

Issues: Group II Written Notice (failure to follow instructions) and Group II Written Notice (failure to follow instructions); Hearing Date: 08/26/13; Decision Issued: 08/30/13; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No.10143; Outcome: Partial Relief.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10143**

Hearing Date: August 26, 2013  
Decision Issued: August 30, 2013

#### **PROCEDURAL HISTORY**

On April 26, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On May 9, 2013, Grievant was issued a Group II Written Notice for failure to follow instructions and unsatisfactory performance.

On May 24, 2013, Grievant timely filed a grievance to challenge the Agency's issuance of the first Group II Written Notice. On June 7, 2013, Grievant filed a grievance to challenge the second Group II Written Notice. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On July 22, 2013, the Office of Employment Dispute Resolution issued Ruling Number 2014-3652 consolidating the two grievances for a single hearing. On July 30, 2013, EDR assigned this appeal to the Hearing Officer. On August 26, 2013, 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?
5. Whether the Agency retaliated against Grievant?

### **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 employs Grievant as a Student Employee Personnel Coordinator. Grievant is responsible for hiring student workers and competing payroll for them. Grievant's position is non-exempt under the Fair Labor Standards Act.

Grievant began reporting to the Supervisor in November 2012. Grievant's work hours began at 6 a.m.

On March 25, 2013, the Supervisor met with Grievant to discuss Grievant's work duties. Grievant had had difficulty processing time records without being interrupted. Since the Agency opened at 8 a.m., the Supervisor concluded that Grievant would have time to enter time records without interruption from 6:30 a.m. until 8:30 a.m. The Supervisor instructed Grievant to key time records into the Agency's financial accounting system from 6:30 a.m. to 8:30 a.m.<sup>1</sup>

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<sup>1</sup> In a follow up memorandum, the Supervisor did not mention that she instructed Grievant to key the time records from 6:30 a.m. to 8:30 a.m. Although the Supervisor failed to include the requirement in the

For the period from March 29, 2013 through April 12, 2013, Grievant began entering time records after 6:30 a.m. on nine days. On five of these days, Grievant logged into the accounting system after 8:30 a.m.

The Agency sent Grievant a Due Process memorandum regarding pending disciplinary action. On April 18, 2013, Grievant sent the Supervisor an email saying she would not be able to process payroll on April 19, 2013 because she had to draft a response to the Due Process memorandum. The Supervisor sent Grievant an email authorizing her to devote two hours from 6:30 a.m. to 8:30 a.m. to her response. At approximately 9 a.m. on April 19<sup>th</sup>, Grievant sent the Supervisor an email stating that she was still working on her response and would notify the Supervisor when she finished. At 11:37 a.m., the Supervisor went to Grievant's office and observed that Grievant was still working on her response. The Supervisor instructed Grievant to submit leave from her leave balances to cover her time devoted to responding to the memorandum beyond the two hours granted. Grievant submitted her response to the Supervisor at approximately 2:45 p.m. or 3 p.m. as Grievant left for the day. In the following pay period, Grievant submitted a leave request. The Agency reduced Grievant's leave balances in the amount of 5 hours.

Payroll 8 was for the time period April 10, 2013 through April 24, 2013. Although some of the students and their supervisors had not submitted final documents to Grievant, the payroll was ready to be processed with respect to the completed records. Grievant failed to process several of the completed student time records. As a result, several students were not paid for their work on a timely basis.

On April 24, 2013, Grievant reported to work 1.25 hours late. She did not notify anyone that she would be late.

Grievant was placed on pre-disciplinary leave from May 3, 2013 to May 9, 2013.

### **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."

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follow up memorandum, her testimony was credible that she gave the instruction to Grievant on March 25, 2013.

<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.

Failure to follow instructions is a Group II offense.

“[U]nsatisfactory work performance” is a Group I offense.<sup>3</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

#### First Group II Written Notice

On March 25, 2013, the Supervisor instructed Grievant to enter time record information in to the Agency’s financial system from 6:30 a.m. until 8:30 a.m. A supervisor has the authority to dictate the activities of a subordinate including the time in which those activities are performed. On several occasions after March 25, 2013, Grievant did not begin entering time record information until well after 6:30 a.m. Grievant failed to comply with the Supervisor’s instructions thereby justifying the issuance of a Group II Written Notice.

