

Issues: Group I (unsatisfactory performance), Group I (unsatisfactory performance), Group II (failure to follow instructions), Group II (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 04/07/14; Decision Issued: 04/18/14; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10278, 10279, 10280; 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: 10278 / 10279 / 10280

Hearing Date: April 7, 2014
Decision Issued: April 18, 2014

PROCEDURAL HISTORY

On September 18, 2013, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance. On September 18, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On October 18, 2013, Grievant was issued a Group I Written Notice for unsatisfactory performance. On November 18, 2013, Grievant was issued a Group II Written Notice for failure to follow instructions and/or policy. She was removed from employment effective November 18, 2013 based upon the accumulation of disciplinary action.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes, of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On January 28, 2014, the Office of Employment Dispute Resolution issued Ruling No. 2014-2798, 2014-2799, 2014-2800 consolidating the grievances for a single hearing. On February 11, 2014, EDR assigned this appeal to the Hearing Officer. The hearing was originally scheduled on March 17, 2014 but rescheduled due to inclement weather. On April 7, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 an Administrative Office Specialist. Grievant began working with the Department on July 30, 2012. She received on-the-job training and then was moved to the "main desk" in May 2013. Grievant reported to the Supervisor.

Grievant had prior active disciplinary action. On August 30, 2012, Grievant received a Group I Written Notice of disciplinary action for failure to follow instructions and/or policy.

Grievant supported three functional areas in her department. She served as the receptionist who answered the telephone and completed projects as needed. One section of the Department was Student Finance. Grievant was to check to ensure that students had properly completed their financial paperwork and then send the

documents to the finance section. If the documents were not properly completed, Grievant was to return them to the students.

Grievant's unit served as "Grand Central Station" because it was the place where students and visitors would go when they had questions and were not sure what they needed. The unit provided services to over 500 student organizations. If Grievant was asked a question for which she did not know the answer, she was expected to ask the Supervisor or three other professional staff in the unit.

On May 3, 2013, Grievant received a Notice of Improvement Needed setting forth an Improvement Plan:

You are required to listen carefully to instructions and follow them. Following instructions as given will increase productivity, reduce confusion and help with the successful operations of the Department.

You are also required to understand the functions and services provided in this department and each encounter must be thoughtful, professional and courteous.

Should you encounter situations that you are unsure about, rather than making assumptions and initiating confusing processes, you are to seek assistance. You are not to be argumentative, however, I expect you to ask questions when clarity is needed.

You should observe and note how the department works and how our office fits into the bigger picture. This will help you have a better context of the overall operations of the Department and better prepare you to assist the students and staff. For example this should lead you to be able to answer more questions accurately. I suggest that you take steps to clarify what you have told people and be certain that they understand what you have said.¹

On May 6, 2013 and May 8, 2013, students asked Grievant about storage available for their organizations. Grievant's answers were unclear and confusing to the students. She did not seek assistance from the Supervisor or anyone else in the unit to answer the students' questions. Grievant should have been able to answer the students' questions because she and the Supervisor had had a detailed discussion regarding student organizations storage.

On May 10, 2013, the Supervisor instructed Grievant to keep the ringer on her telephone turned up so it could be heard when someone called Grievant's telephone.

¹ Agency Exhibit 6.

On May 30, 2013, grievant was sitting at her desk when the telephone rang. She did not answer the telephone. Answering the telephone was one of Grievant's primary duties.

On June 10, 2013 the Director requested that everyone in the Department attend three book club meetings and that they complete a strengths assessment. Grievant was reminded of this expectation on June 17, 2013 and June 19, 2013. Grievant did not attend any book club meetings or complete a strengths assessment.

On August 19, 2013, Grievant had turned down the ringer on her telephone. When people called Grievant's telephone number, the telephone ringer could not be heard.

On August 21, 2013, Grievant was at her desk speaking with the Employee. The telephone rang and Grievant answered the call. The caller asked to speak with the Employee. The Employee asked Grievant who was calling. Grievant told the Employee she could not ask that question to the caller. Grievant told the caller that the Employee was busy even though the Employee was not busy and was standing directly in front of Grievant. The caller later emailed the Supervisor and said the caller had been calling all week and had not gotten an answer to the caller's question.

The Department had a "generic" email account. Grievant was responsible for checking the email account and taking appropriate action. On June 11, 2013, the Supervisor questioned Grievant as to why she had not checked the email account every day. Grievant should have understood that the Supervisor expected Grievant to check the email account on a daily basis. On August 22, 2013, the Supervisor observed that Grievant had not checked the generic email account since August 12, 2013.

From September 23, 2013 through October 4, 2013, the Supervisor received several complaints regarding Grievant's work performance. Grievant provided at least seven students with incorrect information regarding financial paperwork for student organizations. Grievant had been given a financial checklist outlining the step-by-step process for how student financial paperwork was to be completed. She did not follow the checklist.

During the week of September 23, 2013, the Supervisor asked Grievant to place an order for white and color copy paper. Grievant placed the order with the Office Manager but Grievant's description of the order caused confusion. The Office Manager spoke with Grievant to clarify the order but Grievant failed to clarify the order. The Office Manager placed an order using her best guess as to what was needed.

