

Issues: Group II Written Notice (failure to follow policy/instructions), Group II Written Notice (failure to follow policy/instructions), and Termination (due to accumulation); Hearing Date: 09/21/12; Decision Issued: 10/01/12; Agency: ODU; AHO: Ternon Galloway Lee, Esq.; Case No. 9896, 9912; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9896

Case Number: 9912

Hearing Date: September 21, 2012

Decision Issued: October 1, 2012

SUMMARY OF DECISION

In case number 9896, the Agency had found that in May 2012, Grievant failed to follow supervisor's instructions about professional and collegial interaction with colleague and, further, Grievant failed to timely complete her work. The Agency then issued Grievant a Group II Written Notice. In case number 9912, the Agency had found that on June 21, 2012, Grievant failed to follow instructions and/or policy when she was involved in an altercation with a co-worker at the front counter. The Agency then issued Grievant a Group II Written Notice with termination. The Hearing Office has found Grievant engaged in the offenses alleged by the Agency and upholds all disciplinary actions.

HISTORY

On May 21, 2012, the Agency issued Grievant a Group II Written Notice for failing to follow supervisor's instruction about professional and collegial interaction with colleague and, further, failure to timely complete her work. Grievant timely filed a grievance to challenge the Agency's action. On July 9, 2012, the Agency issued Grievant a Group II Written Notice with termination for failure to follow supervisor's instruction to which Grievant timely filed a grievance. On August 27, 2012, the office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on September 5, 2012, and subsequently a scheduling order was issued.

The Hearing Officer scheduled the hearing for September 21, 2012, the first date available between the parties. Prior to commencing the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were expressed. The Hearing Officer then admitted the Agency's Exhibits 1 through 11; Grievant's Exhibit 1; and the Hearing Officer's Exhibits 1 through 4.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During, the proceeding, the Grievant represented herself and the Agency was represented by its attorney advocate.

APPEARANCES

Attorney Advocate for Agency
Agency representative
Witnesses for the Agency (3 witnesses, including the Agency's representative)
Grievant (5 witness, including Grievant)

ISSUE

Was the termination warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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. Grievant had been employed by the Agency for about 25 years. The last five years she worked in the Office of the Registrar. (Testimony of Grievant).
2. The Assistant Registrar has been Grievant's immediate supervisor since February 10, 2011. (Testimony of Assistant Registrar/Supervisor).
3. The services provided by the Registrar's Office include, but are not limited to, assisting students in withdrawing/dropping courses; providing transcripts to students; accepting dissertations; providing degree verifications for students; assisting senior citizen students; determining domicile of students; certifying Veteran benefits. (Testimonies of Supervisor, Student Service Specialist; Military Educational Benefits Specialist/Agency Witness 3).
4. Grievant's, along with one other worker in the Registrar's Office, primary duty

was to provide customer service at the front counter. The assistance Grievant was expected to provide included, but was not limited to, providing students with transcripts, verifying diplomas, and providing information to students. For many students, their only contact with the Registrar's Office was with the counter workers; primarily, Grievant and the other counter worker. (Testimony of Supervisor).

5. The Registrar's Office closes at 5:00 p.m., and it is office policy to begin closing procedures at that time. One closing procedure is that front counter windows¹ where students are served during office opening hours are shut or pulled down. In spite of the closing time, Agency policy is if a student has entered the Registrar's Office before the doors are closed, employees such as Grievant are required to help the student. Even if doing so means an employee must work beyond 5:00 p.m. to provide that assistance. (Testimony of Supervisor).

6. Agency policy also requires that if a student requests a transcript at the front counter, barring some exception, staff must provide the transcript to the student that day. (Testimony of Supervisor).

The May 3, 2012 Counter Incident

7. Shortly before 5:00 p.m. on May 3, 2012, Grievant closed her counter window. Grievant then removed the transcript paper from the printer and took it to the rear of the office to be locked. At the time, Grievant closed her window, the other counter window was open and the other counter worker was assisting a student needing a transcript. The other counter worker was unable to print the transcript because Grievant had started closing procedures and removed the transcript paper and taken it to the rear of the office. The other counter worker initially asked Grievant to retrieve the paper. Grievant stated "I already put the paper in the back." The other counter worker then shouted for someone to get the transcript paper. When no one retrieved it, Grievant then asked if the student needed the transcript on that day. When the student replied it was needed then, Grievant retrieved the transcript paper. Presumably, the transcript was then printed and provided to the student. Once the office closed, the other counter worker removed the transcript paper and slammed it on the floor. Grievant responded with words to the effect of "I am not going to get the paper with your dropping it like that." The other counter person responded that she just wanted to drop it so she would not forget it." (Testimony of Supervisor and Student Service Specialist).

