

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 01/05/15; Decision Issued: 01/23/15; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10485; Outcome: No Relief - Agency Upheld;  
**Administrative Review: EDR Ruling Request received 02/06/15; EDR Ruling No. 2015-4096 issued 02/20/15; Outcome: AHO's decision affirmed; Administrative Review: EDR Ruling Request to Reconsider Ruling No. 2015-4096 received 02/25/15; EDR Ruling No. 2015-4102 issued 03/05/15; Outcome: Request denied; Administrative Review: DHRM Ruling Request received 02/06/15; DHRM Ruling issued 03/13/15; 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: 10485**

Hearing Date: January 5, 2015  
Decision Issued: January 23, 2015

#### **PROCEDURAL HISTORY**

On May 27, 2014, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for insubordination because he repeatedly refused to comply with the Agency's instructions.

On June 27, 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 he requested a hearing. On October 27, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 5, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
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:

The University of Virginia employs Grievant as a Buyer Specialist. He has been employed by the Agency for approximately eight years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in a position that required him to have a college degree. He had completed most of the credits required for a degree but needed some additional credits. Rather than removing Grievant from his position, the Agency chose to let Grievant take the additional coursework to obtain his degree. The Agency also agreed to assist Grievant financially with his studies.

On June 21, 2012, Grievant and the Agency entered into an Educational Studies Contractual Agreement ("Agreement") stating, in part:

The Employee is enrolled in an Educational Studies Program ("academic program"); an academic program previously approved by the Employee's Department. The University is willing to make certain payments to or for the benefit of the Employee who agrees to repay the University these amounts with interest at the rate of three percent (3%) per annum, calculated from the date the monies are paid or credited to the Employee, unless the Employee successfully completes the academic program and serves as an employee with the University for a period of 12 months after

the Employee's completion of the academic program, which should occur no later than December 31, 2012.

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The University agrees to pay the cost of tuition and fees as stated in Attachment A, (Tuition Payment Schedule), not to exceed a total of \$9,900.<sup>1</sup> The tuition payments are necessary to permit the Employee to complete the Bachelors of Science in [major] from [University J].

The Employee agrees to furnish to the University a copy of the courses for which the Employee is registered. Furthermore, the Employee agrees to furnish the Employee's Department at the end of the academic program a copy of the school's transcript showing the titles of the courses taken, the number of credit hours, and the grades received, or a notation of progress achieved in the courses.

The Employee hereby authorizes the school in which the Employee is enrolled to disseminate any information concerning the Employee to the University in order to determine whether the Employee is complying fully with this Agreement. In addition, the Employee agrees to supply the University with any other pertinent information which it may request of him/her prior to the complete discharge of his/her obligation under this Agreement in order to allow the University to determine whether the Employee is complying fully with this Agreement.<sup>2</sup>

Grievant and the Director signed the Agreement on June 21, 2012. The Chief Human Resource Officer signed the Agreement on June 26, 2012.

Grievant received money from the Agency but did not take classes in the fall of 2012 with University J. He did not obtain his bachelor's degree by December 31, 2012 as promised under the Agreement. He took classes beginning in the Spring 2013 term and ending in the Spring 2014 term.

On August 16, 2013, the Director sent Grievant a memorandum stating, in part:

My review of your FY 2013 evaluation appeal has revealed that several terms of your Education Studies Contractual Agreement ("Agreement") have not been fulfilled. The Agreement states that you are to complete your Bachelor's degree by December 31, 2012; to date you have provided no evidence that you have completed your degree. This Memorandum

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<sup>1</sup> Grievant received \$8053 from the Agency.

<sup>2</sup> Agency Exhibit 4.

serves to remind you of the unfulfilled terms of that Agreement and invokes its provisions to request the following documents:

Proof that the amount of \$9,900 you received under the terms of the Agreement was used to pay tuition at [University J] in the form of an invoice sent directly from [University J];  
An official transcript from [University J];  
A certificate of good standing from [University J];  
A complete list of requirements that remain to be met before the degree can be conferred.

Please be advised that these documents must be sent directly from [University J] to PSDS. Kindly request these documents from [University J], provide [University J] with any and all authorizations or permissions to release forms required, and request that the above-listed documents be sent directly to:

[Business Manager]  
[Address]

Please provide these documents on or before September 2, 2013.<sup>3</sup>

Grievant did not comply with the Director's August 16, 2013 instruction.

