

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 06/02/16;
Decision Issued: 06/07/16; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10794; 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: 10794

Hearing Date: June 2, 2016

Decision Issued: June 7, 2016

PROCEDURAL HISTORY

On January 21, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. During the grievance step process, the disciplinary action was reduced to a Group I Written Notice.

On January 27, 2016, 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 12, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 2, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's 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:

Virginia Commonwealth University employs Grievant as a Staff Mechanical Engineer. On a rotating basis, Grievant was assigned responsibility as a Duty Manager. No evidence of prior active disciplinary action was introduced during the hearing.

The Building had 500,000 square feet of work space divided into three phases. Phase 3 contained numerous research projects held in storage containers requiring extreme cold. Some of the units had to be cooled to minus 80 C degrees. The containers had alarms that activated if the temperatures inside rose to a level endangering the research projects. Phase 3 held research projects with values exceeding many millions of dollars. These projects depended on continuous electric power. Phase 3 also contained delicate and expensive scientific instruments worth millions of dollars and requiring careful calibration which had to be redone at significant expense if power was interrupted. Phase 3 had research projects involving animal subjects. Phase 3 had a backup generator to provide power to emergency receptacles. Only if freezers were plugged into emergency receptacles would the generator protect their contents.

The Agency had an Operations Center on campus that was staffed every day on a 24 hour basis. Operations Center staff provided immediate, on-site incident reporting and made first contact if necessary with VCU Public Safety, a Public Utility and the Local City Government. Employees in the Operations Center reported to Ms. T, a Supervisor, who reported to Ms. M, the Director of Business Services. The Executive Director held overall responsibility for the Operations Center and Grievant.

Approximately 16 employees in the Agency's Facilities Management division served as Duty Managers on a rotating basis. A Duty Manager was "on-call", meaning that he or she was not required to work at the Agency's campus but had to remain available by telephone to receive calls and make decisions about issues with the Agency's facilities. A Duty Manager was expected to respond to the campus within an hour to support the Operations Center and in response to any campus emergency. The purpose of a Duty Manager was to help mitigate losses arising with Agency's facilities. Duty Managers reported to the Executive Director.

On October 23, 2015, Grievant attended a Duty Managers meeting called by the Executive Director. During the meeting, Grievant was informed:

Duty Manager responsible for contacting Executive Director on all major events.

On December 24, 2015, Grievant was serving as Duty Manager. He was located within a 15 minute drive of the Agency's campus preparing food at a friend's house. The Executive Director was in another State.

Electric power went out in Phase 3 of the Building. At approximately 11:46 a.m., staff in the Operations Center were notified of the problem. At 11:55 a.m., Operations Center staff notified Grievant of the power outage.¹ At 12:32 p.m., Operations Center staff notified Ms. T about the power outage. At 12:34 p.m., Operations Center staff learned that the chillers in Phase 3 were not working.

Mr. K also worked as a Duty Manager but was not serving as Duty Manager on December 24, 2015. Mr. K had been contacted by the Assistant Dean who was responsible for research in Phase 3 and notified of his concerns about the Phase 3 power outage. Mr. K called the Operations Center staff and told them to contact an electrical contractor to address the problem. Operations Center staff told Mr. K he did not have the authority to request an electrical contractor because he was not the Duty Manager that day. .

At approximately 1:28 p.m., Mr. K called Grievant and told him power was not on to the Building. Mr. K told Grievant about the need for an electrical contractor. Mr. K recommended to Grievant that he call the Executive Director to inform her of what was going on.

At 1:39 p.m., Grievant called the Operations Center and told staff to contact an electrical contractor so the electrical contractor could address the problem. Operations Center staff rejected Grievant's instruction and said a Trade Tech would be called since the issue may relate to a problem with service from a local Public Utility.

¹ Grievant claimed the Operations Center staff told him generators were not running but did not mention the Building did not have power.

At 1:44 p.m., staff in the Operations Center called the local Public Utility to seek assistance. Operations Center staff notified Grievant and Ms. T about the telephone call to the local Public Utility.

At 2:54 p.m., Operations Center staff called the local Public Utility employee who estimated he would arrive at the Building in 30 minutes. Grievant and Ms. T were informed of this conversation.

At approximately 3:47 p.m., Phase 3 lost emergency backup power. The Operations Center staff called the local Public Utility. At 3:50 p.m., a local Public Utility employee told the Operations Center staff that the Public Utility had not been notified of the problem. Operations Center staff informed Grievant of the delay.

