

Issue: Group II Written Notice (failure to follow instructions and excessive tardiness);
Hearing Date: 06/05/14; Decision Issued: 06/09/14; Agency: JMU; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10368; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10368

Hearing Date: June 5, 2014

Decision Issued: June 9, 2014

PROCEDURAL HISTORY

On February 5, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and excessive tardiness.

On March 6, 2014, 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 May 19, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency's 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:

James Madison University employs Grievant as a Managing Editor. Grievant received a Group II Written Notice on September 3, 2013 for poor attendance, excessive tardiness, failure to follow instructions, and disruptive behavior. On September 13, 2013, Grievant received a Group II Written Notice for poor attendance, excessive tardiness, and failure to follow instructions.

Grievant's position required her to collaborate with several co-workers. Grievant demonstrated a pattern of reporting to work late in the morning and working late into the night. Grievant's tardiness affected the ability of other employees to collaborate with her. The Agency also wanted to ensure an appropriate balance between Grievant's work time and personal time so it restricted the number of hours Grievant could work. On August 20, 2013, Grievant received a Notice of Improvement Needed identifying an improvement plan stating, in part:

Show up to work at 8 a.m. and leave the office at 5 p.m. Monday through Friday with a one hour lunch during that work period. No work should be done outside of those work hours. There will be no working from home. All work required in fulfilling your job responsibilities must happen within these specific work hours.¹

On January 29, 2014, the Supervisor walked to the building where Grievant worked to meet with other employees. Shortly after 9 a.m., he walked to Grievant's

¹ Agency Exhibit 9. The two prior Written Notices referred to this instruction as well. The Agency only relied on the quoted portion of the Notice of Improvement Needed to support the disciplinary action.

office and observed the door closed and locked. As he walked back to the meeting, he observed Grievant walking towards her office wearing her coat and carrying her purse. He believed she had reported to work late.

On February 3, 2014, the Supervisor was in a parking lot adjacent to the building where Grievant worked. At approximately 5:40 p.m., he observed the light in Grievant's office on and Grievant inside her office. Grievant was inside her office packing personal items to ensure their safe transport when the Agency moved Grievant's office to another building in the following week.

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."

Failure to follow a supervisor's instructions is a Group II offense.³ On August 20, 2013, Grievant was instructed in writing by the Supervisor to "leave the office at 5 p.m. Monday through Friday" On February 3, 2014, Grievant did not leave her office at 5 p.m. She remained in her office until at least 5:40 p.m. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instruction.

Grievant argued that she was not performing her regular work duties when she was in her office after 5 p.m. but rather was packing personal items in preparation for moving her office to another location. The instruction given to Grievant did not focus on what Grievant was doing after 5 p.m., it focused on an expectation that Grievant not be located her in office after 5 p.m. By performing personal tasks in her office after 5 p.m., Grievant violated the Supervisor's instruction.

The Agency asserted that Grievant reported to work late on January 29, 2014. This claim has not been established. The Supervisor was not at Grievant's office at 8 a.m. He did not enter the building containing Grievant's office until sometime after 9 a.m. Grievant presented evidence that she told a coworker that day that she had arrived at her office at 8 a.m. but no one else was present so she locked the door to her office and left to assist a student who had suffered the death of a loved one. Based on the evidence presented, the Agency has not established whether or not Grievant was in her office at 8 a.m. on January 29, 2014.

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.

The Agency wrote in its Written Notice that Grievant would “not accrue leave during the pay period when this unauthorized absence occurred.” Because the Agency has not established that Grievant was tardy on January 29, 2014, the Agency’s denial of accrual of leave must be reversed.

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”⁴ 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 argued that she was being singled-out from other employees and treated unfairly. The reason Grievant was singled-out by the Agency was because she demonstrated a pattern of tardiness. It is appropriate for an agency to treat an employee who has demonstrated a problem with attendance differently from employees who are attending work according to the agency’s expectations. 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 II Written Notice of disciplinary action is **upheld**. The Agency is **ordered** to restore the leave that Grievant would otherwise have accrued during the pay period for which she was denied leave accrual.

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:

⁴ *Va. Code § 2.2-3005.*

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.⁵

[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

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