8. At the time, Grievant closed her counter window on May 3, 2012, there were at

¹ There are two counter windows for customer service. One was usually staffed by Grievant and the other by the additional counter worker. (Testimony of Supervisor).

least two students waiting to be assisted. Another staff member with the Registrar's Office and the other counter worker assisted those students. (Testimonies of Supervisor and Student Service Specialist; A Exh. 7).

9. At the time Grievant closed her counter window, she had not shut down her computer. (Testimony of Student Service Specialist).

10. The Student Service Specialist was working on May 3, 2012. Her cubicle/workstation is several feet from the front counter where students are located when they are receiving assistance from the Registrar's Office staff. Student Service Specialist can hear conversations at the front counter when she is at her workstation. On May 3, 2012, Student Service Specialist also was working in close proximity to Grievant and she overheard the conversation regarding the transcript. (Testimony of Student Service Specialist; A Exh. 7).

11. Supervisor witnessed the incident that occurred at or near closing on May 3, 2012. (Testimony of Supervisor; A Exh. 1, p.11).

12. On February 17, 2012, Grievant was issued a Group I Written Notice for violating customer service standards of conduct at the counter. The disciplinary notice is active until February 17, 2014. (A Exh. 4).

Timeliness of Work

13. Processing verification requests was a secondary responsibility of Grievant. Grievant normally performed this task away from the counter. Requests could include an insurance company seeking verification that a student was in school to determine eligibility for insurance; a prospective employer requesting verification of a student's degree; etc. (Testimony of Supervisor).

14. Agency policy also requires requests for verification to be processed within 48 hours or two business days. (Testimony of Supervisor).²

15. By on or about May 7, 2012, Grievant was at least 12 days behind in processing verification requests. (Testimony of Supervisor; A Exh. 1, p.13).

16. On May 21, 2012, Grievant received a Group II Written Notice for failure to follow supervisor's instructions about professional and collegial interaction with

² On or about July 1, 2011, Grievant's supervisor did relax the requirement and gave Grievant 4 days to process a back log of verification requests. (Testimony of Supervisor; A Exh. 5).

colleague and established procedure for completing work timely. (A Exh. 1, pp. 12-13).

17. Prior to the Group II Written Notice being issued, Grievant had been counseled for similar misconduct or offenses.

By July 1, 2011, the Agency had determined 204 verification requests had not been timely processed by Grievant. 112 of them were for potential federal employment of students. Also, some of the untimely verifications were over 30 days due. On July 7, 2011, Grievant was counseled about the untimeliness of processing these verifications. (Testimony of Supervisor; A Exh. 5).

On April 27, 2012, Grievant received a counseling memorandum regarding providing incorrect information to students and/or the untimeliness of servicing students at the counter. (A Exh. 3; Testimony of Supervisor).

June 21, 2012 Incident

18. On June 21, 2012, a student arrived at the counter and sought the assistance of Grievant to withdraw a study abroad course. The student had not traveled abroad and taken the course. The policy of the Registrar's Office in such a situation is a student is not required to complete the "Green Withdrawal Form" ("green form") to withdraw from the course. Instead upon request, a student is simply dropped from the course and no cost is incurred by him/her. If the green form is completed, dropping the course is considered a withdrawal and normally the student is required to pay for the course he/she dropped. (Testimonies of Supervisor, Military Educational Benefits Specialist, and Student Service Specialist; A Exh. 8).

19. Grievant informed the student that she was required to complete the green form. The student did not accept this information and requested to speak to someone else. Grievant then verbally summoned her co-worker, the Military Educational Benefits Specialist. Earlier that day, this co-worker had helped the student with another matter. (Testimonies of Supervisor, Military Educational Benefits Specialist, and Student Service Specialist; A Exh. 8).

20. In response to Grievant's summons, the Military Educational Benefits Specialist arrived at the front counter and proceeded to assist the student seeking to drop the course.

