

Issues: Group II Written Notice (failure to follow instructions/policy, unsatisfactory performance, disruptive behavior, interference with operations) and Termination (due to accumulation); Hearing Date: 09/05/14; Decision Issued: 09/19/14; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10431; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 10/06/14; EDR Ruling No. 2015-4014 issued 11/04/14; 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: 10431

Hearing Date: September 5, 2014
Decision Issued: September 19, 2014

PROCEDURAL HISTORY

On May 12, 2014, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance, failure to follow instruction or policy, disruptive behavior, and interference with state operations. Grievant was removed from employment based on the accumulation of disciplinary action.

On June 12, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 30, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 5, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 Virginia Community College System employed Grievant as a Fiscal Technician. She began working for the Agency in 2006. Grievant had prior active disciplinary action. She received a Group III Written Notice with a 30 day work suspension on February 28, 2014. Grievant was suspended from work beginning on March 3, 2014. She returned to work on April 14, 2014.

On April 14, 2014, the Supervisor gave a performance improvement plan to Grievant to outline Grievant's performance obligation.

Grievant was responsible for reconciling P-card accounts of certain employees with the Agency. The due date for January P-card accounts was February 15, 2014. The due date for February reconciliations was March 15, 2014. Grievant was instructed to submit her January and February 2014 P-card reconciliations to Ms. C by April 24, 2014. On April 24, 2014, the Supervisor asked Grievant again to submit the reconciliations. Grievant submitted the January 2014 reconciliation on April 29, 2014 and the February 2014 reconciliation on May 2, 2014.

Grievant was instructed to store her P-card reconciliations and purchase order balance sheets on the Q drive of the Agency's computer system so that they would be accessible by other employees. Grievant failed to do so. After the Supervisor asked Grievant to perform the task a second time on April 24, 2014, Grievant completed the task.

Grievant was instructed to verify all invoices in AIS, the Agency's computer database, and ensure there were not duplicate invoices. The Supervisor coached Grievant about the importance of not having duplicate invoices in the computer system. Grievant failed to verify invoices. As of April 25, 2014, there remained three duplicate invoices in AIS.

The Agency presented evidence of other incidents supporting its disciplinary action. The Hearing Officer will not discuss those incidents because they were not proven by the evidence or did not rise to the level justifying the issuance of a Group II Written Notice.

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 instruction is a Group II offense.² Grievant was instructed to complete her January and February P-card account reconciliations by April 24, 2014. Only after being reminded a second time to complete the reconciliations did she do so. Grievant was instructed to move her reconciliations and purchase order balance sheets to the Q drive but failed to do so. Only after being reminded a second time, did Grievant complete the task. Grievant was instructed to verify there were no duplicate invoices. She failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant has a prior active Group III Written Notice. With the accumulation of a Group II Written Notice, the Agency has presented sufficient evidence to support its decision to remove Grievant.

Grievant argued that the duplicate invoices may have resulted from the invoices being sent to an auditor before being entered into the system. Although this may have been a possibility, the evidence showed that it was unlikely that auditors would receive invoices without the invoices having been entered first into the AIS.

Grievant argued that she should not be disciplined for failing to complete the reconciliations because those reconciliations should have been completed by other staff in her absence. This argument is not persuasive. Grievant was advised of her

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.

responsibility to complete the reconciliations when she returned to work and was given a performance improvement plan. She failed to meet the Agency's expectations for her work performance.

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 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 is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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.

³ *Va. Code § 2.2-3005.*

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.