

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 03/29/13; Decision Issued: 04/23/13; Agency: DGS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10035; 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: 10035

Hearing Date: March 29, 2013
Decision Issued: April 23, 2013

PROCEDURAL HISTORY

On December 13, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor's instructions by not reporting to her assigned building on a nightly basis.

On January 11, 2013, 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 March 4, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 29, 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 Department of General Services employs Grievant as a Cleaning Services Manager. The purpose of her position is "to provide a clean, safe and healthy environment for tenants occupying facilities by the Commonwealth of Virginia."¹ She has been employed by the Agency for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's usual work shift is from 3:45 p.m. to 11:45 p.m.

On December 10, 2012, the Manager instructed the Supervisor to have Grievant verify unoccupied space in M Building. He instructed the Supervisor to make sure that Grievant understood she was to verify that space personally. Grievant's Supervisor asked her to check the rooms in the M Building. The Supervisor told Grievant that the Supervisor needed the information the next day and to send a report back indicating the status of the rooms.

Grievant had a "flare-up" of her medical concern.² Grievant did not inform the Supervisor of her flare-up. To ensure that the rooms were checked in M Building,

¹ Grievant Exhibit 6.

² Grievant had a history of using family medical leave when she felt necessary to address her flare-ups.

Grievant called the Custodial Contract Supervisor, Mr. B, to verify the unoccupied space. She said she would meet Mr. B at M Building, but Grievant did not go to M Building. At approximately 6 p.m., the Custodial Contractor Supervisor informed the Manager that Grievant called him on his cell phone and instructed him to verify the unoccupied space in M Building. The Custodial Contractor Supervisor is not a State employee and would not normally perform Grievant's duties.

On December 10, 2012, Grievant sent an email to the Supervisor stating:

[Building number for M Building]

- a) Checked the areas to see if they were occupied with tenants.
 - 1) 305 – no one is on the floor area
 - 2) 320 – the contractors that are working in the building is using this floor
 - 3) 330 – the contractors that are working in the building are using this floor
 - 4) 750 – no one is on this floor area is taking place
 - 5) 1601 – remodeling this floor area is taking place
 - 6) 1750 – remodeling this floor area is taking place
 - 7) 1751 – remodeling this floor area is taking place
 - 8) 1919 – this area is occupied by tenants.

All other areas went well, there were no special projects going being worked on that I was aware of in my travels throughout the complex tonight.³

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."

Failure to follow a supervisor's instructions is a Group II offense.⁵ Grievant was instructed by her supervisor to physically inspect office space in a building and report

³ Agency Exhibit 2.

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.

regarding her observations. Grievant did not walk to the building and observe the office space. Instead, she obtained the information from another person who worked in the building. Grievant failed to comply with a supervisor's instructions thereby justifying the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's five work day suspension must be upheld.

The Agency alleged that Grievant failed to report to her assigned buildings on a daily basis as required.⁶ The Agency showed that Grievant did not "swipe in" at various buildings on many days of the week. This argument fails. Grievant's shift began at 3:15 p.m. when many of her buildings were open to the public. She could enter them without using her badge. If she entered a building without using her badge, the Agency's database would not record her as being present even though she was inside an assigned building. The Agency's evidence is not sufficient to support its allegation.

Grievant argued that the Agency violated the Americans with Disabilities act by taking disciplinary action against her. The ADA addresses the need for an accommodation but does not prohibit an employer from taking disciplinary action against an employee who violates the standards of conduct. The Agency afforded Grievant family medical leave when she experienced difficulties relating to her medical condition.

Grievant argued that the Supervisor had been harassing her. No credible evidence was presented showing that the Supervisor harassed Grievant because of a protected status such as race, gender, etc. What Grievant describes as harassment is better described as conflicts between Grievant and the Supervisor based on differences in expectations for Grievant's work duties and performance. There is no reason to believe that any conflict between Grievant and the Supervisor inappropriately influenced the Agency's decision to take disciplinary action. The instruction for Grievant to inspect office space in M Building was at the initial request of the Manager. The Supervisor was merely relaying the Manager's instruction. The Manager issued the Written Notice without being unduly influenced by the Supervisor.

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"⁷ 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

⁶ The Agency reviewed the Cardholder Transaction History Report for November 12, 2012 through December 11, 2012.

⁷ Va. Code § 2.2-3005.

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’s medical condition must be addressed with respect to the mitigation of disciplinary action. There are both mitigating and aggravating circumstances in this case. Grievant’s medical condition resulted in a “flare-up” that “was so bad that I got sidetracked from the pain and was unable to meet [the Custodial Contractor Supervisor] at the building.”⁸ To the extent Grievant’s medical condition prevented her from performing her duties, it was a mitigating circumstance. Aggravating circumstances exist to counter the mitigating circumstances. Grievant did not mention to her supervisor that her medical condition prevented her from walking to the building. The Supervisor stated that “[n]ormally when [Grievant] isn’t feeling well during the night she calls me on my phone and asks if she could leave work early. On Dec 10th [Grievant] didn’t call or go home.”⁹ She left the Supervisor with the impression that she actually visited the building. On December 11, 2012, Grievant reported no projects were being worked on “in my travels, throughout the complex tonight.”¹⁰ Grievant’s attempt to ensure that the Agency did not know she had not visited M Building is an aggravating circumstance. When the mitigating and aggravating circumstances are considered in this case, the Agency’s disciplinary action must be upheld.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension 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:

⁸ Agency Exhibit 2.

⁹ Agency Exhibit 2.

¹⁰ Agency Exhibit 2.

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.