

Issues: Group II Written Notice (unsatisfactory performance and failure to follow instructions), Group II Written Notice (unsatisfactory performance and failure to follow instructions), and Termination (due to accumulation); Hearing Date: 04/22/16; Decision Issued: 09/30/16; Agency: DCR; AHO: Carl Wilson Schmidt, Esq.; Case No.10763; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10763

Hearing Date: April 22, 2016
Decision Issued: September 30, 2016

PROCEDURAL HISTORY

On December 7, 2015, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory work performance and failure to follow instructions and/or policy. On December 7, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory work performance and failure to follow instructions or policy.

On January 4, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 27, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 22, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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?
5. Whether the Agency discriminated against Grievant because of his age?
6. Whether the Agency retaliated against Grievant?

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 Department of Conservation and Recreation employed Grievant as Dam Safety Division Director. He was responsible for management oversight for the Division including personnel, program, and financial management. The purpose of his position was:

To direct the dam safety and floodplain management programs in accordance with Virginia law and regulations and in the context of the policies of the administration as communicated by the DCR Department Director. To recognize opportunities to minimize the risk to the public and the environment, and limit the Commonwealth's liability. To expand public awareness of the impacts of flooding, flood damage and the public benefits derived from impoundments and to increase the public's interest and actions in preventing the loss of life and property related to flooding.¹

¹ Agency Exhibit 10.

Grievant assumed this position in August 2010 through a competitive hiring. He began working for the Agency in 2005.

The Agency alleged numerous factual scenarios to support its issuance of disciplinary action. The Hearing Officer must examine each factual scenario separately to determine if it rises to the level justifying the disciplinary action. The Hearing Officer will address primarily factual scenarios that given rise to disciplinary action.²

The Agency Head began working for the Agency on March 31, 2014. Grievant began reporting to the Deputy Director in May 2015. Grievant supervised approximately nine employees.

On Grievant's October 2014 annual performance evaluation, the Agency Head wrote about Grievant, "[u]nfortunately, his division is suffering from lack of leadership and guidance. [Grievant] needs to work harder to pull his team together, promote more collaborative working arrangements, seek input from ALL his staff. Morale within Dam Safety and Flood Plain Management Division is a major problem and we need to work collectively to solve this issue."³

The Division maintains a Dam Owner Inventory Database. The Internal Auditor concluded that the database "does not have complete, accurate, and timely dam owner information. Updates to dam owner information, dam certification status, P.E. dam visits, and other items [affecting] regulated dams do not always get entered in the database."⁴

On June 6, 2015, the Deputy Director asked Grievant to "[p]rovide me with information regarding which employees are currently under alternate work schedules."⁵ The Deputy Director sent Grievant an email on July 4, 2015 stating, "[p]rovide me with information regarding which employees are currently under alternate work schedules and/or telework."⁶

The Agency's telework agreement specifies a beginning and ending period and states, "[a]n employee is not permitted to telework without an active Telework Agreement on file with Human Resources."⁷

² For example, the Agency's allegation that Grievant should receive a Group II Written Notice for approving leave for a dam safety engineer for the period August 7, 2015 through September 8, 2015 does not rise to the level justifying the issuance of disciplinary action. Grievant approved the leave in April 2015 before Grievant began reporting to the Deputy Director.

³ Agency Exhibit 9.

⁴ Agency Exhibit 13.

⁵ Agency Exhibit 38.

⁶ Agency Exhibit 18.

⁷ Grievant Exhibit 11.

Grievant did not provide the Deputy Director with information regarding which employees were under alternate work schedules and/or teleworking. The Deputy Director contacted the HR Officer to obtain the necessary documents. He concluded that at least two employees were telecommuting but did not have telework agreements. Grievant was responsible for ensuring that his subordinates who teleworked obtained the necessary documents authorizing them to telecommute.

On July 4, 2015, the Deputy Director sent Grievant an email instructing him to “[r]un dam safety database report indicating in the upcoming six years what permits will be expiring. Create rough budget revenue estimates by July 10.”⁸ Grievant did not provide a report identifying permits expiring in the next six years.

