

Issues: Group II Written Notice (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 08/10/15; Decision Issued: 08/25/15; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10643; 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: 10643

Hearing Date: August 10, 2015
Decision Issued: August 25, 2015

PROCEDURAL HISTORY

On May 12, 2015, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions, violation of DHRM Policy 2.30 governing Workplace Harassment, and disruptive behavior.

On June 10, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 6, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 10, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 Community College System employed Grievant as a Veterinary Administrative Assistant at one of its colleges. Grievant had prior active disciplinary action. She received a Group II Written Notice on February 18, 2013. On October 13, 2013, Grievant received a Group I Written Notice.

Ms. F began working part-time at the College in March 2014. Grievant hugged Ms. F towards the end of the Ms. F's first work day. Ms. F did not wish to be hugged or touched by Grievant.

Ms. F began sharing an office with Grievant in September 2014. Grievant sometimes printed documents relating to topics of interest to Grievant but not topics of interest to Ms. F. Grievant gave the documents to Ms. F or left them on Ms. F's desk. Ms. F asked Grievant to stop but Grievant continued to give Ms. F documents. Grievant often interrupted Ms. F's work with lengthy conversations especially when Grievant was late to work. Grievant sometimes pulled things off of Ms. F's clothing such as "fuzzy on a sweater". Ms. F asked her to stop. In February 2015, a bead fell onto Ms. F's clothing. Grievant grabbed the bead without asking Ms. F. This upset Ms. F.

Ms. F began complaining to her supervisor, Dr. A, about Grievant's behavior soon after Grievant and Ms. F began sharing an office.

In February 2015, Ms. F again notified Dr. A of her concerns about Grievant. Dr. A notified Grievant's supervisor, Dr. C. Dr. C discussed Ms. F's complaints with human resource staff. Dr. C decided to move Grievant from the office she shared with Ms. F to another desk in the "old" part of the building.

On or about March 18, 2015, Grievant left her work station and returned to the office she shared with Ms. F. Grievant tripped on a trash can and braced herself on her former desk. Ms. F was startled by Grievant's entering the office and quickly left the office to get away from Grievant. Ms. F reported the incident to her supervisor.

On March 23, 2015, the HR Assistant sent Grievant an email stating:

We have reached out to both [Dr. A] and [Dr. C] to clarify the directive given to them on Friday. There should be ZERO interaction between yourself and [Ms. F], throughout the remainder of this investigation and until final recommendations have been determined and this "no contact" has been lifted. If you or [Ms. F] require items from one another's work areas, then you must coordinate with your supervisors to ensure there is no interaction. Failure to comply with this directive may result in disciplinary action for either/both parties. This directive has been provided to both parties, [Ms. F] and yourself to ensure there is a full understanding of the requirement for no contact.¹

On March 23, 2015, the Supervisor sent Grievant an email stating:

As discussed with me via phone after forwarding this message, you are to follow the revised HR directives and not have any contact with your co-worker [Ms. F]. This includes work contact via E-mail, telephone/cell phone or texting. Any work related communications required are to be sent to me as your supervisor and I will pass them along.

One of your primary work duties is answering the main department phone during business hours of 9 a.m. to 5 p.m., Monday to Friday except during scheduled lunch breaks when voicemail can automatically handle missed calls. Any messages for [Ms. F] as the On-Line program admin assistant are to be sent to me to give to her and/or her supervisor, [Dr. A] ***²

On March 31, 2015, Grievant walked into the new section of the building and near where Ms. F's office was located. Ms. F's office door was closed but Ms. F heard Grievant's voice. Ms. F remained in her office. Dr. A also heard Grievant's voice and became concerned that if Grievant entered the new section of the offices when Ms. F was working, they may inadvertently come into contact.

On April 2, 2015, Dr. A sent the Supervisor an email stating:

I am asking that [Grievant] refrain from entering the office area hall way in the new area while [Ms. F] is present in the building, so that proximity to [Ms. F] is avoided. I also ask that [Grievant] use the other bathroom at the

¹ Agency Exhibit 4.

² Agency Exhibit 4.

other end of the building while [Ms. F] is present in the building. This will avoid any potential proximity until HR sorts things out.³

On April 3, 2015, the Supervisor met with Grievant and told Grievant not to enter the new section of the building during Ms. F's regular work hours.

On April 7, 2015, Grievant left her work area and entered the new section of the building. She walked past at least four offices on her left and to the Teaching Lab on her right. Ms. F was working in her office. She got up from her seat to go to the restroom. She went to the door of her office and observed Grievant at the doorway of the Teaching Lab. Ms. F remained in the room in order to avoid contact with Grievant. Ms. F remained in the room waiting for approximately ten minutes. Dr. C heard Grievant's voice and came out of her office. She approached Grievant and waved in a manner to indicate to Grievant that Grievant should leave the area. Grievant left the new part of the building and returned to the old part of the building.

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."⁴ 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. On March 23, 2015, the Supervisor instructed Grievant to not have any contact with Ms. F. On April 3, 2015, the Supervisor instructed Grievant not to enter the new section of the building where Ms. F worked. On April 7, 2015, Grievant entered the new section of the building and remained for several minutes until directed to leave by Dr. C. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

Upon the accumulation of two Group II Written Notices an agency may remove an employee. Grievant had a prior active Group II Written Notice. She had now accumulated two Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that Ms. F's testimony was not credible and that her allegations were not supported by the evidence. Ms. F's testimony was credible. Nevertheless, the Hearing Officer can disregard the testimony of Ms. F and the outcome of this case does

³ Agency Exhibit 4.

⁴ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

not change. Grievant was observed by the Supervisor entering the new section of the building even though Grievant had been instructed not to do so.

The Agency argued that Grievant created a hostile work environment for Ms. F. This allegation is not supported by the record. Although Ms. F considered Grievant's behavior to be annoying, Grievant's actions were not "on the basis of sex" as required by DHRM Policy 2.30. Grievant's actions towards Ms. F were not because of Ms. F's sex.

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. 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 based on the accumulation of disciplinary action 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

⁵ *Va. Code § 2.2-3005.*

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

[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

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