

Issue: Group II Written Notice with Suspension (attendance/tardiness, leaving work without permission, failure to follow instructions, workplace harassment, abuse of State time, abusive language, disruptive behavior, unauthorized use of State property, threats/coercion); Hearing Date: 10/28/16; Decision Issued: 11/17/16; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 10875; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 12/01/16; EDR Ruling No. 2017-4452 issued 01/17/17; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/02/16; DHRM Ruling issued 01/25/17; 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: 10875

Hearing Date: October 28, 2016
Decision Issued: November 17, 2016

PROCEDURAL HISTORY

On June 13, 2016, Grievant was issued a Group II Written Notice of disciplinary action with a ten workday suspension for attendance/excessive tardiness, leaving work without permission, failure to follow instructions and/or policy, workplace harassment, abuse of State time, obscene or abusive language, disruptive behavior, unauthorized use of State property or records, and threats or coercion. Grievant was transferred from a supervisor position to a non-supervisory position.¹

On July 11, 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 she requested a hearing. On September 26, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 28, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

¹ Grievant does not seek reversal of the Agency's transfer of her to a non-supervisory position. Although the Agency's action was not permitted under the Standards of Conduct, the Hearing Officer will not reverse the Agency's action because Grievant does not seek a reversal of that action.

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 Department of Health employs Grievant as a Special Projects Coordinator. She had been a Case Surveillance Supervisor but was transferred to the Special Projects Coordinator position as part of the disciplinary action. Grievant has been employed by the Agency for approximately 12 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency combined nine separate factual scenarios to justify issuance of a Group II Written Notice. The Hearing Officer must evaluate each scenario separately to determine if any one of them rises to the level of a Group II offense. Several of the Agency's allegations do not rise to the level justifying disciplinary action. Several of the Agency's allegations do not rise higher than a Group I offense. A Group II Written Notice is only supported by Grievant's failure to follow policy.

Grievant was required to travel to a training conference held at a Hotel in a locality outside of Virginia. The training was scheduled for April 19, 2016 to April 22,

2016. Grievant assumed that because the Agency required her to attend the training, the Agency had also arranged for her travel lodging. She thought the trip was a “direct bill” completed by the Administrative Assistant. When Grievant arrived at the Hotel, she realized she did not have a reservation. Grievant called the Supervisor but the Supervisor did not answer her telephone. Grievant contacted the Division Director at approximately 10 p.m. and discussed her lodging. The Division Director said Grievant should stay at that Hotel and the next day they would see about conducting travel correctly.

Grievant obtained a room at the Hotel and attended the training on the following day. On April 19, 2016 at 9:10 a.m., Grievant received an email identifying a different hotel away from the training location that was within the State guidelines. Grievant remained at the same Hotel and incurred lodging fees in excess of the State guidelines.

On April 22, 2016, the training was to last for approximately four hours. Grievant did not attend the training that day. Grievant claimed she was ill and had to remain in her Hotel room. She took medication that made her drowsy. At 9:28 a.m., the course Trainer sent Grievant an email asking if Grievant was okay. At 10:33 a.m., Grievant replied to the Trainer. Grievant checked out of the Hotel by 11 a.m. She left the locality where the training was held. Grievant did not contact her Supervisor on April 22, 2016 to obtain permission to take sick leave.

Grievant paid for the cost of her lodging. She sought reimbursement and was provided reimbursement in accordance with the State travel guidelines. The amount reimbursed was less than the cost Grievant paid.

Division staff maintained personal health information regarding Virginia citizens. The Unit had a locked storage area where all personal health information was to be stored. Employees could remove the information from the storage area and review it at their desks as long as the information was returned to the storage area by the end of the work day. On January 13, 2016, the Division Director sent staff including Grievant an email stating:

Please note that [Division’s] Security and Confidentiality Policies and Procedures REQUIRE that documents containing patient identifiers shall be secured at the end of each workday in designated storage areas. Any variance from this rule requires prior supervisory approval and shall be minimal.²

When Grievant returned to work on April 25, 2016, the Agency removed her supervisory duties and moved her office to another location. She was placed on pre-disciplinary leave.

² Agency Exhibit 10.

At some point, the Agency reviewed the contents of Grievant's office files. Grievant had in her office personal health information relating to nine or ten citizens. She had not returned the information to the Unit's central storage area as required.³

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."

Attendance/excessive tardiness

Tardiness and poor attendance are Group I offenses.⁵ The Agency did not establish that Grievant acted contrary to the Standards of Conduct regarding attendance/excessive tardiness. The Agency did not establish a pattern of absences or tardiness by Grievant.

