

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 07/17/15;
Decision Issued: 07/20/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 10626; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10626

Hearing Date: July 17, 2015

Decision Issued: July 20, 2015

PROCEDURAL HISTORY

On April 1, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions/policy.

On April 13, 2015, 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 she requested a hearing. On June 29, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 17, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Behavioral Health and Developmental Services employs Grievant as a Food Service Tech I at one of its facilities. She has been employed by the Agency for approximately seven years. No evidence of prior active disciplinary action was introduced during the hearing.

Several employees working at the Facility perceived Grievant as a difficult employee with whom to work. At least one supervisor believed Grievant had difficulty respecting authority. Other employees described Grievant as trustworthy, loud, strong-willed, opinionated, and "bossy". Ms. L and Grievant had such significant conflict that they entered into an agreement not to speak with each other unless a supervisor was present.

Ms. S worked at the Facility. She has anxiety and a learning disability. She sometimes desires to please others by telling people what she believes they want to hear. Ms. S felt she was inexperienced at certain tasks. She would seek assistance from Grievant and considered Grievant to be her friend.

On March 20, 2015, Grievant told Ms. S to stop wiping carts and perform other duties. Ms. S went to Ms. L and asked what else to do and Ms. L said that Grievant should not have given Ms. S such an instruction. Ms. L reported her concerns to the Manager. Ms. S met with the Manager, Supervisor, and Ms. L to discuss Grievant's interaction with Ms. S. Ms. S told them what had happened. The Manager asked Ms. S

to write a statement. On March 20, 2015, Ms. S wrote a statement complaining about Grievant

[Grievant] is always telling me what to do about different tasks. It's very confusing to me. I just want to do my job and not have employee acting like supervisor. I know to listen to my supervisor only.¹

On April 23, 2015, the Agency received a statement from Ms. S saying she "would like to recant my complaint on [Grievant.]"

CONCLUSIONS OF POLICY

The Agency alleged Grievant violated Policy 053-062 governing Mutual Respect Through Adherence to Vision, Mission, and Values. Under this policy, employees are expected to treat other employees with "dignity and respect, as well as promote an environment which is free of disruptive behaviors."

The Agency's disciplinary action rests on the nature of the interaction between Ms. S and Grievant on March 20, 2015. Ms. S testified that she wrote her statement in a manner intended to please the Manager, Supervisor, and Ms. L rather than based on what actually happened. She testified that her statement was untrue. She testified that she was wiping a cart when Grievant told her to perform some other task. Ms. S said that Grievant did not boss her and that she felt safe with Grievant.

Based on Ms. S's testimony, the Agency has not presented sufficient evidence to show that Grievant violated the Agency's Policy 053-062 during her interaction with Ms. S. At most, the Agency has shown that Grievant told Ms. S to perform other duties because in Grievant's judgment it was not necessary for Ms. S to continue performing her assigned task. The Agency asserted that Grievant had been told not to tell other employees what to do but the Agency did not present sufficient evidence to show who gave Grievant such an instruction, when it was given, and the circumstances supporting such an instruction.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.²

¹ Agency Exhibit 1.

² Grievant asked that another employee be investigated. The Hearing Officer does not have authority to order the Agency to investigate an employee. Grievant's request for this relief is denied.

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.³

³ 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