21. Another student (Student #2) then approached Grievant for assistance. While Student #2 was before Grievant for assistance, Grievant interrupted her co-worker assisting the student dropping the study abroad course. Grievant continuously informed the co-worker that the student he was helping needed to complete the green form. Grievant's interruptions and information were contrary to the assistance provided by the

co-worker to the student dropping the course. This led to the student before Grievant's co-worker becoming frustrated. After Grievant's fourth interruption, the co-worker gestured with his hand for Grievant to stop interrupting him. At the same time he stated to Grievant, "[Grievant] stop." Grievant then stopped interrupting her co-worker and asked to speak with him later. (Testimonies of Supervisor, Student Service Specialist, Agency Witness 3; A Exh. 8).

22. The co-worker then proceeded to assist the student before him and the student was allowed to drop the course without completing the withdrawal form and incurring the cost of tuition. (Testimonies of Military Educational Benefits Specialist and Supervisor).

23. While at her workstation, Student Service Specialist heard the above described incident that occurred on June 21, 2012. (A Exh. 8; Testimony of Student Service Specialist).

24. Grievant's witnesses 1 and 4 were at work on June 21, 2012, but did not hear the conversations at the counter involving Grievant and Military Educational Benefits Specialist. (Testimonies of Grievant's Witnesses 1 and 4).

25. Grievant's Witness 2 heard the exchange between Grievant and Military Educational Benefits Specialist that occurred later during the day away from the counter. She described the tone between the two as one of "heated displeasure." (Testimony of Grievant's Witness 2).

24. Grievant's supervisor was informed of the June 21, 2012, incident upon his return from lunch by staff. He investigated it and determined Grievant's conduct was inappropriate. He then issued Grievant a Group II Written Notice with termination for failure to follow a supervisor's instruction. The description of the incident stated the following:

On June 21 you were involved in a verbal argument with a coworker at the front counter. After calling the coworker to the front and handing a student off to him you continued to interrupt and interject while your co-worker was assisting the student. The information you were attempting to give was incorrect and would have been detrimental to the student. During this incident you repeated behaviors that have been cited in prior formal discipline; namely, Customer service standards for the service counter include maintaining professional and collegial interaction with students and colleagues at all times. You were issued a Group II Written Notice on May 21st which cited failure to follow supervisor's instructions about professional and collegial interaction on May 3rd and you were issued a Group I Written Notice on 2/17/12 citing

unsatisfactory performance of your customer service responsibilities.

(A Exh. 2).

25. Agency policy requires an employee who needs the assistance of another employee to use instant messaging; that is, send a computer text message to inform the co-worker that he/she is needed. (Testimonies of Supervisor and Military Educational Benefits Specialist).

26. Grievant's annual evaluations for the cycles October 25, 2008 to October 24, 2009; October 25, 2009, to October 24, 2010; and October 25, 2010 to October 24, 2011, rated Grievant a contributor. (G Exh, 1, pp. 7-14).

27. An accommodation for Grievant provided by the Agency was Grievant was permitted to report to work late. Even so, Grievant was expected to complete her work. (Stipulation of parties; A Exh. 10).

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.³

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 May 21, 2012, Agency management issued Grievant a Group II Written Notice for the reasons previously noted here. On July 9, 2012, Agency management issued Grievant a Group II Written Notice with termination for the reasons noted here. Accordingly, I examine the evidence to determine if the Agency has met its burden in imposing these disciplinary actions.

I. Analysis of Issue(s) before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the notices and was there misconduct?

First, a consideration of the allegations in the Group II Written Notice issued on May 21, 2012, is undertaken. The Agency contends Grievant failed to follow her supervisor's instructions about professional and collegial interaction with colleague and established procedure for completing work timely.

The evidence regarding the May 3, 2012 incident indicates that Grievant commenced closing procedures early even though her co-worker remained at the counter assisting another student and students were in the lobby waiting to be assisted. Grievant's actions initially precluded her co-worker from printing a transcript because Grievant had removed the paper from the printer. Grievant also contested assisting her co-worker. When the co-worker asked Grievant to return the paper, Grievant initially did not. Instead she stated words to the effect of "I already put it away." Further, when other staff did not bring the paper to the counter, Grievant questioned whether the student needed the transcript then. This is so even though policy dictated that a student receives a

³ Grievance Procedural Manual § 5.8

transcript the same day he/she makes it in the Registrar's Office and requests it. Once the office closed, the co-worker took the transcript paper out of the printer and slammed it on the floor. Grievant then responded that she was not going to get the paper with the co-worker dropping it in that manner. The other counter person responded that she just wanted to drop it so she would not forget it.

