

Issues: Group III Written Notice (failure to follow instructions), Group II Written Notice (retaliating against an employee), Group II Written Notice (failure to follow instructions), Termination (due to accumulation), and Retaliation (other protected right); Hearing Date: 07/16/15; Decision Issued: 07/23/15; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10632; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 08/07/15; DHRM Ruling issued 09/04/15; 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: 10632

Hearing Date: July 16, 2015

Decision Issued: July 23, 2015

PROCEDURAL HISTORY

On April 29, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating an instruction not to discuss with others her placement on administrative leave. On April 29, 2015, Grievant was issued a Group II Written Notice with removal for retaliation against an employee who made a complaint against Grievant. On April 29, 2015, Grievant was issued a Group II Written Notice for refusing three times to meet with a supervisor after three separate requests.

On May 29, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 16, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 16, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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?
5. Whether the Agency retaliated against Grievant?

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 Colleges as a Capital Outlay Manager. She began working for the College in September 2009.

In 2013, Grievant observed financial discrepancies within the department and its processing of a contract. Grievant reported her concerns to the State Fraud, Waste and Abuse Hotline. She also told at least two other people with the Agency about her concerns.

Grievant was involved in a conflict with Ms. R. On February 25, 2015, Grievant used the Virginia Freedom of Information Act to request any documents mentioning Grievant's name and submitted by Ms. R and/or two other employees to the Agency's Human Resource department. On March 4, 2015, Grievant received documents in response to her FOIA request. She was advised by the Agency's Counsel that "any act(s) of retaliation to include intimidation, harassment directly or indirectly targeting or directed towards or against any party identified, named, or revealed, as [a] result of this

request will not be tolerated and will result in disciplinary action to the violator up to and including termination.”¹

On March 15, 2015, Grievant sent an email to Mr. P, Mr. N, Mr. L, and Mr. T stating:

Since you are so kindly quoted. [Ms. R] is having an awful time with you all, and even a lousier one with me. Check out the [Ms. R] employee relations attachment!!

Grievant sent a second email to these employees adding, “[t]he one and only restriction that must be observed is the prohibition of any retaliation against any persons mentioned in the released documents.”²

On March 17, 2015, the Supervisor verbally asked Grievant to meet with him in his office regarding a personnel issue. He intended to issue Grievant a Group I Written Notice but he did not tell Grievant that he intended to issue the Group I Written Notice. Grievant refused to meet. The Supervisor made a second request to meet and Grievant refused. On March 17, 2015, the Supervisor sent Grievant an email stating:

I respectfully request a meeting with you at 12:30 p.m. on Wed., March 18th at my office to discuss a personnel matter. As your supervisor, I have the authority to request such meetings, and it is mandatory that you attend. Failure to do so may result in disciplinary action up to and including dismissal.³

Grievant refused to meet with the Supervisor because she believed the meeting was beyond a department related discussion.

The Supervisor met with the HR Director and concluded Grievant should not remain in the office while the Agency investigated the insubordination and for “team work” reasons. On March 18, 2015, Grievant was placed on paid administrative leave “while the college looks into the recent events of the past two weeks.” She was informed by the HR Director that the Agency was placing her on leave while the Agency investigated circumstances at her workplace. Grievant received a memorandum written by the Supervisor preventing her from entering the workplace and instructing her, “[y]ou are not to discuss this administrative leave with any employees of the College or companies currently engaged with [Agency], with the exception of myself, [Supervisor] and [HR Director].”⁴

¹ Agency Exhibit 9.

² Agency Exhibit 5.

³ Agency Exhibit 6.

⁴ Agency Exhibit 4.

On March 18, 2015, Grievant sent an email to Mr. R, an Agency employee, saying, "They just placed me on administrative leave."⁵ Grievant sent a similar email to Mr. W, an Agency contract employee.

On March 20, 2015, the Agency issued Grievant a Group I Written Notice regarding her interaction with Ms. R in December 2014. Grievant did not appeal the Group I Written Notice.