At 4:25 p.m., Operations Center staff learned that the chillers were running but normal power had not been restored to the Building. Operations Center staff called Grievant and asked if they could call in a zone 950 electrician. Operations staff could not reach the zone 950 electrician so they called a first responder to go to Phase 3. Grievant was notified of this by the Operations Center staff.

Operations Center staff spoke with Ms. M, Director of Business Services, and asked if they could call an electrical contractor.

At 5:03 p.m., the Assistant Dean sent an email to the Executive Director and Ms. M stating:

I'm not sure you are aware of this issue, but it seems as though this has gone on longer than it should. Valuable research is on the line that requires power. I've been told the emergency power is now not responding. This needs all the bells, alarms, and whistles to get an electrical contractor in there ASAP ... not sure why the Operations Center did not do this hours ago?²

The Executive Director did not read the email until after 5:16 p.m. when Ms. M called the Executive Director. Ms. M told the Executive Director that a power outage occurred at Phase 3 and she should call Mr. K to get information about the problem.

Upon learning of the power outage, the Executive Director began making telephone calls to obtain information from people working at Phase 3. She called Mr. K and Grievant. She attempted to have extension cables brought in to provide power to important research containers. She attempted to have people move animal cages as needed. At 5:34 p.m., the Executive Director spoke with staff in the Operations Center

² Agency Exhibit 5.

and told them to call an electric contractor.³ At 5:54 p.m., a technician with the Electrical Contractor said he would be at Phase 3 within an hour. At 6 p.m., the Executive Director called Mr. K and discussed calling a contractor to address problems with the emergency power. At 6:20 p.m., the Executive Director called Ms. M. Ms. M volunteered to go to Phase 3.

The Executive Director continued to make telephone calls regarding the power outage until approximately 7:42 p.m. when the power was restored by the Electrical Contractor.

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.”⁴ 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.⁵ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

This case depends on whether the Agency has established that a power outage in Phase 3 of the Building was a major event. If it was a major event, Grievant was obligated to notify the Manager.

The Agency has presented sufficient evidence to show that a power outage in Phase 3 of the Building was a major event. Phase 3 contained research projects developed over years and decades involving millions of dollars and requiring extreme cold storage. Any risk of losing research of that value and difficult to create was a major event.

Grievant argued the power outage was not a major event based on his judgment. Grievant argued that he was informed at 11:55 a.m. that the backup generators were working. He argued that losing power while backup generators were operating was not significant. This argument is not persuasive.

³ Ms. M may also have instructed the Operations Center to call an electrical contractor after speaking with the Executive Director.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See Attachment A, DHRM Policy 1.60.

Grievant was aware of the contents of Phase 3 and the risks to the Agency if power failed. In the normal course of events, Phase 3 operated with electric power from the local Public Utility and had backup generators. When power from the utility ended, there was no “backup” to the backup generators. If the generators failed (as they did), the Agency’s research would be at a critical risk of loss. At approximately 1:39 p.m., Mr. K called Grievant and told him of the need for an electrical contractor and recommended he call the Executive Director. The Operations Center staff ignored Grievant’s instruction to call an electrical contractor. If Grievant did not realize at 11:55 a.m. that the power outage was a major event, he should have been aware of this after Mr. K recommended he call the Executive Director and the Operations Center rejected his instruction. At a minimum, Grievant could have sent the Executive Director a text message or email. Grievant failed to notify the Executive Director of a major event thereby justifying the issuance of a Group I Written Notice.

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 Human Resource Management”⁶ 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.

The evidence is overwhelming that the Agency should have taken disciplinary action against staff in the Operations Center. Poor decisions by the Operations Center staff resulted in a several hour delay in contacting the Electrical Contractor who was responsible for resolving the problem. The Executive Director took no disciplinary action and did not appear to have investigated the nature of their errors. It is unfair for the Agency to take disciplinary action against Grievant yet permit Operations Center staff to avoid discipline. Simply because circumstances are unfair, however, does not mean mitigating circumstances exist to reduce disciplinary action. Grievant and Operations Center staff were not similarly situated. Grievant was obligated to notify the Executive Director and failed to do so. Operations Center staff mistakenly refused to call an electrical contractor. Their mistakes did not relate to failing to notify a supervisor. Thus, there is no basis to mitigate the disciplinary action based on the inconsistent application of disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁶ *Va. Code § 2.2-3005.*

DECISION

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

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.