Grievant denied she was instructed to process payroll between 6:30 a.m. and 8:30 a.m. The Supervisor and the Associate Director were in the meeting with Grievant on March 25, 2013. Both testified credibly that the Supervisor instructed Grievant to process payroll between 6:30 a.m. and 8:30 a.m.

As part of the first Group II Written Notice, the Agency also disciplined Grievant for speaking in a hostile tone to the Supervisor and telling the Supervisor the Supervisor should not tell her how to do her job. During a meeting, Grievant jumped up, walked out of the room, and slammed the door. The Hearing Officer will not address these allegations because even if supported by the evidence, the behavior would not support the issuance of a Group II Written Notice. The Agency has presented other evidence to support the issuance of a Group II Written Notice.

#### Second Group II Written Notice

Grievant was obligated to process student payroll on a timely basis. She failed to process all of the completed student time records for payroll 8 on a timely basis. As a result, some of the students were not paid on a timely basis. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

Grievant argued that she processed payroll 8 on a timely basis but that some of the students and their supervisor’s failed to submit complete time records thereby giving the appearance that she did not timely process payroll. The evidence showed that even if some students and their supervisor’s had not submitted all of the needed records, Grievant could have processed the remaining records. Grievant did not process all of the remaining student time records.

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

Grievant argued that other employees had processed payroll late. This allegation was not established. An individual student or employee's payroll might not be processed timely for many reasons. Once all of the time records are presented for processing, that employee's time can be entered into the Agency's financial accounting system. It is not clear what circumstances caused the untimely paycheck processing for the specific cases Grievant offered as examples.

The Agency alleged Grievant failed to follow a supervisor's instructions by working more than two hours on her response to the Due Process memorandum and failing to let the Supervisor know what leave Grievant was requesting. The Agency has not met its burden of proof to support a Group II level offense.

The Supervisor authorized Grievant to work for two hours on responding to the due process memorandum regarding pending disciplinary action. The Agency failed to ask Grievant how much time she needed to respond. The Agency's determination that Grievant would need only two hours to respond to the due process memorandum was arbitrary. Grievant required more than two hours to complete her response. Grievances are official State business and not personal matters as alleged by the Agency. The Agency's limitation of two hours was unreasonable.

The Agency failed to present the emails regarding the Supervisor's instructions to Grievant. The Hearing Officer cannot determine the precise nature of the interaction between Grievant and the Supervisor to support disciplinary action.

The Agency required Grievant to use her personal leave balances in the amount of five hours. The Supervisor testified she believed the Agency was not obligated to permit Grievant to take any time to respond to the Due Process memorandum.

DHRM Policy 4.05 governs Civil and Work-Related Leave. Under this policy civil and work-related leave may be granted to the employee for absences during scheduled work hours for the following reasons:

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- To participate in resolution of work-related conflicts or of complaints of employment discrimination.

Agencies may establish reasonable limits for this use of Civil and Work-Related Leave to prevent abuse of state time. Agencies may not refuse to grant leave for an employee to fulfill required activities covered by this policy.

The Agency is obligated to restore to Grievant the five hours of leave she was forced to take from her personal leave balances. Grievant was entitled to take civil and work-related leave for the amount of time she needed to complete her response to the Agency's due process memorandum.

The Agency alleged Grievant was late on April 24, 2013. She Agency did not establish a pattern of late arrivals. One instance of being late would not rise to the level justifying 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 further the disciplinary action.

### Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity,<sup>5</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>6</sup>

Grievant has not presented sufficient evidence to show that the Agency retaliated against her for engaging in protected activity. The Agency’s witnesses denied taking action against Grievant as a form of retaliation. Their denial was credible.

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<sup>4</sup> Va. Code § 2.2-3005.

<sup>5</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>6</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).

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the first 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 the second Group II Written Notice for failure to follow a supervisor's instruction is **reduced** to a Group I Written Notice for unsatisfactory job performance. The Agency is **ordered** to restore Grievant five hours of leave taken on April 19, 2013.

## 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>7</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>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.