In August 2013, the Supervisor gave Grievant a checklist and instructed Grievant to use the checklist when reviewing financial paperwork submitted by students. On November 6, 2013, a graduate student presented Grievant with financial paperwork. Grievant refused to accept the package of financial forms without first applying the checklist. The graduate student went to the Assistant Director of Finance who reviewed

the paperwork and concluded it was correct. If Grievant had utilized the checklist she would have realized that the paperwork was correct.

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.”² 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.³ 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.

Failure to follow a supervisor’s instruction is a Group II offense.⁴

Group I Written Notice Issued on September 18, 2013.

On May 3, 2013, Grievant received a Notice of Improvement Needed requiring her to immediately improve her listening skills and ability to follow directions, understand the functions and services provided by the Department, and seek assistance when she encounter situations for which she was unsure how to respond. Grievant’s work performance did not improve after May 3, 2013. She continued to make mistakes involving failure to follow instructions and understanding the functions of the Department. She gave confusing answers to students about student organizations storage. She failed to answer her telephone even though answering the telephone was one of her primary duties. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice of disciplinary action.

Group II Written Notice Issued on September 18, 2013.

Grievant was responsible for checking the Department’s “generic” email account on a daily basis. Grievant failed to check the email account from August 12, 2013 until August 22, 2013. The Director instructed grievant to attend three book club meetings. She failed to attend any meetings. On May 10, 2013, the Supervisor instructed Grievant to keep the ringer on her telephone on all the time to hear incoming telephone

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See Attachment A, DHRM Policy 1.60.

⁴ See Attachment A, DHRM Policy 1.60.

calls. On August 19, 2013, grievant had turned down the ringer on her telephone such that she could not hear incoming telephone calls. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

Group I Written Notice Issued on October 18, 2013.

From September 23, 2013 through October 4, 2013, Grievant failed to properly resolve several questions posed by students. The Supervisor received several complaints regarding Grievant's work performance. Grievant provided inaccurate information to several students. The Supervisor asked Grievant to place an order for white and color copy paper. Grievant spoke with the Office Manager to place the order. Grievant was unable to clearly communicate to the Office Manager the nature of the order. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice of disciplinary action for unsatisfactory work performance.

Group II Written Notice Issued November 18, 2013.

Grievant was provided with and instructed by the Supervisor to use a checklist when reviewing financial documents submitted by students. On November 6, 2013, a graduate student presented Grievant with financial paperwork. Grievant did not use the checklist. She refused to accept the graduate student's paperwork. If she had used the checklist, she would have realized that the paperwork was correct. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

The Agency asserted that Grievant failed to follow a supervisor's instruction because she failed to register for one of several courses at a local community college. When Grievant attempted to register for the courses several days later, the courses were no longer open for enrollment. The Agency did not establish how long the courses were open for enrollment. It is unclear whether Grievant had a sufficient amount of time to enroll in a class before enrollment closed. Grievant's failure to enroll in a course does not form a basis for disciplinary action. There remains, however, sufficient evidence to support the issuance of a Group II Written Notice for failure to use the financial checklist.

Accumulation of Disciplinary Action.

Upon the accumulation of four Group I Written Notices, an Agency may remove an employee. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant had prior active disciplinary action consisting of a Group I Written Notice. She has now accumulated two Group II Written Notices and three Group I Written Notices. The Agency has presented sufficient evidence to support its decision to remove Grievant from employment based upon the accumulation of disciplinary action.

Grievant argued that the Supervisor was biased against her when she first joined the Department. Grievant was laid off from another unit within the Agency but was rehired in July 2012 when a position in the Department became available. The Supervisor had no choice but to receive Grievant as the employee for the open position. The evidence showed, however, that the Supervisor communicated her expectations to Grievant and that Grievant failed to comply with those expectations thereby justifying the issuance of disciplinary action.⁵

Grievant argued that she did not receive adequate training to perform her job duties. The evidence showed that Grievant received on-the-job training. She received instructions from her Supervisor. Much of the disciplinary action against her resulted from her failure to follow instructions and was not based on a lack of training.

Grievant denied many of the allegations against her. The testimony of the Supervisor was credible and the Agency has presented sufficient evidence to support the disciplinary actions.

Grievant argued that she satisfied the Agency's expectations with respect to her work performance. She presented evidence of a Former Supervisor who worked with Grievant for approximately 4 years and viewed Grievant's work performance favorably. This evidence is insufficient to rebut the Agency's allegations because it involved Grievant's work performance prior to 2013.

Grievant argued that she was often very busy and was unable to perform some of her duties such as checking the "generic" email account. Insufficient evidence was presented for the Hearing Officer to conclude the Grievant's work duties were so extensive as to prevent her perform her regular work duties.

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

⁵ Grievant also argued that the Supervisor discriminated against her based on her race. No credible evidence was presented to support this allegation.

⁶ *Va. Code § 2.2-3005.*

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.

DECISION

For the reasons stated herein, the Agency's issuance on September 18, 2013 to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance on September 18, 2013 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance on October 18, 2013 to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance on November 18, 2013 of a Group II Written Notice is **upheld**. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

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.