

Issue: Group II Written Notice with demotion and pay reduction (failure to follow instructions and disruptive behavior); Hearing Date: 11/21/14; Decision Issued: 12/02/14; Agency: VDEM; AHO: Carl Wilson Schmidt, Esq.; Case No. 10449; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10449

Hearing Date: November 21, 2014
Decision Issued: December 2, 2014

PROCEDURAL HISTORY

On April 17, 2014, Grievant was issued a Group II Written Notice of disciplinary action with demotion to a lower pay band with 5% disciplinary pay reduction for failure to follow instructions and disruptive behavior.

On May 30, 2014, Grievant timely¹ filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 8, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 21, 2014, a hearing was held at the Agency's office.

APPEARANCES

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

ISSUES

¹ The Agency extended the deadline for filing a grievance to May 30, 2014.

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 Department of Emergency Management employed Grievant as a Lead Intelligence Analyst until her demotion to an Emergency Coordinator II effective April 25, 2014. Grievant received a demotion to a lower pay band with a five percent disciplinary pay reduction.

Grievant works as part of a Unit staffed with approximately 40 employees from the Virginia State Police and the Virginia Department of Emergency Management. With respect to her daily work duties, she reported to the Supervisor who was an employee of the Virginia State Police. Her performance evaluations were completed by the Deputy Director, an employee of VDEM. The Supervisor reported to the Lieutenant who reported to the Captain who reported to the Major. All of these employees worked for the Virginia State Police. The Captain served as the head of the Unit.

The Agency presented several factual scenarios to support its issuance of a Group II Written Notice. The Hearing Officer will address only the two most significant incidents.²

² One scenario would have been sufficient to support the issuance of the Group II Written Notice.

The Captain gave numerous instructions to Grievant and others in the Unit that employees should follow the chain of command regarding work issues. If Grievant had a concern or question about her work duties or the Unit's operations, she was expected to express her concern first to the Supervisor unless an emergency required her to approach a higher ranking employee when the Supervisor was absent. Grievant was aware of the importance the Unit placed on following the chain of command.

Grievant identified a way to obtain additional funding for a training project of importance to her and to the Unit. On March 28, 2014, she walked down to the Major's office and he invited her in. She discussed her proposal to obtain additional funding and asked how to proceed. She did not first speak with the Supervisor, the Lieutenant, or the Captain before approaching the Major. On April 1, 2014, the Major went to the Captain's office, closed the door, and told the Captain of Grievant's behavior. The Captain sent the Deputy Director an email on April 2, 2014 stating, "I was and remain embarrassed that my boss had to come in and shut the door and tell me this."³

The Captain testified that was not aware of any need for funding that would justify Grievant bypassing her chain of command and speaking directly with the Major. In her response to the Agency's proposed disciplinary action, Grievant wrote, in part:

In retrospect, I realize that this was completely inappropriate. Although [the Major] has been complementary to me since I assisted with the [location] Arsons and has engaged me in conversation since the conclusion of the cases, I showed poor judgment in asking for his time and attention regarding this matter. I allowed external and self-imposed pressure regarding the training class to override common sense and embarrass both myself and the [Unit] leadership. This will not happen again.⁴

On August 28, 2013, the Deputy Director sent Grievant a letter to serve as a formal written counseling. The Deputy Director wrote, in part:

You are hereby formally counseled concerning your continued unprofessional disruptive behavior in the workplace, about which I have previously counseled you in an informal (verbal) manner on several occasions as noted above. Any future confirmed unprofessional behavior exhibited by you including negative remarks about other employees of any agency or any unprofessional behavior or behavior that disrupts the workplace will result in application of the Standards of Conduct via a Written Notice.

³ Agency Exhibit 7.

⁴ Agency Exhibit 1.

