

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 03/01/13; Decision Issued: 05/02/13; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 10011; Outcome: No Relief; **Administrative Review: EDR Ruling Request received 05/17/13; EDR Ruling No. 2013-3618 issued 06/26/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/17/13; DHRM Ruling issued 06/28/13; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10011

Hearing Date: March 1, 2013

Decision Issued: May 2, 2013

PROCEDURAL HISTORY

On May 31, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On July 2, 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 January 16, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 1, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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:

The Virginia Department of Health employs Grievant as a Training and Development Coordinator Senior at one of its regional offices. She has been employed by the Agency for approximately nine years. The purpose of her position is:

Independently developing, delivering, and coordinating training agency wide in support of a program. Characteristic activities include: administration of certification programs, budget development, organizational development, needs assessment, designing course curricula, developing lesson plans & instructional materials; instructional testing, facilitating teams, securing facilities, equipment and other resources for instruction. May supervise support staff. Certification may be required in a specialty area.¹

When Grievant assisted with video conference, some of her duties included ensuring that the speakers knew which room to go to and where the camera was located. Grievant had prior active disciplinary action consisting of a Group I Written Notice.

Grievant was one of four regional Training Coordinators who reported to the Supervisor. The Supervisor reported to the Division Director.

¹ Agency Exhibit 1.

On October 9, 2009, the Agency conducted video conference training with one lead training coordinator. Grievant and the other training coordinator were responsible for providing training support at their locations. Grievant left the training to have repairs made to her vehicle. The Division Director later told Grievant that she was responsible for training and that during her training sessions she needs to “be there.”

On February 10, 2011, the Division Director and Grievant spoke by telephone regarding a training session for which Grievant was responsible. The local health director reported to the Agency that Grievant left the training one and a half hours after it began and before it ended. The Division Director told Grievant that once she committed to training, she should expect to stay the entire time at the training. The Division Director sent Grievant an email stating, “It is not acceptable to leave an event you committed to in order to get to another [event]. You should not have asked to help if you were not able to fulfill the requirements of the task - staying to the end to take notes.”²

In April 2011, the Supervisor told Grievant that he expected that if she was coordinating training, she should attend the training. He told her that attending training was part of the role of a training coordinator.

The Agency scheduled training for July 19, 2011. The Agency hired a vendor for the presentation and assigned each regional training coordinator responsibility for facilitating a training session and serving as a secondary instructor. Four days before the training was to begin, Grievant asked to take leave on July 19, 2011. The Supervisor denied her request. The Division Director attended the training as a precaution in case Grievant did not attend the training. Grievant reported to the training but was late in her arrival. The Division Director told Grievant that she was responsible for attending training and that the Division Director would not “write up” Grievant because Grievant made an effort to be at the training even though Grievant was late.

On December 21, 2011, the Supervisor sent the regional training coordinators including Grievant an email stating:

Here is the planned schedule for the VAMRC Polycom training schedule for 2012. Please note that the RTC assignments for coordination are as follows:

April 3: Public health Education for [Medical Reserve Corp Volunteers] [Grievant] (coordinator).

For those that have not already done this, coordination involves:

Development and distribution of the flyer.

Placement of the course in TRAIN (following established process).

² Agency Exhibit 4.

Coordination (through [State Volunteer Coordinator]) of speakers and slides.

Distribution to the MRC coordinators of any handouts or other instructional materials associated with the training.

Coordination with [Video Conference Engineer] on the VC conference schedule.

Serving as point of contact for the MRC coordinator to answer all TRAIN questions and making sure that all locations are included (correctly) in TRAIN.

Coordination of sign-in sheets and ensuring that all attendees are verified in TRAIN.

Other duties as assigned.

[State Volunteer Coordinator] will work with you ahead of each session to give you details on venue, speakers, instructional materials, etc.³

On December 27, 2011, the Supervisor sent the trainers including Grievant a follow-up email stating:

All polycoms are scheduled for broadcast from 6-8 PM and [Video Conference Engineer] has already added them to the VC schedule. You will still need to coordinate with [Video Conference Engineer] as the districts set up their locations in TRAIN. We need to make sure that the TRAIN schedule and the sites listed on the VC schedule are consistent with one another.⁴ ***

On February 8, 2012, the Supervisor sent Grievant an email indicating that the State Volunteer Coordinator wanted a flyer drafted by Grievant to be sent out at least 30 days prior to the scheduled training.

