

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 08/26/16; Decision Issued: 09/15/16; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10850; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10850

Hearing Date: August 26, 2016
Decision Issued: September 15, 2016

PROCEDURAL HISTORY

On April 11, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy and/or instructions.

On May 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 July 26, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 26, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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?
5. 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:

Virginia Commonwealth University employs Grievant as a Student Employee Personnel Coordinator. Grievant had prior active disciplinary action. On May 9, 2013, Grievant received a Group II Written Notice for failure to follow instructions and unsatisfactory performance.

Grievant began reporting to the Supervisor on November 10, 2015.

The Agency presented evidence regarding numerous separate incidents which it believed rose to the level of a Group II offense. It is only necessary for the Agency to show one factual scenario to support the taking of disciplinary action. Many of the instances presented by the Agency did not rise to the level supporting disciplinary action or were sufficiently defeated by Grievant. The Hearing Officer will only address those facts giving rise to disciplinary action.

The Agency hires and employs student workers and faculty. Grievant's duties included processing student hiring including scheduling student interview appointments, and completing "onboarding" of newly hired employees. Grievant processed faculty hiring.

When a student seeks employment, Grievant is responsible for contacting the student and informing the student of the forms the student should complete and submit.

Grievant is also to provide the student with a link to a calendar so the student can schedule an interview. Grievant then sends emails to students to process a background check and I-9 immigration forms. The “onboarding” process for a student employee typically requires no more than an hour of Grievant’s time.

The Agency employs approximately 300 students. In a month, Grievant could process approximately 100 students or 25 students per week.

The hiring process for faculty differs from the process for hiring students. A hiring manager will contact Grievant and to indicate that the manager wants to create and fill a position. Grievant then works with the HR Consultant to create and describe the position if necessary. The faculty job is then posted on the Agency’s recruitment website. Grievant’s work duties should not exceed approximately an hour or two to complete these tasks. Once a candidate is selected, Grievant completes additional tasks including a hiring proposal and informing the hiring manager that the job can be offered to the successful candidate. Grievant should be able to complete her duties relating to the hiring of faculty within five hours from beginning to end. The Agency hired only two faculty in Grievant’s Unit in the first four months of 2016.

Grievant had been complaining that she needed help. Grievant sought permission to work overtime. The Agency hired an HR Assistant to provide support to Grievant and another employee. The Supervisor told Grievant to train and utilize the HR Assistant. Grievant did not provide the HR Assistant with training and did not utilize the HR Assistant’s services.

The Agency advertised the position of Assistant Director in a sport. An individual was selected for the position in December 2015 before the Agency went on Winter Break. On December 11, 2015, Grievant was given the necessary information to process the Assistant Director so the position could be placed on payroll. The Agency closed on December 18, 2015 for Winter Break. Grievant did not process the required paperwork for this position before Grievant left for vacation. Grievant did not tell the Supervisor she was unable to process the paperwork prior to leaving for vacation.

Grievant was on leave from January 4, 2016 through January 8, 2016. Grievant was absent from work due to illness on January 11, 2016 and January 12, 2016. Grievant returned to work on January 13, 2016. The Supervisor had to perform some of Grievant’s duties to complete the processing for the position. The Agency wanted to have the Assistant Director assume her duties by January 10, 2016. The Assistant Director position was not finalized until January 21, 2016.

The Agency hired several student workers. On February 24, 2016, Grievant was given responsibility to convert the student’s positions to work study, a federal funded program. Grievant should have accomplished this task within two weeks. Instead she completed the task on April 21, 2016. As a result of the delay, the Agency had to pay approximately \$20,000 in wages without being reimbursed under the federal program.

When the Agency no longer employs a student, the program manager completes a termination sheet. Grievant was obligated to update the Agency's Personnel Computer System to show that the students were no longer employed by the Agency. Grievant did not process paperwork necessary to remove student employees from the Agency's payroll. Fifty-three students were not processed from December 2015 through March 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."¹ 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."

"[U]nsatisfactory work performance" is a Group I offense.² 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.

Grievant was given an HR Assistant to help her perform her duties. She did not train the HR Assistant and did not utilize the HR Assistant's help. Grievant was not properly utilizing the resources made available to her.

Grievant was given responsibility on December 11, 2015 for processing the hiring of the Assistant Director. She could have completed this task prior to leaving for Winter Break on December 18, 2015. Because Grievant did not return to work until January 13, 2016, the successful candidate began working over a week later than anticipated.

Grievant failed to timely designate student employees as employees under the federal work study program. If Grievant had acted more timely, the Agency would have been reimbursed for approximately \$20,000 from the federal government.

Grievant failed to timely process the removal of 53 students from the Agency's payroll system.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

The Agency asserted that Grievant should receive a Group II Written Notice. The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency combined several factual scenarios into one Written Notice but none of them individually rise to the level of a Group II offense. Grievant received disciplinary action for a similar offense and, thus, there would be a basis to elevate the disciplinary action from a Group I to a Group II Written Notice. The Agency, however, did not express any intent to elevate the disciplinary action and the Hearing Officer will not do so under the facts of this case.

Grievant argued that the Agency's evidence is not sufficient to support the taking of disciplinary action. For several items, the Agency was unable to show Grievant engaged in behavior giving rise to disciplinary action. For example, the Agency's claim that Grievant's personal use of the Agency's computer was more than incidental and occasional was not established. Grievant did not testify. Much of the Agency's case is unrebutted regarding several of the Agency's other allegations. The Agency has presented sufficient information to support the issuance of a Group I Written Notice as discussed above.

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"³ 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 further the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁴ (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

³ Va. Code § 2.2-3005.

⁴ 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.

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. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"⁵ cause of the alleged adverse action by the employer.⁶

Grievant argued that the Agency retaliated against her for engaging in protected activity. The evidence showed that the Agency took disciplinary action against her because of her poor work performance and not as a pretext for retaliation.

DECISION

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

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

⁵ This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

⁶ See, Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

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.