

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 04/09/14; Decision Issued: 04/15/14; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10303; Outcome: No Relief – Agency Upheld; **Administrative Review:** **EDR Ruling Request received 04/29/14; EDR Ruling No. 2014-3877 issued 05/14/14; Outcome: Remanded to AHO; Remand Decision issued 05/20/14; Outcome: Original decision affirmed; EDR Ruling Request on Remand Decision received 06/03/14; EDR Ruling No. 2014-3901 issued 06/24/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/29/14 (original decision, and on 06/03/14 (remand decision); DHRM Ruling issued 06/19/14; 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: 10303**

Hearing Date: April 9, 2014  
Decision Issued: April 15, 2014

### **PROCEDURAL HISTORY**

On October 17, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and/or policy.

On November 15, 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 he requested a hearing. On March 10, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 9, 2014, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Agency Counsel  
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 Tech employs Grievant as a Laboratory Specialist, Senior. He has been employed by the University for approximately 9 years. No evidence of prior active disciplinary action was introduced during the hearing.

Virginia Tech receives Federal funding for many of its research projects. In order to continue receiving Federal grants, the University must ensure its staff are properly trained in accordance with Federal requirements. In order to satisfy the Federal requirements, Grievant and others holding similar positions were expected to receive civil rights training. The University considered the training to be mandatory.

Virginia Tech scheduled mandatory training for Grievant and several of other employees on September 20, 2013. The training was to be held before a teacher in a room on the University’s campus. Grievant was sent four or five emails reminding him of the training and his obligation to attend. For example, the Department Head sent Grievant and other staff an email on September 12, 2013 stating:

All faculty and staff will be required to demonstrate participation in civil rights training this year. It can be accomplished on-line but there are numerous lengthy modules and non-trivial quizzes associated with going the on-line route.

To facilitate quicker compliance and avoid quizzes, I have arranged to have the compliance training offered for our PPWS department staff on Friday, September 20 at 1 PM in [location]. (Faculty will do the same in one of our upcoming faculty meetings).

There will also be a Department-sponsored lunch that day.

One of the items to be discussed at the lunch is a potential staff retreat for this year. I have offered to support a PPWS staff professional development activity and I would like the staff to decide what would be most beneficial to the group.<sup>1</sup>

The training was held on September 20, 2013 as scheduled. Grievant forgot about the training and failed to attend. He performed his regular work duties in the laboratory while the training was given.

When Grievant worked in the laboratory, he reported to the Post-doc. On September 24, 2013, Grievant was asked to prepare an amino acid solution. He had forgotten how to properly prepare the solution. Grievant made a batch. The Post-doc observed that Grievant had incorrectly prepared the batch and instructed Grievant not to use the first batch as part of the experiment. Grievant disregarded the instruction and continued using the batch. The Post-doc continued insisting that Grievant dispose of the batch and start over. Grievant disposed of the bath.

Grievant worked in two laboratories at the University. In May 2013, his work shift began at 8:15 a.m. He continued to report to work late so his supervisor began delaying the start of his work shift. In September 2013, Grievant's work shift began at 9 a.m. He continued to report to work after the beginning of his shift.

## **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."<sup>2</sup> 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.<sup>3</sup> Grievant was instructed by a supervisor to attend mandatory training scheduled for September 20, 2013. Grievant failed to attend the training without justification. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instruction.

The Agency also alleged that Grievant failed to comply with the Post-doc's instructions. The evidence showed that the Post-doc was abrasive, disrespectful, and confrontational in her interaction with Grievant. She called Grievant "stupid" and

---

<sup>1</sup> Agency Exhibit 3.

<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

displayed anger towards him. The Post-doc's inappropriate behavior may have influenced how Grievant may have otherwise reacted to a supervisor's instruction. Grievant's failure to follow the Post-doc's instruction does not form a basis for disciplinary action.

The Agency alleged that Grievant should receive a Group II Written Notice for tardiness. Tardiness is a Group I offense. The University was unable to present evidence showing the dates Grievant was tardy and the amount of time he reported late to work. A general reputation for being tardy is not a sufficient basis to support disciplinary action. The evidence is insufficient to support disciplinary action.

*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 ...."<sup>4</sup> 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. 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 to the Grievant of a Group II Written Notice of disciplinary action for failure to follow instructions 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 14<sup>th</sup> St., 12<sup>th</sup> Floor

---

<sup>4</sup> Va. Code § 2.2-3005.

