

Issues: Group II Written Notice (excessive tardiness and failure to follow instructions), and Termination (due to accumulation); Hearing Date: 07/28/16; Decision Issued: 08/03/16; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10833; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10833

Hearing Date: July 28, 2016
Decision Issued: August 3, 2016

PROCEDURAL HISTORY

On May 4, 2016, Grievant was issued a Group II Written Notice of disciplinary action for excessive tardiness and failure to follow a supervisor's instructions. Grievant was removed based on the accumulation of disciplinary action.

On May 27, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 20, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 28, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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:

Norfolk State University employed Grievant as an Office Manager. She had been employed by the Agency since October 2011. Grievant had prior active disciplinary action. She received a Group II Written Notice on May 4, 2016 for unauthorized use of State property.

The Supervisor wanted to ensure that the Office was staffed and open at 8 a.m. every day to ensure that the Office was open for business at the same time other University offices opened. On February 1, 2016, the Supervisor instructed her staff, including Grievant, "to send [Ms. W] an email each day with a copy to me confirming your time of arrival"¹ The Supervisor's objective was to encourage employees to report to work on time through self-reporting. On February 2, 2016, the Supervisor sent her staff an email stating, "[t]he best time to send the email is as soon as you arrive as this is another documented confirmation of the time of arrival."²

When Grievant reported to work, Grievant began sending an email to Ms. W and the Supervisor to report her arrival time. On several days Grievant reported to work she failed to send an email reporting her time of arrival. These dates included: February 3, 2016, February 8, 2016, February 9, 2016, February 11, 2016, and February 12, 2016.

¹ Agency Exhibit 3.

² Agency Exhibit 3.

On February 16, 2016, the Supervisor sent Grievant an email stating:

I reminded you to submit your time of arrival email to me and [Ms. W]. You said “ok” and failed to do so. I am again requesting that you immediately submit the email with the requested information.

Also, I am not – I repeat – not going to keep reminding you each day. Your failure to do so will be considered insubordination.³

Grievant did not send emails reporting her arrival time on February 19, 2016, March 4, 2016, March 31, 2016, April 8, 2016, April 14, 2016, April 15, 2016, April 19, 2016.

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.”

Failure to follow a supervisor’s instructions is a Group II offense.⁵ Grievant was instructed to send an email stating the time she reported to work that day. For at least 12 days from February 3, 2016 to April 19, 2016, Grievant reported to work but failed to send an emailing stating the time she reported to work. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has another active Group II Written Notice. With the accumulation of a second Group II Written Notice, the Agency has presented sufficient evidence to uphold Grievant’s removal.

Grievant was disciplined for failure to follow a supervisor’s instructions and also for excessive tardiness. Excessive tardiness is a Group I offense. Grievant argued that she was not tardy and, for example, arriving at 8:03 a.m. is the same as arriving at 8 a.m. for all practical purposes. The Hearing Officer can assume for the sake of argument that reporting to work a few minutes after 8 a.m. was sufficient to avoid being

³ Agency Exhibit 3.

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.

considered tardy. The Agency, however, has presented sufficient evidence to show that Grievant failed to follow a supervisor's instructions, a Group II offense.

Grievant argued that no policy authorized the Supervisor to require employees to report their arrival times. Grievant's argument is unpersuasive. A supervisor has the inherent authority to instruct subordinates and that authority includes requiring subordinates to report their times of arrival.

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"⁶ 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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

⁶ Va. Code § 2.2-3005.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.