

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 08/08/14;
Decision Issued: 08/13/14; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10403; 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: 10403

Hearing Date: August 8, 2014
Decision Issued: August 13, 2014

PROCEDURAL HISTORY

On February 19, 2014, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow a supervisor's instruction.

On March 19, 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 July 2, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 8, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency 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:

Old Dominion University employs Grievant as a Housekeeping Supervisor. He has been employed by the University for approximately ten years. No evidence of prior active disciplinary action was introduced during the hearing.

On January 30, 2014, housekeeping employees were given responsibility to clear walk ways and other areas of snow and ice and to spread chemicals to prevent the accumulation of ice. Grievant and the other employees reported to work at 6 a.m. Grievant participated in a meeting that lasted ten to fifteen minutes. After the meeting, he and the two employees reporting to him walked for approximately ten minutes to their work area. They worked outside in the cold for approximately 45 minute to an hour. They went inside a building and began working inside. Grievant wanted to go into the building to warm up from the cold weather outside. A few minutes after 8 a.m., the Supervisor walked into the Building. She observed Grievant inside the Building and knew that other employees were outside working their assigned tasks. She instructed Grievant to gather his employees and go outside to assist in snow removal and salting in Grievant's assigned work area. Grievant replied, "No, it is cold outside and I will do my own work." The Supervisor spoke with Grievant's subordinates and they went outside to work. Grievant remained inside the Building. The other employees continued to work outside for approximately 45 minutes to an hour to complete their duties. Grievant remained in the Building during that time.

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.”

Failure to follow a supervisor’s instructions is a Group II offense.² On January 30, 2014, the Supervisor instructed Grievant to work outside of the Building. Grievant refused to do so and remained inside the Building. The Supervisor’s instruction was lawful, ethical, and within her scope of authority. Grievant failed to comply with the instruction thereby justifying the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice and the Agency’s decision must be upheld.

Grievant argued that he was working outside, became cold, and wanted to work inside for a short period of time. He asserted that he had been inside for only a few minutes when the Supervisor entered the Building and instructed him to return to the cold. Grievant’s argument is not persuasive. Grievant was not treated any differently from other employees who worked in the cold weather. He continued to work inside the Building for another 45 minutes to an hour after being instructed to work outside. He had sufficient time to warm up and return to the work outside yet he chose not to do so. Grievant simply refused to comply with the Supervisor’s instruction.

Grievant argued that this matter should have been resolved with a counseling memorandum rather than disciplinary action. The Agency met its burden of proof to show a basis for disciplinary action existed and it had the discretion to issue a counseling memorandum or a written notice.

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”³ 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

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 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 I 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
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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.