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>5</sup>

[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

---

<sup>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 10303-R**

Reconsideration Decision Issued: May 20, 2014

**RECONSIDERATION DECISION**

On May 14, 2014, the EDR Division Director remanded the grievance to the Hearing Officer and wrote:

While this evidence supports a conclusion that the University mandated some type of civil rights training during the year, it is less clear that the language of the three emails conveyed a mandatory instruction to the grievant.

The email sent by the Department Head states that the training may also be accomplished on-line, but that she has scheduled a training to "facilitate quicker compliance and avoid quizzes." Although the language of the email indicates that she considers the meeting to be a preferable means of training, at no point does the text of the email advise staff that the September 20, 2013 meeting is mandatory. Further, the two emails from the Graduate and Communications Coordinator arguably suggest, through the use of an RSVP process, that employees could decline the invitation to the training and meeting. Given this record evidence, additional clarification is needed of the hearing officer's conclusion that the grievant failed to attend mandatory training.

The hearing officer's conclusion that the grievant received "four or five emails reminding him of the training and his obligation to attend" similarly warrants additional clarification. Although the University has offered various characterizations of the number of reminders sent to the grievant, the Written Notice and the documentation entered into evidence by the agency support only three communications regarding the September 20, 2013 training: the two September 12, 2013 emails initially advising the grievant of the training and the means by which he could

RSVP, and one follow-up email from the Graduate and Communications Coordinator on September 16, 2013.

Finally, the grievant asserts, in effect, that he was given conflicting instructions regarding September 20, 2013, and that the hearing officer erred in not considering this argument. In his decision, the hearing officer found that the grievant had forgotten the training and instead performed his regular work in the lab. While the grievant's communication to the Department Head about the training suggested that he had forgotten to attend, evidence at hearing also suggested that the individual directing his work on that day had not been advised by the Department of the September 20, 2013 training or that the grievant's attendance was required; that the grievant was scheduled to perform one or more experiments on the day of the training; that he may have been unfamiliar with the experiment(s) in question; and that some experiments could last for a full day. As these circumstances could arguably provide a justification for the grievant's failure to attend the training, clarification by the hearing officer of his findings is warranted on this basis as well.

The hearing decision is therefore remanded to the hearing officer for further consideration consistent with this ruling. In his decision on remand, the hearing officer should provide clarification and explanation of his conclusion that the grievant failed to attend a mandatory training event on September 20, 2013; that his failure to attend the training was without justification; and that his actions warranted a Group II Written Notice for failure to follow policy and/or instructions. However, the determination of whether the hearing officer has correctly applied policy will ultimately be a matter within the sole authority of DHRM.

Failure to follow a supervisor's instructions is a Group II offense. An agency is not obligated to use specific words or phrases such as "you are instructed" or "mandatory training" to establish that an employee failed to follow a supervisor's instruction. It is sufficient if a supervisor conveys to a subordinate that he or she is expected by the supervisor to engage in behavior that is described and identified with sufficient specificity that the employee should reasonably understand that he or she is receiving an instruction. It is not unusual for supervisors to avoid using dictatorial language while conveying a message that a subordinate otherwise would reasonably understand as an instruction. This is especially true among agencies attempting to foster a collegial and professional atmosphere among staff.

The University held workshop training on September 20, 2013 in a room on the University's campus. The training was conducted by an instructor. The training lasted approximately one hour. About a dozen employees holding positions similar to Grievant's position attended the training as required. Grievant was at work on September 20, 2013 but did not attend because he forgot about the training.

Grievant received ample instruction of his obligation to attend the workshop. On September 12, 2013 at 11:58 a.m., the Graduate & Communications Coordinator, Mr. T, sent all wage and salaried regular staff, including Grievant, an email stating:

Please mark your calendar for Friday, September 20<sup>th</sup> from 12:00 p.m. until 2:00 p.m. for the Fall Staff Luncheon hosted by [Dr. G] followed by the new university **required** Civil Rights Training **workshop.**" \*\*\* (Emphasis added).<sup>6</sup>

On September 12, 2013 at 12:59 p.m., the Department Head, Dr. G, sent Grievant and other staff an email stating:

All faculty and staff will be **required to demonstrate participation** in civil rights training this year. It can be accomplished on-line but there are numerous lengthy modules and non-trivial quizzes associated with going the on-line route.

To facilitate quicker compliance and avoid quizzes, I have arranged to have the compliance training offered for our PPWS department staff on Friday, September 20 at 1 PM in [location]. (Faculty will do the same in one of our upcoming faculty meetings).

There will also be a Department-sponsored lunch that day.

