

Issues: Group II Written Notice (failure to follow instructions – communication), Group II Written Notice (failure to follow instructions – failure to complete task), and Termination due to accumulation; Hearing Date: 11/14/16; Decision Issued: 12/05/16; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10879; Outcome: Partial Relief; **Administrative Review**: EDR Ruling Request received 12/19/16; EDR Ruling No. 2017-4462 issued 01/27/17; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 12/19/16; DHRM Ruling issued 01/26/17; Outcome: Remanded to AHO; Remand Decision issued 02/08/17; Outcome: Grievant reinstated; Administrative Review: Second Ruling Request received 02/24/17; Ruling No. 2017-4505 issued on 03/01/17; Outcome: Remanded to AHO; Second Remand Decision issued 03/29/17; Outcome: Exclude back benefits for health insurance coverage.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10879

Hearing Date: November 14, 2016
Decision Issued: December 5, 2016

PROCEDURAL HISTORY

On August 16, 2016, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy/instructions. On August 16, 2016, Grievant was issued a second Group II Written Notice with removal for failure to follow policy/instructions.

On September 15, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 27, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 14, 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 Notices?
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 employed Grievant as a Student Employee Personnel Coordinator. Grievant had prior active disciplinary action. On April 11, 2016, Grievant received a Group II Written Notice for failure to follow policy and/or instructions.

The Agency hired Graduate Assistants and provided them with stipends and scholarships. The Supervisor asked Grievant to complete pay action forms for five graduate students. She began working on the assignment which required her to contact employees in another division including Ms. T. A question arose regarding how to interpret a policy governing how many hours the Graduate Assistants could work. On August 2, 2016, Grievant sent an email to the Manager with copies to other staff expressing her interpretation of the policy.

On August 2, 2016, the Manager sent Grievant an email instructing Grievant to meet with the Supervisor to discuss the policy. The Manager explained that the Supervisor already had had discussions with Ms. T about the policy.¹

The Supervisor wanted to work directly with Ms. T, an employee of the other unit, and for Grievant to discontinue her involvement. On or about August 2, 2016, the Supervisor instructed Grievant to discontinue contacting Ms. T in the other unit

¹ See, Grievant Exhibit 2.

regarding processing the pay action forms under the policy. The Supervisor said she would resolve the issue directly with Ms. T.

On August 4, 2016, Grievant sent Ms. T an email stating:

I just want to check in with you regarding the policy you and I discussed with respect to the work hours/requirement for G9 graduate assistants Where are we? ... have we come up with a resolution?²

On August 4, 2016, the Supervisor sent Grievant an email reaffirming their conversation several days earlier. The email stated:

[Grievant] as we discussed in our one on one meeting yesterday, I am working directly with [Ms. T] on this. I advised you there was nothing further needed from you other than letting HR know to hold off on the PAF's you submitted at my request for the [graduate assistants]. Thank you for your concern and follow up but [names] and I am working on this.³

In February 2016, the Supervisor assigned Grievant responsibility for drafting policies relating to onboarding. The Supervisor reminded Grievant of the assignment in April 2016. On April 15, 2016, Grievant submitted a draft of the document to the Supervisor but it was incomplete and did not show operations or procedures.

On June 1, 2016, the Supervisor sent Grievant an email as a "recap of our conversation in our one on one". The Supervisor wrote, "I asked you what you are currently working on. You advised me that you are working on the policies and the blackboard onboarding project. (Please send me what you have updated on blackboard and the HR policy by tomorrow, June 2, 2016.)"⁴

On June 2, 2016 at 3:23 p.m., the Supervisor sent Grievant an email "to remind you of the deadlines that I gave you yesterday that haven't been met (Please send me what you have updated on blackboard and the HR policy by tomorrow, June 2, 2016.)" Grievant had already left the office by 3:23 p.m. Her shift was scheduled to end at 3:30 p.m.

On June 3, 2016, Grievant replied to the Supervisor, "Attached you will find the policy that I've been working on. As you will see, it is incomplete. I work on it here and there when I have time."⁵ Grievant did not submit a complete draft of the policies.

² Agency Exhibit 8D.

³ Agency Exhibit 8D.

⁴ Agency Exhibit 9C.

⁵ Agency Exhibit 9F.

