

Issue: Group I Written Notice (unsatisfactory performance) and Group II Written Notice (failure to follow instructions); Hearing Date: 06/13/16; Decision Issued: 07/05/16; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10797; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 07/20/16; EDR Ruling No. 2017-4402 issued 08/11/16; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 07/20/16; DHRM Ruling issued 08/16/16; 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: 10797

Hearing Date: June 13, 2016
Decision Issued: July 5, 2016

PROCEDURAL HISTORY

On August 15, 2015, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy or instruction and insubordination. On September 23, 2015, Grievant was issued a Group II Written Notice for failure to follow policy or instructions and insubordination.

On September 30, 2015, Grievant filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 11, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 13, 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?

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 Community College System employs Grievant as a Human Resource Analyst at one of its facilities. Grievant is Exempt under the Fair Labor Standards Act and is not prevented from working overtime as needed. She began working for the College in 2012.

One of Grievant's responsibilities included credentialing. Grievant was responsible for researching a faculty member's credentials to verify that the faculty member had a sufficient number of study hours for a specific teaching discipline. A faculty member's credentialing could affect his or her rate of pay. Grievant was responsible for approving the rate of pay. Credentialing for a faculty member should take no more than 30 minutes to complete once all needed documents have been received. Once a faculty member has been credentialed, he or she could be paid and receive a badge enabling the faculty member to access secured areas on the Campus such as laboratories.

On July 28, 2015, Grievant and the Supervisor met regarding Grievant's work assignments. The Supervisor counseled Grievant regarding her untimely responses to email and work requests or assignments. The Supervisor instructed, in part:

I would like for you to give me a thorough list of your pending workload in prioritized order and with time estimates by July 31, 2015. We will meet to

discuss your work prioritization on Monday August 3, 2015. You will give me daily updates during that week so we can monitor your progress. We will also meet on September 4, 2015, October 8, 2015, and November 6, 2015 to evaluate your workload and progress in responding to work assignments and requests.

Moving forward, I expect you to:

- Monitor your emails periodically throughout the day.
- Respond to emails in a timely fashion depending on the content. Notify me if you have an issue in responding to an email.
- Respond to target dates for posting, screening and interviewing set by hiring managers. Notify me if you have an issue in meeting the target dates set by the hiring manager.
- Credentialing adjunct files within five business days of receiving them.¹

Grievant's workload was not so excessive as to prevent her from completing faculty credentialing in five workdays. The five workday requirement was reasonable.

Grievant was upset before and after the July 28, 2015 meeting. She felt she was being criticized unfairly. She did not work on July 29, 2015 because she had an upset stomach. Grievant notified the College President of her concerns on July 30, 2015. Grievant was not comfortable meeting with the Supervisor.

Grievant did not provide the Supervisor with a prioritized workload list. On Friday July 31, 2015 at 7:37 a.m., the Supervisor sent Grievant an email asking to meet on August 3, 2015 at 9 a.m.

On August 3, 2015 at 9:10 a.m., the Supervisor went to Grievant's office and asked if she had received the Supervisor's email about their meeting at 9 a.m. Grievant said "no" and that she was behind on reading emails. Grievant said she had sent the College President an email about their meeting and was waiting for a response. The Supervisor again said she wanted to meet with Grievant. Grievant said she "had some things to review and I will get with you." Approximately 15 minutes later, the Supervisor returned to Grievant's office and said she needed to meet with Grievant. The Supervisor planned to leave the campus and wanted to meet with Grievant before she left. Grievant said she was waiting for a return phone call and said she could not meet at that time.

On August 5, 2015, the Supervisor attempted to meet with Grievant. Grievant refused to meet with the Supervisor. Grievant met with the College President on August 5, 2015.

¹ Agency Exhibit 8.

On September 1, 2015, Grievant received the file for Faculty P. Grievant was supposed to complete the credentialing for Faculty P within five workdays. Grievant did not complete the credentialing for Faculty P within the time period required.

Faculty P asked for the status of her credentialing because she wanted to get her badge so she could access the “prep room” as part of her duties. She was displeased with the delay. On September 22, 2015, the Supervisor sent Grievant an email asking for the status of the credentialing for Faculty K. Grievant replied:

Please note that [Faculty P’s] file was received on September 1st. However, other files were received prior to that date and were reviewed in order of receipt unless I had to wait on information. Additionally, as you are aware, the on-boarding training was on September 1st and 2nd, which affected the turnaround time for my entire work responsibilities. I reviewed files received up until the 1st week of September and then began focusing on other requests to balance my workload and planned to review her file and others during this month, so adjuncts may receive the next adjunct payment.²

Grievant’s delay in completing credentialing for Faculty P prevented her from being timely paid.

The Supervisor offered Grievant assistance with time management. The Supervisor offered to help Grievant prioritize her work. Grievant refused these offers of assistance. The Supervisor asked Grievant to inform the Supervisor of any reason why Grievant could not perform her tasks timely. Grievant did not inform the Supervisor of any reasons.

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.”³ 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 I Written Notice

“[U]nsatisfactory work performance” is a Group I offense.⁴ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was

² Grievant Exhibit C.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See Attachment A, DHRM Policy 1.60.

responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was instructed to monitor her emails throughout the day, prioritize her workload by July 31, 2015, and meet with the Supervisor on August 3, 2015. Grievant did not monitor her emails throughout the day. She did not prioritize her workload by July 31, 2015. Even if the Hearing Officer disregards Grievant's failure to meet with the Supervisor on August 3, 2015, there remains sufficient evidence to support the issuance of a Group I Written Notice.⁵

Group II Written Notice

Failure to follow a supervisor's instruction is a Group II offense.⁶ Grievant was instructed to process faculty credentialing within five workdays. She did not process Faculty P's credentialing within five workdays. She had not completed the credentialing as of September 22, 2015. It is unclear whether Grievant made any significant attempt to achieve the five workday deadline. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued her work load was excessive and the five workday deadline was unrealistic and unreasonable. The evidence showed that the five workday deadline was not excessive and when others had performed credentialing duties they were able to complete the process within five workdays. Grievant did not demonstrate that her workload was so excessive as to prevent her from timely completing her work duties.

Grievant claimed the Supervisor made threatening gestures towards her. The Supervisor denied the allegation. Even if the allegation were true it would not affect the outcome of this case. Grievant was in control of her work schedule and was not affected by any gestures of the Supervisor.

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"⁷ 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

⁵ Grievant claimed it was appropriate for her to refuse to meet with the Supervisor until she received resolution from the College President and because meeting with Supervisor undermined her health.

⁶ See, Attachment A, DHRM Policy 1.60.

⁷ *Va. Code § 2.2-3005.*

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.

Procedural Due Process

The Agency failed to provide Grievant with procedural due process prior to the issuance of the Written Notices in this case. Prior to issuing the Written Notices, the Agency should have informed Grievant of the allegations, notified her that the Agency may take disciplinary action, and then given Grievant a reasonable time to provide her defenses to the allegations. The Agency's failure to provide procedural due process does not affect the outcome of this case. Grievant had the opportunity to present to the Hearing Officer any defenses she would have provided to the Agency. The hearing process cures the Agency's defect in procedural due process.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁸ (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 by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁹

Grievant argued that the Supervisor retaliated against her because she filed a complaint against the Supervisor. Grievant's behavior was protected activity. Grievant suffered an adverse employment action because she received disciplinary action. Grievant did not establish a causal link between her protected activity and the adverse

⁸ 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.

⁹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

employment action. The Agency took action against Grievant because of her behavior and not as a pretext to retaliation.

DECISION

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

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.