Agency staff contacted University J staff about obtaining documents relating to Grievant. The University J staff indicated Grievant would have to sign certain releases. The Agency provided Grievant with releases and instructed him to complete the releases. On October 29, 2013, the Executive Assistant sent Grievant an email asking, "When can I expect return of the signed forms?"<sup>4</sup> Grievant responded to her email by asking questions.

On October 30, 2013, Grievant sent the Executive Assistant an email stating, in part, "I was under the impression from our brief meeting last Wednesday that you were going to be following up with me (not the other way around) – My impression was that you were going to look into the status of the Agreement as it related to additional authorizations (as you have done below), and let me know what you found out. My apologies for the confusion."

On October 30, 2013, the Executive Assistant replied to Grievant's email stating, in part:

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<sup>3</sup> Agency Exhibit 2.

<sup>4</sup> Agency Exhibit 1.

I don't understand the source of the confusion. My notes from our meeting last Wednesday confirm that you declined to sign the authorization in order to give yourself the opportunity to consult the contract. If you have questions as to whether the contract required your cooperation in this regard, it is your responsibility to investigate the matter for yourself. It makes no sense to place the onus on me to do the investigation, as it is self-evident that UVA has already determined your obligation by virtue of the fact that we presented you with the authorization to sign. Indeed, General Counsel affirms you have an obligation in this matter.<sup>5</sup>

On November 13, 2013, Grievant sent the Executive Assistant an email stating, in part:

With respect to your most recent request for me to execute the attached [University J] Authorizations, I am going to respectfully decline. As I detailed in my November 1<sup>st</sup> e-mail (a copy of which is below):

“other than the authorization already included in the Agreement, I have not found any other language in the Agreement that would require me to execute additional authorizations. By all means, if I am mistaken (and other language in the Agreement details such a responsibility) please let me know.”<sup>6</sup>

On January 16, 2014, the Director sent Grievant a Demand Letter informing Grievant that he was in breach of the Agreement and giving him three options. The first option was to return the money paid by the Agency pursuant to the Agreement. The second option was to make arrangements with the Agency's Payroll department to repay the money by payroll deduction. The third option was:

Present satisfactory evidence to me [Director] by January 28, 2014, that you have requested that the following documents be sent directly from [University J] to me to be received by February 28, 2014.

1. Certified Transcript.
2. Certificate of Good Standing.
3. Listing of courses and/or requirements needed to complete Bachelor's Degree.
4. Statement of Accounts showing amounts paid to [University J] for the time period from June 2011 to the present.

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<sup>5</sup> Agency Exhibit 1.

<sup>6</sup> Agency Exhibit 7.

In addition, please provide to me a signed release allowing [University J] to correspond directly with employees of University of Virginia Human Resources.<sup>7</sup>

Grievant was given until January 28, 2014 to notify the Agency which of the three options he would select.

On April 4, 2014, Grievant sent the Director an email stating, in part:

I wish to inform you of the completion of my Bachelor's Degree from [University J]. Attached is a copy of my diploma. \*\*\* Furthermore, in keeping with your previous requests, I have directed [University J] to send an "official" transcript directly to you ([University J's] system shows that it was mailed out today.) If you do not receive that document in the upcoming few days, please let me know.<sup>8</sup>

On April 8, 2014, the Director received an official transcript from University J confirming Grievant's completion of the degree requirements.

On April 25, 2014, the Vice President sent Grievant a letter stating, in part:

On April 8, 2014, [Director] received your official transcript from [University J] confirming that you have completed the requirements for your degree. Even though it was received beyond the deadline stipulated in the demand letter this satisfies the request in-part, but the request for information relating to payments made to [University J] remains outstanding. To satisfy this remaining issue, the University requests that you provide written consent for [University J] to provide this information directly to UVa. I believe this is a legitimate request of the University give the financial support we have provided for your education.<sup>9</sup>

## 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>10</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

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<sup>7</sup> Agency Exhibit 1.

<sup>8</sup> Agency Exhibit 11.

<sup>9</sup> Agency Exhibit 1.