Grievant served as the unit's timekeeper. She was to review time cards, approve them, and send them to the payroll department. In July 2016, a student failed to clock out at the end of his shift. The time records for this student showed he worked 28 hours more than he actually worked. An employee in the payroll department recognized the error after the student had been paid. The Agency had to recover the overpayment from the student.

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."

First Group II Written Notice

Failure to follow policy and/or instructions is a Group II offense.⁷

On or about August 2, 2016, the Supervisor instructed Grievant to refrain from further conversation with Ms. T about work hours policy governing Graduate Assistants. Grievant was informed that the Supervisor would address the policy with Ms. T. On August 4, 2016, Grievant sent Ms. T an email to continue her discussion with Ms. T about the interpretation. Grievant failed to follow the Supervisor's instruction thereby justifying the issuance of a Group II Written Notice.

Grievant asserted but did not prove that the Supervisor did not tell Grievant to refrain from communicating with Ms. T. The Agency presented sufficient evidence to show the Supervisor's instruction for Grievant to discontinue addressing the issue.

Second Group II Written Notice

"[U]nsatisfactory work performance" is a Group I offense.⁸ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

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.

⁸ See Attachment A, DHRM Policy 1.60.

Grievant was assigned responsibility for drafting policies. She made several drafts but did not complete them properly. She failed to complete satisfactorily her work assignment.

Grievant served as the Agency's timekeeper. She should have verified the time records of a student who failed to clock out at the end of his shift. If she had done so, she would have recognized the error and prevented the Agency from overpaying the student for 28 hours of work. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant asserted that she made the error because the Agency's computer system "dashboard" only displayed 100 names and the student and the student's name was not within the 100. The evidence showed that Grievant received sufficient information to enable her to conclude that she could have and should have reviewed all of the students' names and entries.

The Agency argued that Grievant should receive a Group II Written Notice for failure to follow instructions and policy. The Agency presented evidence that Grievant was given an instruction to draft policies. It is unclear what would constitute successful completion of the assignment. Grievant attempted to comply with the instruction but did not do so adequately. The Agency presented the manual governing the process Grievant was to follow to verify employee time entries. Grievant was attempting to comply with the requirements of the Agency's manual but failed to do so. The facts of this case show that Grievant's behavior is better described as unsatisfactory work performance than as a violation of instruction or policy.

Accumulation of Disciplinary Action

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. With the written notices in this case, Grievant as accumulated two Group II Written Notices and one Group I Written Notice. Accordingly, the Agency's decision to remove Grievant must be upheld.

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"⁹ 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-

⁹ Va. Code § 2.2-3005.

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 actions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow instructions regarding communications with the Manager is **upheld**. The issuance to the Grievant of a second Group II Written Notice for failure to complete tasks adequately is **reduced** to a Group I Written Notice. 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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

RECONSIDERATION DECISION OF HEARING OFFICER

In re:

Case No: 10879-R

Reconsideration Decision Issued: February 8, 2017

RECONSIDERATION DECISION

In the Original Hearing Decision issued December 5, 2015, the Hearing Officer wrote that Grievant had a prior active Group II Written Notice. That finding was in error. Grievant had only a prior active Group I Written Notice.

The Original Hearing Decision upheld the first Group II Written Notice but reduced the second Group II Written Notice to a Group I Written Notice.

The Original Hearing Decision upheld Grievant's removal but that holding was in error. Grievant had accumulated a Group II Written Notice and two Group I Written Notices. The Original Hearing Decision should have reinstated Grievant to her former positions.

RECONSIDERATION DECISION

The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

RECONSIDERATION DECISION OF HEARING OFFICER

In re:

Case No: 10879-R2

Reconsideration Decision Issued: March 29, 2017

SECOND RECONSIDERATION DECISION

In the First Reconsideration Decision issued February 6, 2017, the Hearing Officer ordered:

The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

DHRM Policy 1.60 grants hearing officers the authority to "exclude back benefits for health insurance coverage if the employee was enrolled in other coverage during a period of suspension or termination and awarding back benefits would present undue financial hardship to the employee. The employee must provide proof of the other coverage."¹¹ Grievant has presented sufficient proof of other coverage. The Agency does not object to Grievant's request. Accordingly, the First Reconsideration Decision is revised to Order:

The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency is ordered to exclude back benefits for health insurance coverage.

¹¹ DHRM Policy 1.60, *Standards of Conduct*, (F)(2)(d).

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer