

Issues: Group II Written Notice (violation of safety rule) and Termination (due to accumulation); Hearing Date: 10/09/12; Decision Issued: 10/11/12; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9909; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9909

Hearing Date: October 9, 2012
Decision Issued: October 11, 2012

PROCEDURAL HISTORY

On July 12, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and failure to follow safety rules. Grievant was removed effective July 12, 2012 based on the accumulation of disciplinary action.

On August 10, 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 September 4, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 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 DAR. Grievant worked in the cage washroom. He was responsible for washing cages that held animals. Grievant had prior active disciplinary action. On November 28, 2011, Grievant received a Group II Written Notice with a five workday suspension for failure to follow a supervisor's instructions and failure to follow a safety rule for wearing a N95 instead of the Powered Air Purifying Respirator (PAPR).

One of the Agency's divisions maintains animals in cages. Periodically, the cages must be washed. To wash the cages, the cages have to be disassembled. During the disassembly process, animal waste from the cages can become airborne and pose a health risk to someone breathing the air. In order to avoid injury to employees washing the animal cages, the Agency requires these employees to wear personal protection equipment. The Agency provides employees with a N95 to wear. The N95 can be worn by male employees without facial hair or with trimmed beards.

On November 11, 2011, the occupational health and safety unit of the Agency tested Grievant and other employees to determine whether their N95 fitted them and worked properly. Grievant was tested with the N95 but failed the test twice because Grievant's beard was too long. Grievant told the Manager that he would not shave his beard. The Manager decided to purchase a Powered Air Purifying Respirator (PAPR) for Grievant. Grievant agreed to wear the PAPR.

On April 27, 2011 and September 28, 2011, Grievant was counseled for not wearing the PAPR as required.

On June 28, 2012, Grievant was working in the “dirty cage” area. He was wearing a N95 instead of the PAPR he has been issued and required to wear.

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 instructions is a Group II offense.² The Supervisor instructed Grievant to wear the PAPR when cleaning cages. Grievant agreed to wear the PAPR and he knew that he had failed the N95 fit test. In November 2011, Grievant was disciplined for wearing the wrong personal protection equipment. It is clear that Grievant knew he was obligated to wear the PAPR and was not permitted to wear the N95 when cleaning dirty cages. On June 28, 2012, Grievant wore the N95 instead of the PAPR thereby acting contrary to the supervisor’s instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant has a prior active Group II Written Notice. Based on the accumulation of disciplinary action, Grievant’s removal is upheld.

Grievant argued that other employees had beards and wore the N95 but only he was required to wear a PAPR. The difference between Grievant and the other employees was that the other employees had not failed the fit test while wearing the N95. Grievant could not wear the N95 because it was unsafe for him to do so.

Grievant argued that it was too hot for him to wear the PAPR on June 28, 2012. The Agency tested the temperature level for several days after learning of Grievant’s concern and concluded that although the work area was hot, it was not so hot as to prevent Grievant from wearing his PAPR. The Hearing Officer has no reason to reject the Agency’s conclusion. In any event, Grievant could have reported his concerns to a supervisor and obtained permission to wear a N95 before doing so.

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.

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....”³ 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.

Grievant argued that he had suffered “long term discrimination” by the Manager, but he presented no evidence of such discrimination. There is no reason to believe that the Agency discriminated against Grievant.

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 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.

³ Va. Code § 2.2-3005.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.