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."⁶ 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.⁷

Group III Written Notice

On March 18, 2015, the Supervisor placed Grievant on paid administrative leave and instructed Grievant "[y]ou are not to discuss this administrative leave with any employees of the College or companies currently engaged with [Agency], with the exception of myself, [Supervisor] and [HR Director]." The Supervisor's instruction was lawful, ethical, and within the Supervisor's authority to give. On March 18, 2015, Grievant violated the instruction when she told an Agency employee and Agency contract employee that she had been placed on administrative leave. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

The Agency's assertion that the discipline should be elevated to a Group III Written Notice is not supported by the evidence. No basis exists to elevate the disciplinary action.

Grievant argued it was necessary for her to tell her co-workers she would not be working to ensure that projects and other work duties could proceed without disruption. Although other employees may have benefited from knowing Grievant would not be

⁵ Agency Exhibit 4.

⁶ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁷ See, Attachment A, DHRM Policy 1.60.

working for several days, it was not Grievant's position to make that decision and disregard the Supervisor's instruction.

Grievant argued that the Agency was not authorized to place her on paid administrative leave. The Hearing Officer can assume for the sake of argument that the Agency incorrectly placed Grievant on paid administrative leave and removed her from the Agency's offices. The outcome of this case does not change with such an assumption. Grievant's remedy to this Agency error would not involve disregarding an instruction by the Supervisor. The Supervisor's instruction was lawful, ethical, and within the scope of his authority even if it may have been based on a mistaken interpretation of policy.

Group II Written Notice – Retaliation

The Agency alleged that Grievant retaliated against Ms. R when Grievant disclosed to four other employees information she received as part of her Virginia Freedom of Information request regarding Ms. R's complaints. Grievant's objective was to enable the four employees to protect themselves from Ms. R's false allegations to the HR department staff.

Although the Agency has alleged Grievant's behavior was retaliatory, it has not established any actual retaliation by Grievant. Ms. R did not testify. None of the four employees receiving information from Grievant testified that they retaliated against Ms. R. At most, the Agency has established that Grievant's actions could have resulted in retaliation. The Agency has not presented sufficient evidence to support the issuance of disciplinary action for retaliation. The Group II Written Notice must be reversed.

Group II Written Notice – Refusal to Meet

On March 17, 2015, the Supervisor instructed Grievant three times to meet with him. He informed her that the meeting was mandatory and she could receive disciplinary action for failing to meet with him. The Supervisor's instruction was lawful, ethical, and within the scope of his authority. Grievant refused to meet with the Supervisor thereby justifying the issuance of a Group II Written Notice.

Grievant refused to meet with the Supervisor and explained that she was concerned about issues beyond the department. Grievant's disagreement with the Supervisor about the need to meet does not justify Grievant's refusal to meet. Employees are obligated to comply with a Supervisor's instructions.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency's decision to remove her must be upheld.

Grievant argued that the Agency failed to engage in progressive discipline by first taking lower levels of disciplinary action without removing Grievant. Although issuing progressive disciplinary action is encouraged under the Standards of Conduct, it is not required.

Mitigation

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 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 further the disciplinary action.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁹ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant’s evidence shows by a preponderance of the evidence that the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency’s explanation was pretextual.¹⁰

⁸ Va. Code § 2.2-3005.

⁹ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁰ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

Grievant engaged in protected activities by reporting to the State Fraud, Waste and Abuse Hotline potential fraud and waste occurring at the College. She suffered an adverse employment action because she received disciplinary action. Grievant has not established a nexus between her protected activity and the disciplinary action. The Supervisor testified he was unaware of the protected activities prior to issuing the disciplinary action. He was not employed by the Agency at the time Grievant engaged in the protected activity. He began working for the Agency in January 2015. His testimony was credible. No credible evidence was presented to show that any employee involved in the issuance of disciplinary action against Grievant knew of Grievant's protected activity and acted based on that knowledge. The Agency did not retaliate against Grievant or take disciplinary action as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. The Agency's issuance of a Group II Written Notice for retaliation is **rescinded**. The Agency's issuance of a Group II Written Notice for refusing to meet is **upheld**. Grievant's removal is **upheld** based on 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 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.¹¹

[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

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.