

Issues: Group II Written Notice with Suspension (failure to perform duties) and Assignment of Duties; Hearing Date: 10/04/12; Decision Issued: 10/11/12; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9901; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9901

Hearing Date: October 4, 2012
Decision Issued: October 11, 2012

PROCEDURAL HISTORY

On June 21, 2012, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction for gross negligence for not entering dates into the Agency's database for its holiday calendar. As part of the Step Process, the Agency reduced the discipline to a Group II Written Notice with a ten workday suspension but changed Grievant's duties to remove her responsibility for supervising employees.

On July 12, 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 she requested a hearing. On September 5, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 4, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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:

The Virginia Community College System employs Grievant as an Educational Support Specialist III at one of its Colleges. She began working for the Agency in 2006. The purpose of her position is:

The purpose of the position is to manage the College's admissions and records office, admit students and maintain their records, supervise registration each semester, supervise the production of the Course Schedule twice a year, supervise the production of the Catalog every other year, and supervise graduation once a year.¹

One of Grievant's Measures for Core Responsibilities is "Updates college calendar." In order to update the Agency's Holiday Calendar, Grievant entered the dates of the College's holidays into the Agency's financial database. Grievant received an overall rating of "Contributor" on her 2011 evaluation. No evidence or prior active disciplinary action was introduced during the hearing.

¹ Agency Exhibit 14.

The College has three calendars including the Academic and Holiday calendars. Grievant updated the Academic and Holiday calendars beginning in 2007. Grievant stopped updating the Holiday Calendar in 2010. She also failed to update the Holiday Calendar in 2011. Grievant falsely assumed that responsibility for updating the calendar had become the responsibility of another department.

When students obtain federal loans to pay for tuition, the federal Department of Education sends the College money to pay for tuition. If the student withdraws from the College, the College must send back a portion of the money to the DOE and seek reimbursement from the student. The student becomes ineligible to attend the College until the debt is addressed. The amount of money to be returned to the DOE is based on a calculation which includes the number of holiday dates shown on the College's Holiday Calendar.

An audit was performed on the College's financial records. The College learned that because Grievant had not entered dates into the Holiday Calendar in the financial database, the College had not repaid moneys to the DOE and had not notified students that they owned money and could not re-enroll until their debts were accounted for. After addressing the audit points, the College concluded it owed the DOE approximately \$19K and 49 students had not been timely informed of their debts. Some of those students had re-enrolled even though they should not have been permitted to return to the College.

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."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."

"[U]nsatisfactory work performance" is a Group I offense.³ Grievant's EWP required that she update calendars. She had been updating the Holiday Calendar since 2007 but then stopped in 2010 and 2011. As a result of Grievant's failure to update the Holiday Calendar in the College's financial database, the College had to repay the DOE approximately \$19K and approximately 49 students were adversely affected by Grievant's error. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

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.

In rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

The Agency has presented sufficient evidence to show that the Group I offense should be elevated to a Group II offense. The amount of money the College had to return to the DOE was significant from the College's perspective and the number of students it had to notify of its error had a material impact on the College's reputation and operations. Accordingly, the Agency has established that Grievant should receive a Group II Written Notice with a ten work day suspension.

The Agency issued Grievant a Group II Written Notice with suspension. Upon the issuance of a Group II Written Notice, the Agency was not authorized to change Grievant's work duties. Thus, Grievant must be returned to her former position without having her duties changed as a result of the disciplinary action.

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.

Grievant contends the disciplinary action should be mitigated because the Agency inconsistently disciplined employees. Grievant's audit error was one of six audit points identified by the Auditor. None of the employees responsible for the other five audit points received disciplinary action. Although the Agency could have taken disciplinary action for unsatisfactory work performance with respect to those other employees, it chose not to do so because their errors had no financial impact on the College and students were not affected to the degree Grievant's error affected students. The Agency has presented a sufficient basis to distinguish between Grievant and the other employees. The Agency did not inconsistently discipline employees. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁴ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a ten workday suspension is **upheld**. The Agency is **ordered** to return Grievant to her former position without a modification of her job duties.

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 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

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

2. 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 North 14th St., 12th Floor
Richmond, VA 23219

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

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.

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 EDR before filing a notice of appeal.