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.”⁹ 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.”

Group II Written Notice

Failure to follow instructions is a Group II offense.¹⁰ In June and July 2015, the Deputy Director instructed Grievant to provide him with information about Grievant’s subordinates who were under alternate work schedules and/or were telecommuting. Grievant did not provide the Deputy Director with this information thereby disregarding a supervisor’s instructions.

Grievant argued that the telework agreements were contained in the files of the Agency’s human resource section and he did not have a final signature of the agreements. This argument is not sufficient to rebut the Agency’s allegation. Grievant could have asked the human resource officer for copies of the telework agreements. In addition, Grievant knew or should have known the alternate schedules of his employees and been able to report that information to the Deputy Director.

⁸ Agency Exhibit 18.

⁹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

¹⁰ See, Attachment A, DHRM Policy 1.60.

The Agency presented additional evidence to supports its Group II Written Notice. The Agency's evidence regarding Grievant permitting "program creep regarding use of the Dam Safety First Aid Trailers" does not rise higher than a Group I offense for unsatisfactory work performance. The Agency's allegation that Grievant failed to close out certain grants does not rise higher than a Group I offense. The Agency's allegation that Grievant inappropriately approved leave for an employee does not rise to the level supporting disciplinary action. The Agency's allegation that Grievant had "shown no leadership in bringing this matter [insurance needs] to closure" does not rise higher than a Group I offense. The Agency's allegation that Grievant did not have a better mastery of a database does not rise higher than a Group I offense. The Agency's allegation that Grievant lacked follow-up with an Enforcement Attorney regarding completion of a draft produced does not rise to the level supporting disciplinary action. The Agency's allegation that Grievant's failure to assume a more direct role in the daily management of certain issues within Region III does not rise higher than a Group I offense. The Agency's allegation that Grievant submitted a legislative request to move his division to another Agency does not rise to the level supporting disciplinary action.

Group III Written Notice

On July 4, 2015, the Deputy Director sent Grievant an email instructing him to "[r]un [a] dam safety database report indicating in the upcoming six years what permits will be expiring."¹¹ Grievant failed to comply with that instruction thereby justifying the issuance of a Group II Written Notice.

Grievant argued that the dam safety database was antiquated and that making and compiling the database was not his responsibility. It does not appear from the evidence that Grievant raised his concern with the Deputy Director. It appears that Grievant simply disregarded the Deputy Director's instruction.

The Agency argued that Grievant should receive a Group III Written Notice for "serious failings to provide program compliance oversight and for financial mismanagement including: the continued practice of issuance of conditional certificates to dam owners without having received an application and payment for fees in violation of §10.1-613.5 of the Code of Virginia and 4VAC50-20-350 of the Impounding Structure Regulations; and financial mismanagement including request and approvals for recruitment/retention of personnel or travel all in disregard of my instructions and the Finance Department's forecast of a \$282,933 shortfall for the fiscal year 2016."¹²

The practice of issuance of conditional certificates to dam owners without having received payment began under a prior Agency Head and prior to Grievant's assumption of his duties as the division manager. Grievant sent an email on October 2, 2015 advising his staff "the administration has asked us to issue permits and certificates only

¹¹ Agency Exhibit 18.

¹² Agency Exhibit 3.

after confirmation of payment.” See, Grievant Exhibit 26. Grievant did not disregard the Agency’s expectation once he was informed of the change. Possibly Grievant should have questioned the practice sooner, but his failure to do so cannot rise to the level of a Group III offense. Grievant did not engage in financial mismanagement.

The Agency alleged Grievant should receive a Group III Written Notice because he continued to spend money in excess of available funds. The evidence showed that Grievant understood the Agency’s revenue shortfalls but was not given a specific budget number upon which to base a spending limit. He offered various proposed budgets to Agency’s managers to inform them of the division’s staffing needs under various budget scenarios. Seeking approval for employees to attend conferences is not financial mismanagement. The Deputy Director instructed Grievant to “[s]et up a meeting to share with me your proposed budget concepts/numbers for this fiscal year. Need to determine our ability to fill the Region III engineer (top concern) and provide partial support for a business manager.”¹³ The Deputy Director did not place a monetary limit on Grievant’s budget. Grievant presented budget proposals to the Deputy Director showing revenues and expenditures and identifying the division’s needs. No evidence was presented that Grievant actually spent money in excess of any established budget. Even if the Hearing Officer were to assume that Grievant should have limited his budget documents to a set amount, communicating his division’s needs to the Deputy Director would not rise to the level of a Group III offense.

