

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 05/20/13;
Decision Issued: 05/21/13; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10066; 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: 10066

Hearing Date: May 20, 2013

Decision Issued: May 21, 2013

PROCEDURAL HISTORY

On January 10, 2013, Grievant received a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On February 8, 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 April 24, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 20, 2013, 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 Department of Alcoholic Beverage Control employs Grievant as a Special Agent at one of its locations. She began working for the Agency in August 1993. Except for the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency.

In 2009, Grievant was assigned responsibility for completing a financial investigation of Business C. She was assigned the investigation because of her expertise. She was slow in conducting the investigation and it had not been completed after 1300 days. Most cases are completed in 45 days.

On April 19, 2012, Special Agent in Charge 1 (SAC1) sent Special Agent in Charge 2 (SAC2) an email stating, in part:

What I would like your attention on is the [Business C] Financial Investigation case that was started in 2008. Please have [Grievant] bring this case to a logical conclusion by the end of August 31, 2012.¹

SAC2 met with Grievant and instructed her to make the Business C review a priority and to complete the work by July 31, 2012. Grievant made little progress in her review of Business C.

¹ Agency Exhibit 7.

On June 26, 2012, SAC2 sent Grievant an email stating:

Back in April I spoke with you on [Business C] investigation [number] and I advised you then to make this investigation a **PRIORITY**. This case is over thirteen hundred days old. After reviewing the case in CMS today I have found no progress has been made. This is unacceptable, therefore, I'm instructing you to write a memo thru me to [SAC1] updating the status of this investigation by the close of business on Wednesday (June 27, 2012). If you have any questions feel free to call.² (emphasis original).

On June 27, 2012, Grievant drafted a memorandum to SAC1 through SAC2 stating, in part:

[Grievant] has reviewed and analyzed all documents for April 1, 2006 through March 31, 2009. The narrative for this period has been entered into CMS. Analysis of the [Mixed Beverage Annual Review] for the years ending March 31, 2010, 2011, and 2012 has been completed and the indications are that the license has underreported sales for the years ending March 31, 2010, 2011, and 2012. Based on the sales and purchases reported on the MBAR, the licensee has underreported Food and Non-Alcoholic Beverages, Mixed Beverages, and Wine and Beer Sales.³

On July 11, 2012, SAC2 sent Grievant an email stating, in part:

Also, after reviewing your investigative report, it appears to me you should have this investigation completed by the 31st of July 2012.⁴

On July 12, 2012, Grievant sent SAC2 and email stating:

I am not planning on auditing the 2010, 2011, and 2012 MBARs for [Business C] but this may be prudent for the assigned agent.⁵

SAC2 replied:

Following our brief conversation yesterday 7/12/2012, you would need to complete this investigation. It would not be fair to bring another agent in to take over [a] case you've been working on for two to three years.⁶

² Agency Exhibit 7.

³ Agency Exhibit 7.

⁴ Grievant Exhibit 2.

⁵ Agency Exhibit 7.

⁶ Agency Exhibit 7.

On July 24, 2012, Grievant sent a memorandum to SAC1 through SAC2 stating in part:

Please be advised the above audit will not be completed by July 31, 2012, as requested in your emails from July 11, and 13, 2012. The audit will not be completed because I will be on Annual leave between July 25, 2012 and August 6, 2012. However, I am providing an update on what has been completed between July 13 and 24, 2012.

I project completing the above audit by August 31, 2012, provided the requested information is provided and no other issues arise. In order to complete the audit, I have advised [SAC C], [SA G] that I will not be able to teach the new agents financial investigations or ownership investigations, due to time constraints.⁷

Grievant did not complete the investigation of Business C by July 31, 2012 or August 31, 2012. In October 2012, SAC1 asked SAC2 for a status of the case. In November 2012, SAC2 sent SAC1 an email saying he had spoken with the Director and SAC1 was to follow up with the discipline. SAC1 consulted with Agency managers and human resources staff and issued a Group I Written Notice after giving Grievant an opportunity to respond to the proposed disciplinary action.

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.”⁸ 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.⁹ In 2009, Grievant was assigned responsibility to complete an investigation of Business C. In April 2012, SAC2 instructed Grievant to make the Business C investigation a priority and complete the work by July 31, 2012. On July 11, 2012, Grievant was reminded of

⁷ Agency Exhibit 7.

⁸ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁹ See, Attachment A, DHRM Policy 1.60.

the July 31, 2012 deadline. Grievant insisted she could complete the task by August 31, 2012. Grievant did not meet the July 31, 2012 deadline nor completed the task by August 31, 2012. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency reduced the disciplinary action to a Group I Written Notice which must be upheld.

Grievant argued that there was a failure of communication between her and her supervisors. The evidence showed, however, that SAC2 clearly instructed Grievant to make the Business C investigation a priority and that he reminded her of the instruction on July 11, 2012

Grievant argued that she could not complete the investigation timely because she lacked necessary documents. The evidence showed that to the extent Grievant's assertion is true, it is because she delayed requesting necessary documents. No credible evidence was presented showing that in April 2012 Grievant began requesting documents that she did not have received before July 31, 2012. Grievant did not seek additional documents such as wine, beer, and liquor invoices until July 12, 2012. If Grievant had made the Business C investigation a priority, she should have requested that information several months before July 12, 2012.

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"¹⁰ 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 her workload was excessive. Grievant asserted that she had taken on additional territories and was not able to complete the assignment. This argument does not affect the outcome of this case. Grievant was assigned responsibility for the investigation in February 2009. In April 2012, SAC2 instructed Grievant that the Business C investigation was her priority. If she had an excessive workload, she should have delayed other investigations and not the case for which she had been assigned priority. The fact that Grievant delayed the Business C investigation in order to complete her other assignments showed that she did not make the Business C investigation her

¹⁰ *Va. Code § 2.2-3005.*

priority. Nevertheless, the Agency considered Grievant's case load when determining the appropriate level of disciplinary action.

Grievant argued that SA J was the case agent for Business C yet he was not disciplined. The Agency showed that the responsibilities of SA J and Grievant were different and that SA J had not been instructed to complete the financial investigation of Business C by July 31, 2012.

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 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.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.