The Agency scheduled a video conference presentation on April 3, 2012 for volunteers throughout the Commonwealth. Volunteers attended approximately 18 different sites to participate in the video conference. The video conference was set to begin at 6 p.m. and end at 8 p.m. Conference speakers were located at the Agency's headquarters. Grievant was expected to "attend" the video conference on April 3, 2012. She could attend by appearing at the Agency's headquarters where the speakers were located or she could attend by working from the conference room in her regional office where video conferencing equipment was available.

Prior to the conference beginning at 6 p.m., Grievant provided the Video Conference Engineer with assistance to ensure that all of the sites were connected to the video conference. Earlier in the morning, Grievant was asked to change the format

³ Agency Exhibit 1.

⁴ Agency Exhibit 1.

of the presentation and make it available to the group. She completed the task before the video conference began at 6 p.m.

Grievant did not attend the video conference. At approximately 6 p.m. on April 3, 2012, the Supervisor spoke with the Division Director and said that he did not think Grievant was assisting with the video conference. The Division Director said she would stay and provide assistance during the video conference because of Grievant's absence. The Supervisor and the Division Director assumed Grievant's duties of introducing the speakers, taking roll call, and progressing slides. In short, Grievant did not coordinate the video conference as expected by the Agency.

On April 3, 2012, the State Volunteer Coordinator was the "customer" for the video training. Grievant was expected to work with the State Volunteer Coordinator. One of Grievant's duties was to draft a flyer for the State Volunteer Coordinator describing the upcoming video conference so that the flyer could be distributed to potential viewers of the conference. Grievant had been instructed to finish the flyer at least 30 days before the date of the scheduled video conference. She did not meet the deadline but the reason for the delay was that the State Volunteer Coordinator did not provide her with the necessary content information to enable Grievant to create the flyer at least 30 days before the training.

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."⁵ 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. Grievant was instructed by the Supervisor to coordinate the video conference on April 3, 2012. Grievant could not coordinate the video conference without being in attendance. As part of that instruction, Grievant knew or should have known that she was to attend the video conference. She could have attended the video conference by driving to the speakers' location or by working in the conference room of her regional office. Grievant did not attend the video conference when it began at 6 p.m. and ended at 8 p.m. Grievant failed to follow her Supervisor's instruction thereby justifying the issuance of a Group II Written Notice.

Grievant argued that she had not been instructed to attend the April 3, 2012 video conference. Grievant's position required her to exercise judgment and act

⁵ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

independently to accomplish her duties. Although Grievant had not been specifically instructed to attend the April 3, 2012 video conference, she knew or should have known of her obligation to attend. On at least four occasions, the Supervisor or the Division Director had instructed Grievant that she was obligated to attend video conferences.

Grievant argued that for some training sessions she had not attended. For example, on February 11, 2010, she did not attend a scheduled training session because the Division Director told her that it was more important for her to attend a team meeting than attend the training session. On April 3, 2012, the Division Director did not excuse Grievant from the training session. On February 11, 2010, Grievant was excused from the training session. On April 29, 2011, Grievant was working on a volunteer coordinator training session and the Supervisor said that it was not necessary for her to attend. The Hearing Officer construes these incidents to show that the Agency's expectation was for Grievant to attend video conference training unless instructed otherwise. Given the number of times Grievant was instructed to attend video conferences, Grievant should have attended the April 3, 2012 video conference.

Grievant argued that she fulfilled the items listed by the Supervisor in his December 21, 2011 email and, thus, coordinated the training event. Although it is unclear how Grievant could coordinate slides or coordinating the sign in sheet without attending the video conference, if the Hearing Officer assumes for the sake of argument that Grievant completed all of the tasks listed, the outcome of this case does not change. The Supervisor testified that he always expected training coordinators to attend the event. Thus, it is likely he did not include the requirement of attending the training because it was implicit in the event requirement and he had counseled Grievant in the past to attend training events.

