

Issues: Group I Written Notice (unsatisfactory job performance), Group II Written Notice (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 06/22/12; Decision Issued: 06/26/12; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9838, 9839; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 07/10/12; EDR Ruling No. 2013-3383 issued 07/25/12; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 07/10/12; DHRM Ruling issued 08/02/12; Outcome: Declined to review.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9838 / 9839

Hearing Date: June 22, 2012
Decision Issued: June 26, 2012

PROCEDURAL HISTORY

On March 7, 2012, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On April 5, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction in unsatisfactory job performance. Grievant was removed from employment based on the accumulation of disciplinary action.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On May 18, 2012, the EDR Director issued Ruling Numbers 2012-3348 and 2012-3349 consolidating the two grievances for one hearing. On May 29, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 22, 2012, 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 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:

Old Dominion University employed Grievant as a Housekeeper. She had been employed by the Agency for approximately 16 years until her removal effective April 5, 2012. Grievant had prior active disciplinary action. On February 3, 2010, Grievant received a Group II Written Notice for Fed to follow established procedure.

Grievant worked in Building 1. She was told she was being moved to Building 2. She did not wish to move to Building 2 because she would be under the supervision the B Supervisor. Grievant knew that the B Supervisor was abrasive, confrontational, and extremely difficult to work with. Grievant was instructed to report to Building 2 on February 6, 2012. Instead Grievant reported to be Human Resource Office on February 6, 2012 and asked HR staff to be moved to a different location. Grievant's request was denied. On February 7, 2012, Grievant began working in Building 2 under the supervision of the B Supervisor. The B Supervisor presented Grievant with a schedule outlining Grievant's duties throughout the day in Building 2. The B Supervisor reported to the C Supervisor who reported to the Director.

Grievant argued that the B Supervisor was a difficult person to work with. Grievant presented evidence showing that the B Supervisor was abrasive when speaking with other employees. The B Supervisor was excessively confrontational with

employees and often spoke to them in a demeaning manner. The evidence showed that employees had complained to the Agency but the Agency had taken few actions to correct the B Supervisor's behavior. Grievant was justified in being concerned about having to work with the B Supervisor. The Hearing Officer will disregard evidence relating to instructions given by the B Supervisor. The Hearing Officer will only consider evidence with respect to instructions given by the C Supervisor and/or the Director.

On February 14, 2012, a tenant complained to the Agency that a women's restroom had a "closed for cleaning" sign posted in front of the restroom at 3:01 p.m. Grievant's shift ended at 1:30 p.m. Grievant failed to remove the closed for cleaning sign before she ended her shift that day. Grievant was reminded subsequently that she was obligated to remove the signs before the end of her shift.

On February 16, 2012, Grievant was assigned responsibility to clean two rooms. The Director observed the condition of the two rooms and concluded that Grievant had not properly cleaned the rooms.

On February 20, 2012, a tenant filed a complaint at 2:48 a.m. that a men's restroom was blocked with a "closed for cleaning" sign. Grievant's shift ended at 1:30 p.m. She failed to remove the sign before she ended her shift that day.

On February 24, 2012, Grievant was assigned responsibility to clean two rooms. The Director observed the condition of the two rooms and concluded that Grievant had not properly cleaned the rooms. He observed that the floors contained trash, white boards had not been cleaned, and the table tops were dirty.

Grievant was assigned responsibility for cleaning ten rooms during the Agency's Spring Break, from March 5, 2012 through March 9, 2012.¹ Some of her duties included wiping walls clean, vacuuming floors, cleaning white boards, and picking up trash. On March 7, 2012, the C Supervisor observed the rooms and informed Grievant of the items needing correction. The C Supervisor instructed Grievant to clean the rooms based on the items identified for correction. On Friday, March 9, 2012, Grievant had not fully cleaned the rooms. There remained marks on the walls, paper under desks, and floors not vacuumed. The C Supervisor spoke with Grievant and pointed out the items that needed to be completed and instructed Grievant to finish cleaning the rooms. She instructed Grievant to vacuum the floors, clean the marks off the walls, and wipe the tables. On Saturday, March 10, 2012, the C Supervisor inspected the rooms and observed that Grievant had not addressed any of the remaining items. The Director also observed marks on the wall and trash under desks.

CONCLUSIONS OF POLICY

¹ The Agency conducts a "deep clean" during Spring Break because the students are away from the campus and more time is available to clean.

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.”² 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.”

Group I Written Notice

Unsatisfactory job performance is a Group I offense.³ Grievant’s work performance was unsatisfactory because on February 14, 2012 she left the work place at the conclusion of her shift without having removed the “closed for cleaning” sign in front of a restroom. This resulted in inconvenience for the Agency’s tenants and generated a complaint to the Agency. Grievant was reminded not to leave the sign up after her shift concluded yet she did so again on February 20, 2012. In addition, the C Supervisor and the Director observed that Grievant had not properly cleaned rooms for which she was assigned to clean. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Group II Written Notice

Failure to follow a supervisor’s instructions is a Group II offense.⁴ Grievant was assigned responsibility to clean ten rooms from March 5, 2012 through March 9, 2012. Grievant failed to clean those rooms. The C Supervisor spoke with Grievant regarding the rooms and identified specific items in the rooms that needed to be cleaned. Although Grievant had ample time to clean the items identified by the C Supervisor, Grievant failed to do so. The Director also observed that Grievant failed to clean the rooms as instructed. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. The Agency’s removal must be upheld.

Grievant argued that the B Supervisor harassed her and made it difficult for her to work. The Hearing Officer agrees that the B Supervisor lacked proper communication skills and, thus, the Hearing Officer has disregarded facts originating from the B Supervisor with respect to the disciplinary actions. Grievant was not harassed or mistreated by the C Supervisor or the Director, yet she failed to perform her

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

⁴ See, Attachment A, DHRM Policy 1.60.

duties as instructed. If facts relating to the B Supervisor are disregarded, there remains sufficient evidence to support the disciplinary actions.

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....”⁵ 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 I Written Notice of disciplinary action is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice 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.
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

⁵ Va. Code § 2.2-3005.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

August 2, 2012

[Grievant]

RE: **Grievance of [Grievant] v. Old Dominion University**
Case No. 9838, 9839

Dear [Grievant]:

The Agency head, Ms. Sara R. 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, as advised in the Grievance Procedure Manual and in the hearing decision, either party to the grievance may file for an administrative review within 15 calendar days from the date the decision was issued if at least one of the following applies:

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 Office of Employment Dispute Resolution (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 instant case, you asked for an administrative review by the Department of Human Resource Management. However, referencing item number two above, you failed to indicate which human resource policy, either state or agency, that the hearing decision violates or contradicts. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and what weight he placed on that evidence. This review is restricted to reviewing issues related to the application and interpretation of policy. Because you have not identified any such human resource policy, DHRM has no basis to interfere with the application of this decision.

If you have any questions regarding this correspondence, please contact me at (804) 225-2136.

Sincerely,

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services