

Issue: Group II Written Notice (failure to follow instructions and inappropriate conduct);
Hearing Date: 11/18/13; Decision Issued: 11/19/13; Agency: University of Mary
Washington; AHO: Carl Wilson Schmidt, Esq.; Case No. 10195; Outcome: No
Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10195

Hearing Date: November 18, 2013
Decision Issued: November 19, 2013

PROCEDURAL HISTORY

On November 27, 2012, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory job performance, failure to follow a supervisor's instructions, and conduct of a sexual nature in the workplace. The Agency amended the Written Notice approximately a week prior to the hearing to delete reference to conduct of a sexual nature but retained the allegations of unsatisfactory job performance and failure to follow a supervisor's instructions.¹

On October 14, 2013, 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 14, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Counsel
Witnesses

¹ The Agency's amendment of the Written Notice does not affect the outcome of this case. The amendment did not add allegations for which Grievant had not received prior notice. The Agency removed one allegation in order to clarify its basis for taking disciplinary action.

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 Mary Washington employs Grievant as an Assistant Dean of the Bachelor of Liberal Studies Program. The purpose of his position is:

Provide academic and career advising to incoming and continuing Bachelor of Professional Studies (BLS) students. Monitors student progress, and approves BLS students for graduation (certifying completion of degree requirements). Manages day to day activities of the BLS office location. Provides information to students, faculty, and other offices about the BLS program and its details.²

Several witnesses testified that Grievant was a passionate, valuable, and professional advisor. He often generated favorable comments from students who appreciated his assistance.

² Agency Exhibit 4.

On November 25, 2011, the Supervisor presented Grievant with a Probationary Progress Review. The Supervisor described Grievant's work performance as a "Contributor." The Supervisor included in the evaluation an "Employee Development Plan" stating, in part:

5. Employee will use an appropriate manner of address in dealing with difficult students or in dealing with members of the faculty.

9. Employee will maintain collegiality with other Student Services offices.
10. Employee will exercise good judgment in dealing with students, colleagues, faculty, and staff.
11. Employee will exercise discretion at all times and will refrain from remarks that address the private lives or appearance of students.³

The Supervisor met with Grievant to discuss the review. The Supervisor discussed with Grievant each item of the development plan including her expectation that Grievant refrain from making remarks about the appearance of students. Grievant questioned several parts of the development plan especially item 11. The Supervisor informed Grievant that she expected him to comply with the terms of item 11.

On March 19, 2012, the Supervisor gave Grievant an Interim Evaluation Form that re-stated the Employee Development Plan included in the Probationary Progress Review.

Grievant was responsible for advising Student 1 and Student 2. Student 1 and Student 2 were friends. On November 5, 2012, Student 1 went to Grievant's office to discuss which classes she should take during the following semester.⁴ After discussing her concerns, she mentioned that Student 2 had a question for Grievant and had asked her to raise that question with Grievant. Grievant recognized Student 2's name and said he was "a hottie", referring to Student 2's physical attractiveness. Student 1 was surprised at Grievant's comment and said that she supposed Student 2 "could be" and that his "wife certainly thought so." She added that Student 2 and his wife had a cute daughter as well. Grievant responded that "married men are so much hotter" and continued to discuss Student 2's attractiveness.

Student 1 felt that Grievant's comments about Student 2 were unprofessional and inappropriate. Following the meeting, she approached one of her teachers and described Grievant's behavior. The teacher said Grievant's behavior was unprofessional and Student 1 should contact Grievant's supervisor. On November 5,

³ Agency Exhibit 5.

⁴ Grievant had met with Student 1 approximately three times prior to November 5, 2012.

2012 at 5:03 p.m., Grievant sent the Supervisor an email expressing how Grievant made her feel uncomfortable when she met with him for advice.

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.”⁵ 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. On November 25, 2011 and March 19, 2012, the Supervisor instructed Grievant to “refrain from remarks that address the ... appearance of students.” On November 5, 2012, Grievant met with Student 1 and remarked on the appearance of Student 2. His actions were contrary to the Supervisor’s instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant denied that Student 1 accurately described his comments during their meeting. Student 1 testified at the hearing and her testimony was credible. She immediately reported her concerns to a teacher and then to the Supervisor. The Agency has presented sufficient evidence to support its allegation that Grievant made several remarks to Student 1 about Student 2’s physical appearance.

Grievant argued that it is not possible to advise students without discussing their personal lives because advising may include how to respond to prioritizing school and personal issues such as divorce, sick children, sick parents, etc. Grievant was not disciplined for discussing the personal life of a student. Grievant was disciplined for discussing the personal appearance of one student to another student and expressing the opinion that the student was attractive. In short, it was possible for Grievant to advise the Student without referring to another student’s physical attractiveness.

Grievant argued that the Supervisor advised him that item 11 of the development plan originated from a human resource officer and that it was not necessary for him to comply with the item. The Supervisor testified credibly that although item 11 originated from the human resource officer, she expressly informed Grievant that she expected him to comply with item 11.

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

⁵ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Management”⁶ 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 his actions on November 5, 2012 were an insignificant matter in an otherwise successful career with the Agency. He presented evidence from witnesses who described his ability to advise students as passionate, effective, and capable. Although Grievant’s work performance is admirable otherwise, it does not rise to the level sufficient to mitigate the disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency denied him procedural due process. To the extent the Agency failed to properly investigate the allegations or formulated an opinion prematurely without receiving all of the needed information from Grievant, these defects have been cured by the hearing process. Grievant had the opportunity to present to the Hearing Officer any information that the Agency failed to properly consider. There is no basis for the Hearing Officer to reverse the disciplinary action because of a denial of procedural due process.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice 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:

Director

⁶ Va. Code § 2.2-3005.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.