

Issues: Group II Written Notice (insubordination, failure to follow instructions, unsatisfactory performance and breach of confidentiality), and Termination (due to accumulation); Hearing Date: 05/14/14; Decision Issued: 06/02/14; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10311; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 06/13/14; EDR Ruling No. 2014-3914 issued 07/11/14; Outcome: AHO’s decision affirmed;** **Administrative Review: DHRM Ruling Request received 06/13/14; DHRM Ruling issued 07/08/14; 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: 10311**

Hearing Date: May 14, 2014

Decision Issued: June 2, 2014

#### **PROCEDURAL HISTORY**

On February 4, 2014, Grievant was issued a Group II Written Notice of disciplinary action for insubordination, failure to follow instructions and/or policy, unsatisfactory performance, and breach of confidentiality. Grievant was removed from employment based upon the accumulation of disciplinary action.

On March 4, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 26, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Attorney  
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 Community College System employed Grievant at one of its colleges as its Director of Admissions and Records. She began working for the Agency in 2008. Grievant received favorable performance evaluations. Grievant had prior active disciplinary action consisting of a Group II Written notice issued June 21, 2012.

Grievant reported to Ms. G who reported to Mr. S.

The Agency employed a part-time Graduation Coordinator to assist with its graduation procedures and practices. Ms. M served as the part-time Graduation Coordinator. She was competent in her duties and well-liked and respected by Agency managers. Ms. M reported to Grievant. The Agency decided to hire a full time Graduation Coordinator. The full time position would report to Grievant. Ms. M wanted to be the full time Graduation Coordinator and assumed that if she did not get the position, the need for her part-time position would end. Grievant had given Ms. M numerous favorable evaluations and had requested continuance of Ms. M's services at the end of her contract period with the Agency.

The Agency advertised the new position using websites including the DHRM job website. Ms. M had an existing electronic application on the DHRM website that included Ms. G and Mr. S as references. Ms. M asked Ms. G and Mr. S if she could use them again as references for her application for the full time Graduation Coordinator position. They agreed. Ms. M submitted her application for employment to the Agency.

Ms. S was working at neighboring University with more students than the College and had experience with registration and graduation. Ms. S applied for the full time Graduation Coordinator position.

Grievant was the Hiring Manager and placed in charge of selecting employees for the committee to interview candidates. She selected four other employees to assist her with the interviews.

The Agency's human resource staff screened the online applicants and narrowed the list of candidates to approximately 16. The list was sent to Grievant and the selection committee who reviewed the candidates and narrowed the list to six candidates to be interviewed. One of the applicants had a PhD. Another was a retired Dean.

Interviews were scheduled for November 12, 2013. Several days prior to the interviews, Ms. M approached Grievant and asked for the status of the selection process for the full time position. Grievant asked Ms. M if she had been contacted by the human resource staff. Ms. M said "no." Grievant said that one of the applicants had a PhD and another was a former Dean.

The interview committee interviewed the six candidates using predetermined questions. The committee members evaluated each candidate and concluded that Ms. S should be hired as the full time Graduation Coordinator. The decision was unanimous that Ms. S was the best suited for the position. Grievant did not attempt to manipulate the outcome of the selection process or encourage committee members to avoid selecting Ms. M as the successful candidate.

On November 14, 2013, Grievant received an email from the HR Manager indicating that an offer could be made pending a background check. Grievant emailed the background check and applicant data forms to Ms. S. On November 15, 2013, Ms. S delivered the forms to the Human Resource Office.

Ms. M was surprised and disappointed that she was not selected for the full time job. She had been performing the duties of the position on a part-time basis for many months and expected to be selected for the full time position. Ms. M complained to Ms. G and Mr. S. She questioned the quality of the individuals on the selection committee.

On November 18, 2013, Ms. G and Mr. S met to discuss the interview questions and the selection process followed by the committee.

On November 19, 2013 at 8:38 a.m., the HR Analyst sent Grievant an email saying that the background check for Ms. S "has cleared" and saying, "You may proceed with the next steps in the hiring process." Grievant replied by sending an email at 8:46 a.m. to the HR Analyst with a copy to the HR Manager asking, "Is it ok to make

[Ms. S] an offer now?" The HR Manager responded, "No, we are not to make a job offer at this time."<sup>1</sup> Grievant was unsure why she could not make an offer at that time.

On November 19, 2013, Grievant met with Ms. F, Ms. G, and Mr. S. Mr. S expressed his concern about the interview process and outcome. Mr. S said he knew that Ms. M had been doing the job well for a year and a half and was concerned that she was over the age of 40 but not selected for the job. He indicated that because Ms. M was in a protected class she might have grounds for suing the Agency. Mr. S told Grievant not to contact Ms. S until he had reviewed the committee's questions and the information the Committee had gathered about Ms. M and Ms. S. Mr. S told Grievant that second interviews would be conducted.

