

Issues: Group II Written Notice (failure to follow instructions and leaving work without permission) and Termination (due to accumulation); Hearing Date: 08/09/12; Decision Issued: 08/10/12; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9862; 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: 9862**

Hearing Date: August 9, 2012  
Decision Issued: August 10, 2012

#### **PROCEDURAL HISTORY**

On June 29, 2012, Grievant was issued a Group II Written Notice of disciplinary action for insubordination, failure to follow a supervisor's instructions and unsatisfactory work performance. Grievant was removed from employment effective June 30, 2012 based on the accumulation of disciplinary action.

On July 2, 2012, 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 16, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 8, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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:

The Virginia Community College System employed Grievant at one of its campuses. He began working for the Agency in 2006. The purpose of his position was:

This position is located in Custodial Services at the [Location] Campus. The incumbent in this position reports to the Supervisor of Custodial Services and the position is also overseen by the Manager of Custodial Services/Grounds. Although the position is assigned to [location] Campus, the responsibilities of the position are college-wide and the incumbent will be called upon to work anywhere within [Community College]. Duties of the position include performing general housekeeping functions, assisting with special setups, and serving on the college-wide emergency team.<sup>1</sup>

Grievant had prior active disciplinary action. On September 24, 2010, Grievant received a Group I Written Notice for attendance/excessive tardiness.<sup>2</sup> On April 11, 2011,

---

<sup>1</sup> Agency Exhibit 11.

<sup>2</sup> Agency Exhibit 10.

Grievant received a Group I Written Notice for failure to report without notice.<sup>3</sup> On April 11, 2011, Grievant received a Group II Written Notice of disciplinary action for unethical conduct.<sup>4</sup>

Grievant's work schedule began at 6:30 a.m. and ended at 3:15 p.m. He and Mr. H reported to the Supervisor.

On April 26, 2012 at approximately 12:50 p.m., the Supervisor instructed Grievant to arrange chairs for an event held in the Gallery. Although the Supervisor planned to help Grievant set up the event, he was instructed by the Manager to go to the warehouse instead. Mr. H also went with the Supervisor to the warehouse leaving Grievant solely responsible for arranging chairs in the Gallery. Grievant arranged the chairs as directed by the Supervisor.

At approximately 2:45 p.m., the Supervisor and Mr. H returned to the campus. The Supervisor checked his email a few minutes later and concluded that the instructions he had given Grievant regarding how to arrange the room were inaccurate. The Supervisor instructed Grievant to change the setup of the room to add tables. The Supervisor indicated that the Supervisor and Mr. H would assist Grievant. Grievant became irritated and stated "I set up the chairs by myself, now you do the rest by yourself." The Supervisor responded, "Come on [Grievant's first name], [Mr. H] will help us." Grievant left the Gallery. The Supervisor followed behind Grievant for a short distance encouraging Grievant not to leave but to comply with the Supervisor's instruction. Grievant did not comply with the Supervisor's instruction. The Supervisor and Mr. H added tables to the Gallery and were finished by approximately 3:10 p.m.

## 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."<sup>5</sup> 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 as a Group II offense.<sup>6</sup> On April 26, 2012, the Supervisor instructed Grievant to change the furniture arrangement in the

---

<sup>3</sup> Agency Exhibit 9.

<sup>4</sup> Agency Exhibit 8.

<sup>5</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>6</sup> See, Attachment A, DHRM Policy 1.60.

Gallery to add tables. Grievant refused to comply with that instruction and left the Gallery.<sup>7</sup> The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Grievant had a prior active Group II Written Notice. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove Grievant from employment.

Grievant argued that the Supervisor asked him to complete the setup after his shift had ended while he was in the parking lot attempting to leave the Facility. This Argument fails. The Agency presented credible testimony from the Supervisor who testified that the revised set up had been completed by 3:10 p.m. and that Grievant had left prior to that time. Mr. H assisted with the reconfiguration of the room and he left work at the end of his shift at 3:15 p.m. Had Grievant remained, he would have been able to provide assistance and complete the assignment before he shift ended at 3:15 p.m.

Grievant was issued a Notice of Improvement Needed/Substandard Performance on May 22, 2012. The Written Notice was issued on June 29, 2012. Grievant argued that the Agency's delays were unreasonable and suggested that he was not given sufficient time from the issuance of the Notice of Improvement Needed/Substandard Performance to alter his work performance prior to the issuance of the Written Notice. The Agency presented evidence explaining the reasons why it was slow to issue the Written Notice after the date of the offense. In particular, the Agency's deliberative process required numerous discussions among staff over an extended period of time. In addition, the issuance of the Notice of Improvement Needed/Substandard Performance had no bearing on whether the Agency was authorized to issue a Group II Written Notice. The Agency was not obligated to issue a Notice of Improvement Needed/Substandard Performance prior to issuing a Written Notice of disciplinary action.

*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 Employment Dispute Resolution...."<sup>8</sup> 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

---

<sup>7</sup> The fact that the Supervisor's original instructions were inaccurate does not form a basis for Grievant to disregard the Supervisor's instructions to revise the setup.

<sup>8</sup> *Va. Code § 2.2-3005.*

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 for failure to follow a supervisor's instructions is **upheld**. The Agency's decision to remove Grievant is **upheld** based upon 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>9</sup>

[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

---

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