruction because he sent her an email³ after work hours that was not business related. Although the Agency established that the Supervisor instructed Grievant not to call her after work hours for non-work related matters, it failed to establish that the Supervisor instructed Grievant not send her non-work related emails after normal work

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 The Agency did not submit a copy of the email.

hours. There is no basis to take disciplinary action against Grievant for sending the Supervisor an email after work hours that the Supervisor deemed inappropriate.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices and, thus, the Agency's removal must be upheld.

Grievant argued that he was being treated differently from other employees especially with respect to leave reporting. Grievant established a pattern of inaccurate leave reporting and, thus, it was appropriate for the Supervisor to provide greater oversight of Grievant than she did of other employees.

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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.

⁴ Va. Code § 2.2-3005.

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.