

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 09/29/14; Decision Issued: 10/21/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10453; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/04/14; EDR Ruling No. 2015-4028 issued 11/26/14; 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: 10453

Hearing Date: September 29, 2014

Decision Issued: October 21, 2014

PROCEDURAL HISTORY

On July 17, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. He was removed from employment based on the accumulation of disciplinary action.

On August 16, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 3, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 29, 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 Department of Corrections employed Grievant as a Training Development Coordinator Sr. at one of its facilities.

Grievant had prior active disciplinary action. On August 19, 2013, Grievant received a Group I Written Notice for failure to follow instructions. On April 19, 2014, Grievant received a Group III Written Notice with a ten workday suspension for displaying threatening/coercive behavior towards employees.

Grievant was responsible for scheduling the Games Offenders Play program as a one day program in the Agency's scheduling software, e-Scheduler. He incorrectly entered a start date of November 28 and an end dated of September 18 into the e-Scheduler. On November 23, 2013, the Registrar sent Grievant and email asking him to check the dates for the 2014 Games Offenders Play. The Registrar reminded Grievant again on February 24, 2014. On March 3, 2014, the Supervisor sent Grievant an email, "[p]lease follow up with [Registrar] this week regarding the [Games Offenders Play] class" Grievant replied, "It's a one day class" The Supervisor answered, "[p]lease see the original e-mail to resolve the discrepancy." On March 4, 2014, Grievant sent the Supervisor an email with a copy to the Registrar stating, "Original e-mail reviewed Clearly the class begins and ends on November 28, 2014 If a new scheduling form is needed please advise Outside of that, I don't know how I can be of further assistance." On March 10, 2014, the Registrar sent Grievant an email with a copy to the Supervisor indicating she had changed the scheduling form to show the class would begin no November 28, 2014 and end on November 28, 2014. She asked Grievant to "[p]lease correct the eScheduler." On the same day, the Registrar realized that November 28, 2014 would be the day after the Thanksgiving holiday when the

Agency's offices are closed. She sent Grievant an email saying, "You will need to reschedule the program for another date."

On June 11, 2014, the Supervisor sent Grievant an email stating:

Please refer to the emails below and attached scheduling form. This program is still showing upon on the eScheduler supervisor's report. However, the dates have never been finalized below because they are not correct. If you wish to still hold the program, please update the eScheduler and let me know. I would like to bring closure to this issue.

Grievant replied, "Will do!"¹

Grievant did not change the eScheduler. On July 7, 2014, the Supervisor sent Grievant an email stating:

Please submit a corrected e-Scheduler form for the Games Offenders Play program. The one submitted listed the program as a two-day class.

Grievant replied, "Noted."²

On January 23, 2014, the Supervisor sent Grievant an email instructing him, "please complete all the necessary requirements/lessons for certification to facilitate the Spanish program by Friday March 7, since responsibility for this program has now been transferred to you." The Supervisor sent Grievant email on February 26, 2014 instructing him to complete by March 7 the materials required to obtain the certification. Grievant did not complete the certification process by March 7, 2014. Grievant did not complete the Spanish Certification program requirements.

The Agency presented other facts to support its Group II Written Notice issued to Grievant. The Hearing Officer will not discuss those facts since they do not rise to the level of a Group II offense.

The Agency sought reimbursement for the cost of documents it copied and presented to Grievant pursuant to the Hearing Officer's order. The Agency failed to present testimony to support its claim of cost and, thus, the Hearing Officer denies the Agency's request to be allowed reimbursement for the documents it provided to Grievant as part of the hearing process.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but

¹ Agency Exhibit 11.

² Agency Exhibit 11.

[which] require correction in the interest of maintaining a productive and well-managed work force.”³ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁶ Grievant was repeatedly instructed by the Supervisor to change the eScheduler to show Grievant’s class as being a one day class instead of a two day class. He failed to comply with her instructions several times prompting the Supervisor to repeat her instruction. Grievant was instructed to complete Spanish certification requirements by March 7, 2014. He failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the accumulation of a Group III Written Notice, any other disciplinary action justifies removal. Grievant has an active Group III Written Notice. With the issuance of a Group II Written Notice in this case, Grievant has accumulated sufficient disciplinary action to justify its decision to remove Grievant from employment.⁷

Grievant presented a Scheduling Form purporting to show that as of July 2, 2014 he had correctly scheduled the Games Offenders Play course.⁸ The Agency’s witness testified that the date on the form could be manipulated and that Grievant had not submitted the form by July 2, 2014. Grievant did not testify and, thus, there is no basis to determine whether Grievant had completed the task by July 2, 2014. Moreover, Grievant’s email reply to the Supervisor on July 7, 2014 was “Noted.” If he had completed the task before July 7, 2014, he had the opportunity to inform the Supervisor of that action.

Grievant argued that he completed the Spanish certification testing process. Grievant did not testify to support this allegation. No evidence was presented to show that Grievant completed the test. The Agency contacted the testing site and verified that Grievant had not completed the test.

Grievant argued that the Agency did not comply with DHRM Policy 1.40 by failing to properly complete an interim evaluation for him. Whether the Agency failed to

³ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁷ It is not necessary for the Agency to specifically state on the Written Notice that it made its decision to remove based on the accumulation of disciplinary action.

⁸ Grievant Exhibit I.

comply with DHRM Policy 1.40 has no bearing on the outcome of this case. The Agency has established that the Supervisor gave Grievant instructions and that Grievant failed to comply with those instructions.

Grievant argued that he did not disregard his supervisor's instructions. The Agency presented sufficient evidence to show that Grievant disregarded several instructions from the Supervisor.

Grievant asserted that the Agency acted against him as a form of retaliation. No credible evidence was presented to support this defense.

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"⁹ 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 with removal 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

⁹ Va. Code § 2.2-3005.

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.