One of the items to be discussed at the lunch is a potential staff retreat for this year. I have offered to support a PPWS staff professional development activity and I would like the staff to decide what would be most beneficial to the group.<sup>7</sup> (Emphasis added).

On September 16, 2013, Mr. T sent staff including Grievant a second email stating:

Please mark your calendar for Friday, September 20<sup>th</sup> from 12:00 p.m. until 2:00 p.m. for the Fall Staff Luncheon hosted by [Dr. G] followed by the new university **required** Civil Rights Training **workshop.**" \*\*\* (Emphasis added).<sup>8</sup>

The University notified Grievant that the workshop was mandatory. Mr. T wrote two emails using the word "required" to describe the workshop training.<sup>9</sup> Dr. G wrote

---

<sup>6</sup> Agency Exhibit 3.

<sup>7</sup> Agency Exhibit 3.

<sup>8</sup> Agency Exhibit 3.

<sup>9</sup> The fact that Mr. T attached an RSVP survey to his email is not a basis to conclude that attendance at the training was not required. A copy of the survey questions was not presented. The survey may have been to assist with administrative organization of the training, select meals for the luncheon or for some other unknown reason.

that staff (including Grievant) were “required to demonstrate participation” in civil rights training.

Grievant was notified at least three times that the training would be held on September 20, 2013. Because of the importance of his attendance, he was advised to mark that date on his calendar. The number of times Grievant was reminded of the training date is significant. By sending Grievant at least three emails notifying him of the date of the workshop, the University emphasized the importance of his attendance.<sup>10</sup>

Grievant knew that the training was mandatory. In his November 14, 2013, response, Grievant wrote “I did miss the mandatory civil rights training.”<sup>11</sup>

Dr. G and Mr. T notified Grievant of the date, time and location of the training.

Grievant was not given the option of taking the training online. None of the reminders conveyed to him an option of taking online training at his leisure. The required training was described as a “workshop” not as an online module.

In her email, Dr. G wrote:

It can be accomplished on-line but there are numerous lengthy modules and non-trivial quizzes associated with going the on-line route.

To facilitate quicker compliance and avoid quizzes, I have arranged to have the compliance training offered for our PPWS department staff on Friday, September 20 at 1 PM in [location].

Although Dr. G refers to online training, she is not authorizing employees to take online training in lieu of the September 20<sup>th</sup> workshop. She is describing her reasoning for avoiding online training. She states that online training has “quizzes” and that in order to “**avoid** quizzes, I have arranged to have the compliance training offered ... on Friday, September 20 at 1 PM.” (Emphasis added). In other words, Dr. G is explaining that in order to avoid online training (avoid quizzes), she has scheduled training at a specific location on a specific date and at a specific time.

When the facts are considered as a whole, it could not be clearer that Dr. G instructed Grievant (as well as other staff) to attend a workshop on September 20, 2013 at 1 p.m. on the University’s campus. Grievant failed to comply with that instruction thereby justifying the issuance of a Group II Written Notice.

---

<sup>10</sup> Although the University only produced three emails regarding the training, Dr. G testified that Grievant may have received additional alerts and notifications up to five times. Her testimony was credible.

<sup>11</sup> Agency Exhibit 7.

Grievant argued that he did not receive an email on the day of the training to remind him to attend the training. After Grievant missed the training, he sent an email to Dr. G stating:

I missed the meeting today. I didn't receive a reminder, yesterday or this morning. What should I do, now?

Dr. G responded:

I'm guessing there were at least 3 or 4 reminders sent out over the past few weeks about the staff meeting. It is your responsibility to keep a calendar. And frankly, it is also your responsibility not to blame your absence on somebody else not sending you a 5<sup>th</sup> reminder.<sup>12 \*\*\*</sup>

Dr. G's expectation of Grievant was reasonable. If Grievant had marked the training date on his calendar and checked his calendar that day, he likely would have remembered his obligation to attend training.

Grievant argued that his position was unique because he worked in two labs during the week and sometimes had to perform experiments that lasted all day. The evidence showed, however, that approximately 12 other employees holding positions similar to Grievant's position attended the required training. Their responsibility to work in two labs and perform day long experiments did not prevent them from attending the training.

He argued that his supervisors had not been notified that he would have to leave their labs to attend the training. Whether Grievant's lab supervisors were notified that Grievant had scheduled training is irrelevant. Presumably, Grievant could have informed them of his obligation to leave their labs and report to the training as instructed.

Upon reconsideration, the Group II Written Notice issued to Grievant must be upheld.

## **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

---

<sup>12</sup> Agency Exhibit 9.

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer