

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 11/29/16;
Decision Issued: 12/22/16; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10885; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10885

Hearing Date: November 29, 2016
Decision Issued: December 22, 2016

PROCEDURAL HISTORY

On July 28, 2016, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow instructions.

On August 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 October 24, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 29, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Department of Transportation employs Grievant as a Program Administrative Specialist II. She has been employed by the Agency for approximately 25 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in Unit 1. She reported to a supervisor¹ who reported to Supervisor 1. Supervisor 1 reported to Manager 1.² If Grievant had questions about a work task, she sometimes contacted employees in Unit 2, including Supervisor 2 and Manager 2.

The Agency wanted Grievant to stop asking questions directly of Supervisor 2 or Manager 2. If Grievant had a question, the Agency wanted Grievant to present her question to Supervisor 1 and Manager 1 first. Supervisor 1 and Manager 1 would then communicate with Supervisor 2 and Manager 2 about the question and provide Grievant with an answer. The Agency's objective was to keep Unit 1 supervisor informed and respect the chain of command with other units including Unit 2. Grievant was free to ask questions of employees in Unit 2 who were at her pay band 5 level.

¹ Grievant and her immediate supervisor held positions in pay band 5.

² Supervisor 1 was in pay band 6. Manager 1 was in pay band 7.

Unit 1's "escalation" policy applied to all employees in Unit 1.

On February 29, 2016, Supervisor 1 sent Grievant a memorandum stating, in part:

Proper protocol is to work directly with others at your level and if escalation is needed request this from your supervisor as they deem necessary. If further escalation is needed your supervisor will request this from the Assistant Division Administrator level. Further escalation would be for the Assistant Division Administrator to request this from the Division Administrator.³

On March 8, 2016, Manager 1 sent Grievant a memorandum stating, in part:

In regard to my expectations with issues that may require assistance from without the Division, we agreed that you would email [Supervisor 1] first outlining your issue with your suggested solution. He will either handle your issue himself or direct you on the next appropriate step.⁴

On March 9, 2016, Grievant sent Supervisor 1 an email seeking further clarification. Supervisor 1 replied:

Once determined to be a routine work contact that is acceptable for that issue to keep with the contact; other than that if an issue needs escalating above your level to another Division is what is being requested to be sent through me prior. I understand that the [Unit 2] staff you are working with, other than [Supervisor 2], are pay band 5 which groups several levels together in VDOT today, such as your supervisor is a pay band 5 the same as you. Given if there is a routine matter it is fine to discuss and if you are seeking guidance on non-routine issue we would like to be aware prior to see if we can assist.⁵

On April 18, 2016, Grievant sent the immediate supervisor and Supervisor 1 an email stating:

It slipped my mind this morning when we met but I wanted to ask, am I still required to send escalation emails when I need assistance outside of the Division or can I just pick up the phone like I have done since I have been here?

³ Agency Exhibit 3.

⁴ Agency Exhibit 3.

⁵ Agency Exhibit 3.

Supervisor 1 did not reply by email.

Supervisor 1 met with Grievant. Supervisor 1 told Grievant she could escalate to [Unit 2]. He meant this to mean, Grievant could speak with someone in Unit 2 as long as that person was a peer. He did not intend to authorize Grievant to “elevate” the issue directly to Supervisor 2 or Manager 2. He did not adequately express what he meant to tell Grievant. At the conclusion of the meeting, Grievant believed she was free to contact Manager 2 and Supervisor 2 as she had done in prior years without having to first address the question with Supervisor 1 and Manager 1.⁶

On May 4, 2016, Grievant sent Supervisor 1 an email with a copy to the immediate supervisor stating:

I know you stated to me verbally that it is no longer required of me to continue to do an escalation email when I asked you on April 21, 2016 unless it is a situation that is out of the norm but I wanted to follow up in writing.⁷

Supervisor 1 did not respond to Grievant’s email. He testified that he has hundreds of emails per day and if something was important the sender usually followed up with another email.

On July 19, 2016, Grievant sent an email to her immediate supervisor with copies to Supervisor 1 and Manager 1. Grievant wrote, in part:

I am in need of [Unit 2’s] review to know what our next steps should be. I wanted to inform you that I now have reached out to [Manager 2] on this.

Manager 1 replied, “You have already reached out to [Manager 2]?” Grievant responded:

Yes, as this is normal procedure. We need guidance/ resolution to this procurement issue and [Supervisor 2] is out.⁸

CONCLUSIONS OF POLICY

On July 19, 2016, Grievant acted contrary to the Agency’s Unit protocol by contacting Manager 2 without having first addressed her concern with Supervisor 1 and Manager 1. Grievant’s behavior would be unsatisfactory performance in the absence of mitigating circumstances.

⁶ It appears that Grievant the Supervisor 1 had different meanings for the word “escalate”.

⁷ Grievant Exhibit 4.

⁸ Agency Exhibit 4.

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-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.

Grievant has presented sufficient evidence to support the mitigation of the disciplinary action. Grievant did not realize she was acting contrary to the Agency’s protocol on July 19, 2016 for two reasons. First, Grievant had a meeting in April with Supervisor 1 and understood him to have discontinued the Unit’s protocol. Second, Grievant attempted to verify her understanding of her meeting with Supervisor 1. She sent an email to Supervisor 1 on May 4, 2016 confirming, “I know you stated to me verbally that it is no longer required of me to continue to do an escalation when I asked you on April 21st....” Supervisor 1 did not reply to Grievant. In other words, the Agency had the opportunity correct Grievant’s misunderstanding, but failed to do so. Supervisor 1’s assertion that he did not reply because he receives hundreds of emails was not a sufficient justification to ignore Grievant’s request for clarification. The Group I Written Notice must be reversed.

DECISION

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

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:

⁹ Va. Code § 2.2-3005.

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.