Leaving Work Without Permission

"[L]eaving work without permission" is a Group II offense. The Agency has not established that Grievant left work without permission. Grievant should have reported to the training on April 22, 2016. Her work location or duty station would have been in the training room where the training was occurring. Grievant did not leave the training room because she never reported to the training room. She did not leave work without permission. She did not begin working on April 22, 2016.

Failure to Follow Instructions and/or Policy

Failure to follow policy is a Group II offense.⁶ The Agency division had a policy governing Security and Confidentiality. Section 4.3 provides:

³ The Agency also alleged that Grievant had personal health information on the hard drive of her personal computer. Grievant denied she had personal health information on the hard drive of her computer. The Agency did not present sufficient information to prove this allegation.

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

⁵ See, Attachment A, DHRM Policy 1.60.

⁶ See, Attachment A, DHRM Policy 1.60.

All confidential information shall be maintained within the above mentioned file rooms and/or cabinets. Staff should retrieve necessary data on a daily basis and return all confidential information at the end of their workday. No PHI should be left in staff offices during non-work hours. Good professional judgment is required when determining if documents require locking during the workday.⁷

Grievant took personal health information from the Unit's locked central storage area and kept it in her office without returning it to the storage area by the end of the day. Grievant acted contrary to policy.

DHRM Policy 4.57 provides:

Employees should request [sick leave], when feasible, prior to its use in accordance with agency procedures

Grievant failed to attend the training session on April 22, 2016. She did not attend the training due to illness but did not request approval from the Agency to take sick leave prior to or during the training session. Grievant was capable of making such a request by email as evidenced by her ability to respond to the Trainer's request about her status.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant's suspension must be upheld.

Abuse of State Time

"[A]buse of State time" is a Group I offense.⁸ The Agency did not establish this allegation.

Obscene or Abusive Language

"[U]se of obscene language" is a Group I offense.⁹ The Agency did not establish that Grievant used obscene or abusive language.

Disruptive Behavior

"[D]isruptive behavior" is a Group I offense.¹⁰ The Agency did not establish that Grievant's behavior was disruptive. The Agency presented evidence that Grievant

⁷ Agency Exhibit 3.

⁸ See, Attachment A, DHRM Policy 1.60.

⁹ See, Attachment A, DHRM Policy 1.60.

created conflict among her subordinates. It did not present a first-hand account of an incident during which Grievant's behavior was disruptive to the Agency's business.

Unauthorized Use of State Property or Records

“[U]nauthorized use or misuse of State property” is a Group II offense.¹¹ The Agency did not establish that Grievant had unauthorized use of State property or records. Grievant's failure to return personal health information records to a central storage area was not misuse of State property.

The Agency alleged but did not show that Grievant failed to distribute lab results. Even if the Agency had established this allegation, it would not have constituted unauthorized use of State property or records. A failure to distribute records is not a misuse of records.

Threat or Coercion

[T]hreatening others” is a Group III offense.¹² The Agency alleged but did not show that Grievant made threats or coerced employees. To the extent Grievant told a contract employee that his or her contract might not be renewed based on poor work performance, Grievant's behavior was appropriate. Grievant had the authority to inform the vendor regarding how well its employees were performing services for the Agency.

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”¹³ 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.

¹⁰ See, Attachment A, DHRM Policy 1.60.

¹¹ See, Attachment A, DHRM Policy 1.60.

¹² See, Attachment A, DHRM Policy 1.60.

¹³ *Va. Code § 2.2-3005.*

Revision of Written Notice

The manner in which the Agency took disciplinary action in this case is troubling.

State agencies are expected to investigate allegedly inappropriate employee behavior and then take disciplinary action under the Standards of Conduct based on those findings. The Agency made several material errors suggesting its disciplinary action may not have been “free of improper motive.” Rather than mitigating¹⁴ the disciplinary action, the Hearing Officer will Order the Agency to revise its Written Notice to show it being issued solely for violation of written policy.