The Agency alleged Grievant should receive a Group III Written Notice for approving travel reimbursement for an employee who traveled to various places in Virginia but who lived in a neighboring state. Grievant argued that State Travel Regulations provide an employee’s residence can be used as the base point for reimbursement when it is cost beneficial to the State. At most, Grievant’s behavior would rise to a Group II offense.

The Agency alleged that Grievant should receive a Group III Written Notice for failing to fire certain employees who were university students working for the Agency during the summer. The Agency argued that Grievant attempted to hire an hourly wage employee to perform certain duties relating to a flood management workgroup. At most, Grievant’s behavior would rise to a Group I offense for unsatisfactory work performance.

Accumulation of Disciplinary Action

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two active Group II Written Notices. The Agency’s decision to remove Grievant must be upheld.

¹³ Agency Exhibit 18.

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”¹⁴ 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 argued that the Agency should have issued a Notice of Improvement Needed Substandard Performance to inform Grievant of his deficient performance and allow him to improve. The Hearing Officer believes Grievant would have responded actively to a detailed improvement plan if he had been given an adequate opportunity to correct his shortcomings. State policy does not require an agency to issue such a notice as a condition precedent to issuing disciplinary action even though doing so would have been a better management practice. The Agency’s failure to utilize a better management practice is not a basis to reverse disciplinary action.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the Group II Written Notice. The Hearing Officer finds no mitigating circumstances exist to reduce further the Group III Written Notice.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁵ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant’s evidence shows

¹⁴ Va. Code § 2.2-3005.

¹⁵ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"¹⁶ cause of the alleged adverse action by the employer.¹⁷

Grievant alleged that he engaged in protected activity when he made suggestions to Agency managers regarding how to improve the Agency's operations. Grievant suffered adverse employment actions because he received disciplinary action. Grievant did not establish a connection between his protected activity and his disciplinary action. The Agency took disciplinary action against Grievant because it believed his work performance was inadequate and not as a pretext for retaliation.

Age Discrimination

Governor Executive Order Number One declares that it is the firm and unwavering policy of the Commonwealth of Virginia to assure equal opportunity in all facets of State government. Discrimination on the basis of age is prohibited. Policy 2.05 of the Department of Human Resource Management "(DHRM)" prohibits employment discrimination in all aspects of employment practices including disciplinary actions.

The Commonwealth looks to principles of Federal law in the application of age discrimination under State policy. An employee bringing a grievance based on disparate-treatment must prove by a preponderance of the evidence that age was the "but-for" cause of the challenged adverse employment action (disciplinary action). The burden of persuasion does not shift to the Agency to show that it would have taken the action regardless of age, even when an employee has provided some evidence that age was one motivating factor in its decision.¹⁸

Grievant argued that the Agency discriminated against him because of his age. He testified that the Agency Head told him, "Let's cut to the chase, when are you going to retire?" When this phrase is considered standing alone, it raises significant question regarding the reasons for Grievant's disciplinary action. When all of the evidence of this case is considered, however, it is clear that the Agency took disciplinary action because of its belief that Grievant's work performance was inadequate. Indeed, the evidence is overwhelming that to the extent Grievant's age played a role in the issuance of disciplinary action, that role was minimal. Grievant's request for relief based on age discrimination must be denied.

¹⁶ This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

¹⁷ See, *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

¹⁸ See, *Gross v. FBL Financial Services, Inc.* 557 U.S. 167 (2009).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. The Agency's decision to remove Grievant is **upheld** based on the accumulation of disciplinary action. Grievant's request for relief from retaliation and age discrimination are **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
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.¹⁹

[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

¹⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.