The Agency argued that Grievant failed to send out a flyer 30 days prior to the video conference date of April 3, 2012.⁶ Although Grievant failed to meet the 30 day requirement, she did so because the State Volunteer Coordinator failed to timely present Grievant with the information to draft the flyer.⁷

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"⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁶ Grievant contacted the State Volunteer Coordinator on February 16, 2012 asking, "[d]o you have anything in particular you want me to emphasize in a [TRAIN] course description and flier that I'll draft for you?" See Grievant Exhibit 15.

⁷ The State Volunteer Coordinator sent Grievant an email on March 2, 2012 providing information necessary for Grievant to draft the flyer. Grievant responded that day with her first draft of the flyer. On March 5, 2012, the State Volunteer Coordinator sent Grievant an email with her comments on Grievant's draft. See, Grievant Exhibit 23. It is clear that the State Volunteer Coordinator did not provide Grievant with the flyer content far enough in advance of 30 days prior to April 3rd to allow Grievant the opportunity to submit a final draft to the State Volunteer Coordinator.

⁸ *Va. Code § 2.2-3005.*

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 argued that the Agency's disciplinary action was in violation of the settlement agreement she reached with the Agency on November 15, 2011. If, in fact, the Agency breached the settlement agreement, that is a matter that would be resolved outside of the grievance process. Whether the Agency failed to comply with the expectations it created in the settlement agreement, however, could be mitigating circumstances.

Grievant received a Group III Written Notice on July 8, 2011. She filed a grievance to challenge that disciplinary action. The discipline was reduced to a Group I Written Notice as part of the Third Step. To resolve the grievance, the parties entered into a Grievance Settlement Agreement providing, in part:

Within 20 work days of the date of this Agreement, [Grievant] and her supervisor will complete a workplan that will address the following items:

- a. Describe the required planning and assessment prior to initiation of work required activities.
- b. Articulate clear performance expectations for her position.
- c. Clarify the process to assure ongoing information feedback with opportunities for self-correction.

Grievant argued that the "[Supervisor] issued me a 'work plan' that did not comply with the Settlement Agreement, that he designed alone rather than with me, that he produced within 45 days rather than the required 20, and within two months he completely abandoned the practice of issuing any work plans whatsoever"⁹ The evidence showed that the Supervisor provided Grievant with several workplans. Although those workplans may not have been of the quality expected by Grievant since she did not participate in their creation, the settlement agreement does not address the mechanics of developing the workplan. In addition, the settlement agreement refers to "a workplan" not several workplans. Although the settlement agreement required the Agency to draft a workplan within 20 day and the Agency failed to do so, that mistake is harmless error. Grievant was given a workplan prior to the April 3, 2012 training session.

⁹ Agency Exhibit 4.

The Supervisor began frequent, sometimes weekly, meetings with Grievant to discuss her work expectations. Thus, the Agency satisfied the expectation it created for Grievant under the settlement agreement.

Grievant argued that she was not given an opportunity to self-correct. There was no opportunity to self-correct. Grievant was expected to be assisting with the video conference beginning at 6 p.m. She was absent from the training. It would not have been possible for the Agency to notify Grievant that she was not attending the training and then re-start the training so she could participate from the beginning. The Agency did not afford Grievant an opportunity to self-correct because no such opportunity was feasible once the program began.

The Agency's actions met the expectations it created for Grievant under the settlement agreement.

Grievant argued that the Agency singled her out for disciplinary action because it treated another employee, Ms. M, differently. Grievant argued that Ms. M failed to draft her flyer at least 30 days prior to video training for which she was responsible.¹⁰ This argument is moot. Given that the Agency has not established that Grievant was responsible for failing to meet the 30 day deadline, it is not significant whether the Agency failed to discipline Ms. M.

In light of the standard set forth in the Rules, 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 II 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:

¹⁰ The Agency asserted that Ms. M's deadline was changed and, thus, she did not fail to meet the deadline.

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.¹¹

[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

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.