You are specifically directed to immediately cease making unprofessional, denigrating, or sarcastic remarks about your co-workers and other members of the Center and its various member and partner agencies.⁵

On September 3, 2013, Grievant responded to the Deputy Director's letter, in part:

I will refrain from making unprofessional, denigrating, or sarcastic remarks about any of the ... Center Stakeholders.⁶

In February 2014, Grievant and several other Unit employees attended a training program in location away from the Unit's offices. Grievant received a communication from the Supervisor regarding the Grievant's work schedule. Grievant was angered by the Supervisor's scheduling decision. Grievant spoke to the Senior Special Agent about the Supervisor and called the Supervisor a bi-ch. Grievant's comment was intended was to denigrate the Supervisor.

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."⁷ 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 August 23, 2013, the Deputy Director instructed Grievant to cease making unprofessional, denigrating, or sarcastic remarks about her co-workers and other members of the Center and its various member and partner agencies. In February 2014, Grievant spoke with the Senior Special Agent and called the Supervisor a bi-ch. Grievant's comment was unprofessional and served to denigrate the Supervisor. In addition, Grievant received numerous instructions from the Captain and other supervisors within the Unit that she was to follow the chain of command regarding her needs and concerns about the Unit's work duties. Only in the event of an emergency was she authorized to deviate from the chain of command. On March 28, 2014, Grievant bypassed her chain of command and spoke directly with the Major regarding funding for training classes. Her request did not involve an emergency for which she could bypass the chain of

⁵ Agency Exhibit 10.

⁶ Agency Exhibit 10.

⁷ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

command. The Agency has presented sufficient evidence to show the Grievant should receive a Group II Written Notice of disciplinary action.

The Agency argued that Grievant should be demoted and receive a disciplinary pay reduction. It is clear that the Agency intended to demote Grievant and reduce her pay as a form of discipline. It is also clear that the Agency intended to mitigate the disciplinary action by giving Grievant a Group II Written Notice. Grievant understood that she was receiving a Group II Written Notice. She challenged a Group II Written Notice and presented her defenses to the Group II Written Notice.

The Agency made an error in the application of the Standards of Conduct. This decision was made at the time the Agency issued disciplinary action and could not have been corrected once the hearing began despite the strength of the Agency's presentation of evidence at the hearing. An employee may receive a demotion and disciplinary pay reduction only upon the issuance of a Group III Written Notice or upon the accumulation of disciplinary action such as by receiving at least two Group II Written Notices or at least four Group I Written Notices. In this case, Grievant did not receive a Group III Written Notice. Grievant did not have any prior active disciplinary action. The evidence before the Hearing Officer is that Grievant received only a Group II Written Notice. The Hearing Officer does not have the authority to increase the level of discipline issued by an agency. The Hearing Officer does not have the authority to rewrite a Written Notice to reflect an agency's intent to issue a higher level of discipline. Because the Agency chose to issue only a Group II Written Notice, Grievant's demotion and disciplinary pay reduction must be reversed. Grievant must be restored to her former position and pay level.

Grievant argued that the disciplinary action should be reduced to a Group I Written Notice. This argument fails. The Agency presented substantial credible evidence to support its position that Grievant engaged in behavior supporting the issuance of a Group II Written Notice.

Grievant argued that she and the Supervisor had significant conflict such that the Supervisor targeted her for disciplinary action. Grievant argued that the Supervisor asked other employees to notify her when Grievant engaged in behavior that might lead to disciplinary action. Grievant's assertion does not support a basis to reverse the disciplinary action. The Supervisor did not testify at the hearing because she left the VSP. The Agency's most persuasive evidence was based on Grievant's interaction with employees other than the Supervisor and the concerns of those employees were not dependent on the Supervisor's dislike of Grievant. The Hearing Officer can disregard the Supervisor's role in this grievance and the outcome remains the same.

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"⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁸ Va. Code § 2.2-3005.

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**. The Agency is ordered to **reinstate** Grievant to her former position, or if occupied, to an objectively similar position. The Agency is ordered to **restore** Grievant's compensation to her former pay band and rate. Grievant is awarded **back pay** representing the amount of the 5% disciplinary pay reduction effective April 25, 2014. Grievant's full benefits and seniority are also **restored** to the extent they were reduced by the disciplinary pay reduction.

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.