The Agency made significant errors as follows. First, the Agency transferred Grievant as part of the disciplinary action. The Agency’s attachment to the Group II Written Notice provides, “[b]ecause of the seriousness of the findings, you will no longer be in the position of Case Surveillance Supervisor and will no longer have any supervisory responsibilities.”¹⁵ Upon the issuance of a Group II Written Notice (without prior active disciplinary action), an agency is limited to issuance of a ten work day suspension. An agency may not transfer an employee as part of the issuance of a Group II Written Notice. The Agency must revise the Group II Written Notice to exclude reference to Grievant’s transfer.¹⁶

Second, the Agency collected nine different factual scenarios and used them to support a single Group II Written Notice. If Grievant’s behavior was sufficient to support disciplinary action, then the Agency could have issued nine different Written Notices.¹⁷ If the Agency wanted to mitigate nine disciplinary actions, it should have expressed that it was mitigating nine separate reasons for discipline into one Written Notice. Instead, the Agency claimed Grievant’s behavior could rise to the level of a Group III offense but the Agency mitigated the Group III offense to a Group II offense because of her length of service, lack of formal discipline, and otherwise good work performance. Several of the factual scenarios alleged could not have risen higher than a Group I offense yet the Agency claimed the violations supported its consideration of a Group III offense and its issuance of a Group II Written Notice. For example, Group I offenses include attendance/excessive tardiness, abuse of State time, obscene or abusive language, and disruptive behavior. These are stated in Attachment A, Standards of Conduct. The

¹⁴ The Agency’s behavior raises a question regarding whether the Agency’s action was free of an improper motive. The standard for mitigation, however, is high and the Hearing Officer will not mitigate the disciplinary action in this case.

¹⁵ Agency Exhibit 1.

¹⁶ If Grievant had sought reversal of the transfer, the Hearing Officer’s remedy would have been to restore Grievant’s supervisory duties.

¹⁷ As the evidence showed, Grievant’s behavior did not support the issuance of nine different written notices.

Agency must remove any reference to offenses that would otherwise be Group I offenses.

Third, the Agency received an allegation from an employee, Mr. T, that Grievant “sexually harassed him, that she harassed him on the basis of his national origin, that she exhibited bullying and intimidating behavior against him, and that she created a hostile work environment.” On May 17, 2016, the Agency’s EEO Division Director cited the provisions of Policy 2.30 governing Workplace Harassment requiring behavior “on the basis of [their being a protected class]” and concluded, “that the allegations of sexual harassment are unsubstantiated. *** I also find that [Grievant] has not harassed any of her coworkers or subordinates based on their being in a protected class.”¹⁸ Despite this conclusion, on May 25, 2016, the Agency notified Grievant of “Policy Violations” including that “you created a hostile work environment ...”¹⁹ At the hearing, the Agency conceded that it had no evidence to support its allegation of Workplace Harassment. Thus, the Agency disciplined Grievant based on a false (and likely frivolous) allegation of Workplace Harassment that it knew or should have known was false at the time the Group II Written Notice was issued. The Agency’s action is especially offensive because a finding of Workplace Harassment against an employee may attach a stigma to that employee. Workplace Harassment may involve another employee who is a “victim.” The Agency must remove any reference to Workplace Harassment in the Group II Written Notice.

Grievant’s Request for Reimbursement

Grievant seeks reimbursement from the Agency with respect to her travel expenses from April 18, 2016 through April 22, 2016.

State Travel Regulations Topic 20335 provides:

For all official State business travel, the Agency Head or designee is authorized to approve reimbursement in advance for lodging up to 50% over the guidelines when circumstances warrant. ***

Reimbursement for lodging is limited to actual expenses incurred up to the guideline amount, plus hotel taxes, fees, and surcharges. Expenses in excess of the guidelines will not be reimbursed, unless approved in advance as required in the Approval and Exceptions section. Travelers who do not plan with careful consideration to these guidelines will bear the additional expense personally. In such cases, taxes and surcharges will be prorated and reimbursement only for the appropriate rate.

¹⁸ Agency Exhibit 4.

¹⁹ Agency Exhibit 4.

Grievant did not obtain approval in advance from the Agency Head or the Agency Head's designee for reimbursement over the guidelines. There is no basis in policy to grant Grievant's request.²⁰

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a ten workday suspension is **upheld**. The Agency is **ordered** to remove the existing Group II Written Notice from Grievant's personnel file. The Agency is **ordered** to re-issue the Written Notice with only the offense code "13" and on the basis of failure to follow policy. The issue date should remain shown as June 13, 2016 with an Inactive Date of June 12, 2019. Grievant's request for relief regarding reimbursement of travel expenses 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

²⁰ Grievant's failure to obtain lodging within the State guidelines does not form a basis for disciplinary action. The consequence to an employee who fails to obtain lodging within the State guidelines is that he or she is personally responsible for the amount in excess.

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.²¹

[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

²¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.