On November 19, 2013 at 10:39 a.m., Grievant sent Ms. S an email stating:

Your background check came back fine. I was informed today that my supervisor, [Ms. G] and [Mr. S], the Vice President for Academic Affairs and Student Services will be contacting you to conduct a second interview with yourself and another candidate which is already working in the position. Normally our interview committee makes the final say so but in this case our recommendation has been intercepted and they will decide. Maybe by the grace of God they will select you but the other candidate is also a friend of theirs.

On November 19, 2013 at 2:46 p.m., Ms. S sent Grievant an email asking additional questions. At 3:19 p.m., Grievant responded:

I was told by our HR Manager that as long as [the College] did not use them as her [Ms. M's] reference it was okay that they meet with her. I am completely dumb-founded. We are not using them as reference only to meet me with our top candidates to decide who gets the job? I would recommend waiting to see the outcome before contacting [the College President] or the [Department of Human Resource Management]. I am so sorry about this complete mess. I did ask the girl working in the position if they contact her yet for the second interview and she said they had not. I don't know what they are up to. Maybe they just want to meet with you now. Please don't let them know I shared with you that they know the other applicant etc. Just come in and be as professional as possible and give the same information you did during your first interview. I am going to pray this will all work out in your favor.<sup>2</sup>

Agency managers reviewed the hiring process and concluded that Ms. S was appropriately selected as the best suited for the Graduate Coordinator position. On

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<sup>1</sup> Grievant Exhibit 6.

<sup>2</sup> Agency Exhibit 13.

December 6, 2013, the HR Manager sent Grievant an email stating, "Please proceed with offering [Ms. S] the position of Graduation Coordinator ...."<sup>3</sup> Ms. S was hired as the Graduation Coordinator.

In 2006, a Student was enrolled in high school and was also receiving credit at the College. He was "dual enrolled." The Student dropped out of high school and did not complete the class. He obtained his GED. In January 2014, the Student called Grievant and told her he did not complete or attend the class and received a grade of "F". Because of his low grade, he was unable to obtain financial aid and enroll in the College. Grievant believed the Student and accessed the Agency's computer data base to delete the grade from the Student's record. This enabled the Student to become eligible for financial aid. Grievant did not retain any documents showing the Student's transcript before and after she removed the grade. She did not retain any documents showing she had authorization to remove the grade. She intended to contact the local high school to obtain documents regarding the Student's enrollment in the high school's class. When she informed Ms. G that she intended to contact the high school, Ms. G told her it was too late and that it was not necessary for Grievant to contact the high school.

### **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>4</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>5</sup> Mr. S was within Grievant's chain of command. Grievant was obligated to comply with his instructions. On November 19, 2013, Mr. S instructed Grievant not to contact Ms. S while the Agency evaluated the process to select Ms. S. On November 19, 2013, Grievant contacted Ms. S several times and discussed the status of her employment with the Agency. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove her from employment.

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

<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>5</sup> See, Attachment A, DHRM Policy 1.60.

Grievant denied that she was directed to refrain from contacting Ms. S. The Agency has presented sufficient evidence to support its assertion that Grievant was instructed not to contact Ms. S. Ms. G was in the meeting and she heard Mr. S instruct Grievant not to have further contact with Ms. S. The instruction is consistent with the objective of providing Mr. S with sufficient time to review the hiring process for Ms. S.

The Agency argued that Grievant violated the Agency's Student Information System Security Standard policy which provides, in part:

In addition, each use of the Enrollment Panel shall be documented in writing and/or electronic form, showing the individual who initiated the change, the date/time of the change, the purpose of the change and the state of the table information before/after the change, the state of the table information before and after use of the Enrollment Panel to update data in the SIS database.

The Agency has not presented sufficient evidence to support this policy as a basis for disciplinary action. Grievant was not familiar with the policy and it is not clear that she received any formal training regarding how to use the Enrollment Panel. The Agency argued that Grievant should have printed off an example of the Student's record before she deleted it and after she deleted it. The policy does not specify that part of the documentation process must occur prior to the change in the record and that part of the process must occur after the change. Grievant intended to document the changes after she edited the record but was stopped by Ms. G who was it was too late. Although the Agency has not presented sufficient evidence to show that Grievant violated policy, the Agency has presented sufficient evidence to show that Grievant should receive a Group II Written Notice for failure to follow Mr. S instruction as discussed above.

*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>6</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.

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<sup>6</sup> Va. Code § 2.2-3005.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>7</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>8</sup>

Grievant engaged in protected activity when she filed a grievance to challenge disciplinary action she received in 2012. Grievant suffered an adverse employment action because she received disciplinary action and was removed from employment. Grievant has not established a connection between her protected activity and the adverse employment action she suffered. The Agency took action against Grievant because of her behavior in 2013 and not because she filed a grievance to challenge your disciplinary action in 2012. The Agency's disciplinary action in this case was not a pretext for retaliation.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal based on the accumulation 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:

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<sup>7</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>8</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).



Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> 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 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>9</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].

*/c/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.