<sup>10</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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>11</sup> On August 16, 2013, the Director instructed Grievant to cause University J to send the Agency, proof that money the Agency paid was used to pay tuition at University J, an official transcript, a certificate of good standing, and a complete list of requirements that remained to be met before a degree could be conferred to Grievant. Grievant was given a deadline of September 2, 2013 to complete the task. The Agency’s objective was to verify the proper expenditures of its moneys. The Agency’s objective was appropriate. Grievant failed to comply with this instruction. The Agency repeated its instruction and Grievant repeatedly disregarded and disputed the instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s three workday suspension must be upheld.

Grievant argued that he complied with the instructions given to him. The evidence showed that Grievant did not comply with the Agency’s instructions to him. Grievant provided a copy of his transcript directly to the Agency, but the Agency’s instruction was for him to cause University J to provide the transcript and other documents directly from University J. Documents provided directly by Grievant did not satisfy the Agency’s instruction.<sup>12</sup> Although Grievant caused an official transcript to be delivered to the Director on April 8, 2014, the transcript was provided well after the due date. Not all of the other items requested by the Director were provided by University J to the Agency.

Grievant argued that the Agreement was not properly signed and, thus, unenforceable. The Agency showed that the two Agency employees who signed the Agreement had the authority from the Agency to sign the Agreement. The Agreement was enforceable within the context of Grievant’s employment with the Agency.

Grievant argued that the Agreement did not require him to sign the authorization forms. The Agency’s instruction, however, was consistent with the Agreement which provided, “[e]mployee agrees to supply the University with any other pertinent information which it may request of him/her prior to the complete discharge of his/her obligation under this Agreement ....” The Agency’s managers also had the inherent authority to instruct Grievant to provide documents.

Grievant argued the Agency’s Written Notice was defective. For example, the Notice provides that Grievant was insubordinate on April 8, 2014, but he was not insubordinate on that date. Although Grievant is correct regarding the date of the

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<sup>11</sup> See, Attachment A, DHRM Policy 1.60.

<sup>12</sup> The Agency noted that the transcript provided by Grievant stated, “Web Transcript is NOT Official.”



offense, there is no basis to reverse the disciplinary action. The test for a Written Notice is not whether every word or date on the Written Notice is accurate. The test is whether the Written Notice substantially and adequately notifies an employee of the Agency's allegations against him. The Written Notice in this case clearly informs Grievant that the Agency believed he should be disciplined for failing repeatedly to provide requested information about his progress towards completing his college degree. The Written Notice adequately informed Grievant of the Agency's allegations and enabled Grievant to present his relevant defenses at the hearing. In addition, whether the Written Notice was untimely delivered to him is insignificant. Grievant knew of the Agency's allegations against him prior to the hearing and had adequate opportunity to present his defenses at the hearing.

Grievant argued that the Agency's discipline was not progressive in nature. Although agencies are encouraged to apply discipline in a progressive manner, they are not obligated to do so under the Standards of Conduct. Whether the Agency's discipline was progressive, does not affect the outcome of this case.

The Agency presented evidence showing that Grievant repeatedly failed to comply with a supervisor's instructions. The Agency mistakenly referred to this as "insubordination." Insubordination requires a showing that an employee showed contempt, disdain, or disregard for a supervisor's authority or rank. Refusing to comply with a supervisor's instruction is not, in itself, insubordination. Only if the refusal is accompanied with some additional behavior doubting the legitimate or authority of the supervisor does the refusal also constitute insubordination.<sup>13</sup> In this case, the distinction is not material. Insubordination and refusal to comply with instructions are both Group II offenses. The Agency presented overwhelming evidence to show that Grievant repeatedly disregarded the Agency's instructions to provide information from University J. The Written Notice clearly identifies a basis for taking disciplinary action was Grievant's refusal to provide requested information.

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>14</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

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<sup>13</sup> Grievant's questioning of the enforceability of the Agreement was not insubordination in itself. Doubting the Agency's authority to act under the contract was also not insubordination because Grievant was not questioning the inherent authority (as opposed to authority granted by contract) of a supervisor to act.

<sup>14</sup> Va. Code § 2.2-3005.

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 with a three workday suspension 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  
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>15</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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>15</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.