

Issue: Group II Written Notice (unsatisfactory performance and failure to follow instructions); Hearing Date: 10/03/16; Decision Issued: 10/05/16; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10859; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10859

Hearing Date: October 3, 2016

Decision Issued: October 5, 2016

PROCEDURAL HISTORY

On May 23, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and unsatisfactory performance.

On June 21, 2016, 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 August 30, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 2016, 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:

Virginia Commonwealth University employs Grievant as a Sustainability Programs and Projects Coordinator. Grievant had prior active disciplinary action. On June 10, 2014, Grievant received a Group I Written Notice for failure to follow instructions or policy and insubordination. On July 21, 2015, Grievant received a Group II Written Notice for failure to follow policy and instructions and unprofessional and disrespectful behavior.

Grievant's responsibilities include providing sustainability services education to the VCU community with the goal of reducing VCU greenhouse gas emissions and improving VCU's impact on climate change, water availability and ecosystems in an urban setting.

The Agency uses blue bins that resemble trash cans as receptacles for recyclable waste. Grievant used to deliver these bins to various offices on campus. This responsibility stopped several years ago when the Agency began using contractors to deliver blue bins and collect the recyclable materials. Agency contractors billed the Agency periodically after delivering bins and collecting materials from inside those bins.

If Grievant were to deliver bins independently of the contractors, he would create several problems. First, the contractors might not know where Grievant placed the bins and, thus, would not collect the materials in the bins permitting them to overflow. Second, if the contractor discovered where Grievant had placed bins and collected the

materials from the bins, the contractor would send a bill to the department that the department had not anticipated.

On May 5, 2016, Grievant sent an email to the Trade Supervisor indicating he would bring blue recycling bins to his department. Grievant walked by the Supervisor's office on his way to deliver the bins. The Supervisor told Grievant not to deliver the bins because doing so was not part of his duties. Grievant insisted that the department staff needed bins. The Supervisor re-stated that he was not to deliver the bins and Grievant complied with her instruction. If the Supervisor had not stopped Grievant, Grievant would have delivered the bins requested by the Trade Supervisor.

Shortly before May 10, 2016, Grievant went to S Hall and observed a stack of blue recycle bins. He took the bins from the stack and placed them at employee's desks. Grievant was not responsible for distributing bins to employees' desks.

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."¹ 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."

"[U]nsatisfactory work performance" is a Group I offense.² Grievant's job duties changed in 2013 such that he was no longer responsible for distributing recycle bins. That responsibility was given to private contractors. If Grievant distributed recycle bins, he created a risk that the contractor would not empty the bins and the risk that departments would receive unexpected bills from a contractor who discovered the bins and began emptying them. By attempting to distribute bins on May 5th and by handing out bins sometime before May 10, 2016, Grievant's work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant argued that he believed in team work and wanted to help other departments when they needed assistance. In this case, however, Grievant was informed that his assistance might create confusion between the contractor and Agency departments. The Agency has shown that Grievant's otherwise favorable desire to help out was not actually helpful.

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

The Agency argued that Grievant should receive a Group II Written Notice for failure to follow a supervisor's instructions regarding recycling tip-racks. A tip-rack is a small plastic container used to dispose of materials used in scientific experiments. The Agency alleged that Grievant was instructed to obtain a list of items that were recyclable and get a list of the type of tip-racks being purchased.³ After obtaining this information, Grievant was to contact the Contract Administration Manager. According to the Agency, Grievant contacted the Contract Administration Manager before accumulating the needed information instead of after doing so. The Agency relies on the following May 3, 2016 email from the Supervisor to Grievant:

As I mentioned, please work to get a list of what items are recyclable by [Contractor]. Also, please work to get a list from people in [T building] as to what types of tip racks are being purchased. This will allow us to communicate with [Contract Administration Manager] what items people in [T building] would like to recycle, in writing rather than by sample.⁴

The Supervisor's email does not say Grievant should refrain from communicating with the Contract Administration Manager "before collecting the requested information." The Supervisor's email informs Grievant that obtaining the information would allow "us" to communicate with the Contract Administration Manager regarding the items employees in T building would like to recycle. To support a Group II Written Notice for failure to follow a supervisor's instructions, the instruction must be clear and direct. In this case, the Supervisor's instruction is neither clear nor direct and does not support the issuance of disciplinary action. In addition, the Supervisor's "instruction" was contrary to the agreement she reached with Grievant through mediation. On March 8, 2016, the Supervisor and Grievant agreed to "strive to be more specific in their communications to the other regarding work assignments."⁵ If the Supervisor wanted Grievant to contact the Contract Administration Manager only after obtaining the needed information, she should have told Grievant not to contact the Contract Administration Manager until after obtaining the needed information.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. The Agency contends Grievant's level of discipline should be elevated to a Group II based on his prior disciplinary action. There is no basis to elevate Grievant's level of discipline because he engaged in the "same offense." In this case, Grievant engaged in unsatisfactory work performance, a Group I offense with an offense code of 11. Grievant's prior Written Notice offense codes are 13, 56, and 99, but not 11.

³ Ms. M testified that Grievant attempted to gain information from her about tip-racks but she "dropped the ball" when it came to responding to Grievant's requests for information.

⁴ Grievant Exhibit 1.

⁵ Grievant Exhibit 1.

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”⁶ 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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

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:

⁶ Va. Code § 2.2-3005.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.