

Issue: Group II Written Notice with Suspension (insubordination); Hearing Date: 12/04/14; Decision Issued: 12/24/14; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10483; 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: 10483

Hearing Date: December 4, 2014
Decision Issued: December 24, 2014

PROCEDURAL HISTORY

On August 22, 2014, Grievant was issued a Group II Written Notice of disciplinary action with a one day suspension for insubordination.

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 20, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 4, 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 Department of Transportation employs Grievant as a Construction Manager at one of its locations. Grievant's Employee Work Profile included the core responsibility of, "[a]ctively participate in recruiting, interviewing, and providing hiring recommendations for the work section assigned as needed."¹ No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Supervisor who held the position of Area Construction Engineer. Grievant had been reporting to the Supervisor for approximately 25 months.

In November 2013, Grievant was on a hiring panel. After hiring decisions were made, Grievant believed he would be getting a specific employee. Later, he learned that a different employee would be reporting to him. Grievant claimed there was fraud in the hiring process and a waste of taxpayer money. Grievant did not want to participate in the Agency's talent acquisition process.

When the Supervisor learned of Grievant's concerns, he notified his supervisor, Mr. C. The Supervisor wanted Mr. C to hear Grievant's allegations directly from Grievant. The Agency planned another round of hiring and the Supervisor wanted Grievant to be involved in selecting employees.

¹ Agency Exhibit 6.

On June 20, 2014, Grievant, the Supervisor, and Mr. C met to discuss Grievant's concerns about the hiring process and his allegation of fraud. Mr. C asked Grievant about his concerns. Grievant said he did not want to participate in the hiring process anymore. Grievant said he believed fraud occurred in the November 2013 hiring process in which he participated. Mr. C said he would investigate the fraud allegation. The Supervisor said that Grievant could be the lead hiring manager and be able to control the process. The Supervisor believed that if Grievant was in control of the process, Grievant's concerns about the hiring process would be reduced. Grievant would be able to help screen candidates and select the appropriate ones for the open positions. The Supervisor suggested that better questions would be written for the interviews which Grievant would conduct. The Supervisor also suggested that he and Grievant take additional training regarding the Agency's talent acquisition process. Grievant agreed to take additional training.

The Agency advertised for open positions and the advertisement closed on July 21, 2014. The Supervisor instructed Grievant to conduct the hiring for those positions.

Several attempts were made to schedule the training, but the training did not occur on those dates because of Grievant's illness. August 4, 2014 was selected as the date for training.

On August 4, 2014, Grievant and the Supervisor met with a Human Resource Employee. The Human Resource Employee intended to provide Grievant and the Supervisor with answers to their questions about the hiring process. At the beginning of the meeting, the Supervisor asked Grievant if he had any questions about the talent acquisition process. Grievant said he did not know why he was there. The Supervisor was perplexed by Grievant's response and reiterated that they were meeting for a refresher training about the hiring process as had been agreed during the June 20, 2014 meeting. Grievant became loud and argued with the Supervisor. Grievant told the Supervisor that he did not want to hire a new position and that the Supervisor did not listen. Grievant said he did not feel comfortable with the process. The Supervisor asked him why he was uncomfortable and Grievant responded that he had a bad experience with the last hiring package. The Supervisor told Grievant he apologized for that prior process and that they were there in the meeting now and that the training session would help Grievant understand the process for the upcoming recruitment. Grievant said he would not go through the process. Grievant said that if he was involved in the hiring, he would pick the first resume and hire that person regardless of whether the person could spell his name. The Supervisor explained the Agency's business needs and why the Agency needed to hire employees at that time. Grievant continued to express his contempt for the hiring process and his refusal to participate. The Supervisor attempted to diffuse the argument and begin the training but Grievant would not relent. The Supervisor became frustrated with Grievant and began to argue loudly as well. Grievant abruptly pushed his chair backwards and stood up and said "I am getting out of here!" He was upset. Grievant walked out of the room and down the hall. When Grievant walked out of the meeting, the Supervisor believed that Grievant did not intend to participate in the talent acquisition process.

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.”² 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.”

Insubordination is a Group II offense. The essence of insubordination is a rejection and/or contempt of a supervisor’s legitimate authority to supervise.³ Grievant was obligated to follow the instructions of the Supervisor even if he did not agree with those instructions. Grievant’s position description required him to participate in the talent acquisition process. The Supervisor’s expectation that Grievant conduct a recruitment and receiving training regarding that process was reasonable. On August 4, 2014, Grievant was insubordinate to the Supervisor. Grievant was combative in his discussions with the Supervisor. Grievant initiated and perpetuated the conflict. Grievant expressed a desire to sabotage the hiring process if he was forced to participate. He said he would select the first resume and hire that applicant regardless of the applicant’s merit. Grievant walked out of the meeting thereby refusing training he was expected to receive. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s one day suspension must be upheld.

Grievant did not testify during the hearing. He did not present any witnesses that supported his chief defenses.⁴

Grievant argued that he did not say he would not conduct the recruitment. This argument fails. Grievant’s behavior and contempt for the hiring process clearly indicated his refusal to conduct the recruitment. When Grievant walked out of the meeting, the Supervisor believed Grievant did not intend to conduct the recruitment and his belief was reasonable based on Grievant’s behavior. Nevertheless, by starting an argument with the Supervisor about the training and walking out of the training, Grievant failed to follow the Supervisor’s expectation to participate in training for the recruitment.

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ It was appropriate and protected speech for Grievant to express his concerns about his participation in the hiring process. It was not appropriate, however, for him to refuse to participate in the hiring process and suggest he would sabotage the Agency’s attempt to find the best suited candidate for a position.

⁴ Grievant alleged that the Supervisor discriminated and retaliated against him. No credible evidence was presented to support this allegation.

Grievant argued that he told the Supervisor several times about his illnesses and the Supervisor said "I understand." Grievant perceived this as an insult because the severity of Grievant's illnesses was not something someone who had not experienced them could ever understand. This argument is not persuasive. The Supervisor said he understood to show empathy for Grievant not to insult him. Grievant misconstrued the Supervisor's comments as an insult when no such insult was intended or could have been inferred from the circumstances.

Grievant argued that it was appropriate for him to leave the room before the conflict became physical. Although it was appropriate for Grievant to leave the room to avoid physical contact, doing so did not create an immunity from disciplinary action. Grievant created the circumstances that lead to a heated argument. He could have de-escalated the conflict by changing his behavior. Doing so would have avoided the need to leave the room.

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"⁵ 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 the Supervisor was angry and arguing with Grievant just as much as Grievant was angry and arguing with the Supervisor. Although the Supervisor argued with Grievant, he did not initiate the argument and did not maintain it to the same extent as did Grievant. The Supervisor's made attempts to calm Grievant and to diffuse the confrontation. Grievant made no such attempts.

Although Grievant experienced several extreme illnesses, there was little evidence presented about the effects of those illnesses and whether Grievant's behavior on August 4, 2014 was caused by any illness. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

⁵ *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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.⁶

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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