Considering the above, I find Grievant engaged in the conduct alleged and violated the directive of her supervisor to maintain a professional and collegial interaction with her colleague. Thus, the conduct on May 3, 2012, was misconduct. Having made this finding, I note that I had the opportunity to observe the demeanor of all the witnesses and considered their testimony.

Regarding the timeliness of Grievant's work, other than arguing that she caught up her work, Grievant offered nothing to show she was not behind in her work. And the evidence presented illustrates she failed to process verifications timely. In fact, one of Grievant's witnesses testified that the mail had become backlogged and it needed to be processed. I am cognizant that Grievant was permitted to arrive late to work; however, this accommodation did not excuse Grievant from promptly completing her assignments. Thus, I find Grievant did not accomplish her work in the time permitted by policy and this constituted a disciplinary offense.

Second I consider the allegation in the Group II Written Notice with termination issued on July 9, 2012. In this notice the Agency contends that on June 21, 2012, Grievant failed to follow instructions and or policy for the reasons stated previously here.

The evidence shows that Grievant was involved in an altercation with a co-worker while at the front counter on June 21, 2012. This was so because Grievant continuously interrupted her co-worker while he was assisting a student at the counter. Further, Grievant violated the instance message policy of the office by calling out her co-worker's name when she summons him to the counter. Also, the evidence shows Grievant gave erroneous information to a student while at the counter. This action was also contrary to Agency policy and could have resulted in student incurring tuition cost for a course she did not take. Thus, I find the Agency has shown that on June 21, 2012, Grievant engaged in the conduct cited in the notice and it violated the standards of conduct.

Having made this finding, I am conscious of the testimony of all witnesses and have afforded due weight to their testimonies.

B. Was the discipline consistent with policy and law?

I have found on May 3, 2012, and during May 2012, Grievant failed to follow her supervisor's instructions and failed to timely complete her work. These offenses are

more serious in nature. Also, the evidence shows Grievant had been counseled for similar offenses in the past. Thus, I find the Agency acted consistent with policy when it issued Grievant the Group II Written Notice on May 21, 2012.

Regarding the June 21, 2012 offense, I have found Grievant failed to follow her supervisor's instruction when she was involved in an altercation with her co-worker at the counter. The offense was similar to the one she was disciplined for on May 21, 2012, and on February 17, 2012. Thus, it was consistent with policy for the Agency to issue Grievant a Group II Written Notice with termination. This is so because upon Grievant receiving the Group II Written Notice on July 9, 2012, Grievant had an active Group I Written Notice, several counseling memorandums for similar offenses, and, although grieved, a Group II Written Notice for similar misconduct that was issued May 21, 2012.

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 the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁴ 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.”⁵ 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.⁶

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.

⁴ Va. Code § 2.2-3005 and (c)(6)

⁵ *Rules for Conducting Grievance Hearings* VI(A)

⁶ *Rules for Conducting Grievance Hearings* VI(B)

I have found that Grievant engaged in the behavior described in the Written Notices, those behaviors constituted acts of misconduct, and the Agency's disciplinary actions were consistent with law and policy. Next a focus on whether the disciplinary actions were reasonable is undertaken.

Grievant argues that she had no problems at the front counter on May 3, 2012, and June 21, 2012. Further she admits falling behind in her work but states she stayed late and managed to catch up. She also notes she has worked for the Agency 25 years and during that time period she served for 20 years as a supervisor. She presented three evaluations that rated her a contributor.

I have considered Grievant's arguments and all evidence submitted to support them, as well as all other evidence. Of note, Grievant engaged in not one, but two Group II Offenses. Moreover, she has an active Group I Offense which she incurred this year. Also, the evidence shows the Grievant's offenses are repeated ones and the Agency exercised progressive discipline and counseled Grievant regarding her conduct on several occasions. Having carefully deliberated the evidence, I am not convinced the Agency acted unreasonably.

DECISION

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

APPEAL RIGHTS⁷

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. If you believe the hearing decision is inconsistent with state policy or agency

⁷ Grievant grieved her Written Notice issued on May 21, 2012, before July 1, 2012. Thus, the appeal rights effective are those in effect under the GPM in effect before July 1, 2012.

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
Departmental of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

3. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov. or by fax to (804) 786-1606.

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.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar day period has expired, or when requests for administrative review have been decided.

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 EDR before filing a notice of appeal.

Entered this 1 day of October, 2012 _____
Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
Senior Consultant, Office of EDR