

Issue: Group II for leaving work without permission and termination due to accumulation; Hearing Date: 06/26/18; Decision Issued: 7/11/18; Agency: Virginia Tech; AHO: Carl Wilson Schmidt, Esq.; Case No. 11211; Outcome: No Relief - Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11211

Hearing Date: June 26, 2018
Decision Issued: July 11, 2018

PROCEDURAL HISTORY

On March 28, 2018, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance and being absent without authorization. He was removed from employment based on the accumulation of disciplinary action.

On April 26, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 14, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On June 26, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Tech employed Grievant as a Customer Service Representative. Grievant worked in a reception area open to the Agency's guests. He worked at a desk with two other people. Visitors entered the reception area and signed to receive information about the University. Grievant's first responsibility was to welcome guests to the University and sign them in to receive information and tours of the University. Grievant was positioned closest to the visitor entry door. When people called the University's reception area, Grievant was the third person in line to answer the telephone if the other two employees were unavailable.

On April 19, 2017, Grievant received a Group I Written Notice for unsatisfactory performance.

As part of Grievant's 2017 annual performance evaluation, the University advised Grievant of its concern:

It was necessary to issue a Group I Written Notice on April 19, 2017 detailing multiple concerns with [Grievant's] performance. The areas addressed were: being unavailable (away from his desk) during the check-in process¹

¹ Agency Exhibit 10.

On February 13, 2018, Grievant was advised by the Manager, "it is essential that you be present and working in order for the goals of the office to be met."²

On February 15, 2018, Grievant received a Group II Written Notice for unsatisfactory performance. Grievant was disciplined for leaving his desk and leaving telephone lines unattended.

The Supervisor told Grievant that if he needed to leave his desk, he was to let the Supervisor know so arrangements could be made to cover Grievant's work duties.

On March 16, 2018, Grievant learned he was the victim of a financial scam. This caused him to experience a panic attack. Grievant left his desk and walked out of the reception area door. He drove approximately half a mile to his bank. Grievant did not obtain permission from the Supervisor before leaving. Grievant told a student worker that he would be right back. At 1:30 p.m., the Supervisor realized Grievant was away from his desk. The Supervisor went to Grievant's desk and began performing Grievant's assigned duties. Grievant returned to the reception area at 2:40 p.m. where he was confronted by the Manager. Later, the Supervisor asked Grievant if he knew he needed approval to leave work and asked why Grievant did not ask permission to leave. Grievant said he knew he should have obtain permission to leave and apologized for leaving without permission.

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."

"Leaving work without permission" is a Group II offense.⁴ This includes leaving a work post. Grievant was supposed to remain at his desk unless he obtained permission to leave his work space. On March 16, 2017 at approximately 1:25 p.m., Grievant left his desk and the University's campus and did not return until approximately 2:40 p.m. Grievant did not ask permission to leave. His Supervisor had to perform his work duties while Grievant was absent. The University has presented sufficient evidence to support the issuance of a Group II Written Notice.

² Agency Exhibit 7.

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.

Upon the issuance of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, the University's decision to remove Grievant must be upheld.

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"⁵ 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 the disciplinary action should be mitigated for several reasons. First, he suffered from Chronic IBS that resulted in the onsite of severe gastrointestinal distress making it difficult to work in a public area on March 16, 2018. Second, Grievant was the victim of a financially devastating scam which affected him on March 16, 2018. Third, he was in the process of divorcing which affected his emotional health.

There is little doubt that Grievant suffered significant physical, financial, and marital distress that affected his behavior. The University did not expect Grievant to work when he was emotionally or physically unable to do so.⁶ The University only expected Grievant to provide notification and obtain permission to leave his work station. Grievant had the ability to contact the Supervisor or Manager by text message, email, or telephone call. On March 16, 2018, Grievant made no effort to notify the Supervisor or Manager that he needed to leave his post. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

⁵ Va. Code § 2.2-3005.

⁶ The Agency granted Grievant's request for Family Medical Leave on an intermittent schedule. But Grievant was reminded that he "must keep your supervisor updated on how long you will be away from work" See, Grievant Exhibit 1.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.