

Issue: Group II Written Notice (failure to follow instructions), Group II Written Notice (abuse of State time), and Group III with Removal (absence in excess of 3 days without authorization); Hearing Date: 05/19/14; Decision Issued: 05/27/14; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No.10319; Outcome: Partial Relief;
Administrative Review: EDR Administrative Review Ruling Request received 06/10/14; EDR Ruling No. 2014-3911 issued 06/17/14; 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: 10319

Hearing Date: May 19, 2014
Decision Issued: May 27, 2014

PROCEDURAL HISTORY

On March 10, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On March 10, 2014, Grievant was issued a Group II Written Notice of disciplinary action for abuse of State time. On March 10, 2014, Grievant was issued a Group III Written Notice for absence in excess of three workdays without authorization. Grievant was removed from employment on March 10, 2014.

On March 11, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 3, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 19, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

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 a Programmer. He worked at Location H. He began working for the Agency on a full time basis in 2011. In October 2013, Grievant received an overall rating of "High Achiever" on his annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency received a grant to build a computer simulation called A Year in the Life of a Middle School Principal. The project was intended to help schools with decision-making. December 16, 2013 was the deadline for having the simulation completed. Grievant had not completed his work with respect to that project.

Grievant was scheduled to work but did not report to work at Location H from January 2, 2014 through February 5, 2014. He did not report to work February 10 through February 21, 2014.

The Supervisor had been out of the country for approximately three weeks. When she returned, she asked Grievant for a report of what work he had done from December 16, 2013 to January 28, 2014. Grievant responded that he had been writing a book, studying for a biology test, studying for a statistics quiz, developing a course to teach at VCU, and getting documents to look right for non-Project All employees. On

February 17, 2014, the Supervisor asked Grievant for an update on Project Locker. On February 20, 2014, the Supervisor reminded Grievant she wanted an update on Project Locker. Grievant did not provide the Supervisor with an update.

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.”¹ 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.”

Group II – Failure to Follow Instructions

Failure to follow a supervisor’s instruction is a Group II offense.² The Supervisor instructed Grievant to provide her with an update on Project Locker. Grievant failed to provide the Supervisor with an update on Project Locker thereby justifying the issuance of a Group II Written Notice.³

Grievant argued that providing an update on Project Locker was a menial task. Even if a task is menial, an employee must comply with a supervisor’s instruction. Grievant asserted that he was sick on the day the Supervisor asked him for the update. The evidence showed, however, that the Supervisor asked for the update on more than one date and that Grievant ignored the request.

Group II -- Abuse of State Time

Abuse of State time is a Group I offense.⁴ The Agency alleged that Grievant abused State time because he began taking four courses at the University without adjusting his work hours to account for the time he spent devoted to school. Grievant was not authorized to take so many classes, according to the Supervisor. To the extent the Agency’s allegations are true, Grievant’s behavior appears to have been part of his failure to report to work as scheduled for more than three days. By taking disciplinary action against Grievant for being absent in excess of three days, the Agency has

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ The Agency alleged Grievant violated VCU’s Code of Conduct because he wrote a letter using profanity as he criticized his co-workers. Grievant was expressing his concerns to his supervisors and his behavior did not rise to the level justifying the issuance of disciplinary action.

⁴ See, Attachment A, DHRM Policy 1.60.

disciplined Grievant for his abuse of State time. The Agency is using similar policies to discipline Grievant for the same behavior. Accordingly, the Group II Written Notice must be reversed.⁵

Group III -- Failure to Report to Work

Absence in excess of three work days is a Group III offense.⁶ Grievant was expected to report to work at Location H from January 2, 2014 and thereafter. He failed to report to work for more than three days thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that although he may not have been at the Location H it did not mean it was not working at local restaurants or other locations. Grievant was not authorized to telecommute or work remotely after January 2, 2014. He was expected to report to Location H on a daily basis and perform his work duties.

Grievant argued that the disciplinary actions against him were inappropriate because the Agency failed to put him on notice that his behavior was inappropriate and give him a chance to improve. Although it is a better management practice for agencies to engage in progressive disciplinary action, the Agency is not required to do so.

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 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

⁵ If the Hearing Officer were to uphold the disciplinary action, the level of the offense would have to be reduced to a Group I offense because abuse of State time is a Group I, not a Group II offense.

⁶ See, Attachment A, DHRM Policy 1.60.

⁷ *Va. Code § 2.2-3005.*

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 a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice for abuse of State time is **rescinded**. The Agency's issuance to Grievant of a Group III Written Notice for being absent in excess of three days is **upheld**. Grievant's removal 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.