

Issues: Two Group II Written Notices (failure to follow instructions), and termination due to accumulation; Hearing Date: 11/03/17; Decision Issued: 11/07/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11094, 11095; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling request received 11/17/17; EEDR Ruling No. 2018-4648 issued 12/08/17; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11094 / 11095

Hearing Date: November 3, 2017
Decision Issued: November 7, 2017

PROCEDURAL HISTORY

On June 12, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On June 13, 2107, Grievant was issued a Group II with removal for failure to follow instructions and policy.

On June 27, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 18, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 3, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
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. 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:

The Department of Behavioral Health and Developmental Services employed Grievant as a Home Manager. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency had concerns about Grievant’s management of staff. Following an investigation, the Agency decided to issue Grievant a Notice of Improvement Needed/Substandard Performance. This Notice required Grievant to attend Supervisor Training Part I on April 6, 2017 and Part II in May or June 2017.

Grievant completed Part I of the training. Grievant did not attend Part II of the training on May 8, 2017 because her child was sick. Part II was also scheduled for June 1, 2017. On May 30, 2017, Grievant was reminded to attend the training on June 1, 2017 from noon to 4 p.m. On May 30, 2017, the Supervisor sent Grievant an email stating, “Make sure you attend this training. See you there.”¹

Grievant did not report to the training at noon. She appeared at 1:30 p.m. and sought entry into the training class. The HR Director said she could not attend late because she had missed key information.

A Support Intensity Scale (SIS) meeting was scheduled for June 13, 2017. During this meeting, an Assessor would ask questions about an individual living at the Facility. An employee knowledgeable of the individual’s needs was supposed to attend the meeting to speak on behalf of the individual who otherwise might not be able to speak for him or herself.

¹ Agency Exhibit 3.

On June 8, 2017, the Manager sent an email to residential managers indicating Grievant was to attend a SIS meeting for Individual H on June 13, 2017 at 2 p.m. The Manager informed Grievant that the meeting “could take up to 2 hours and you will need to bring the records.”² Grievant’s regular work shift ended at 5:30 p.m.

On June 13, 2017, Grievant met with the Assessor and Individual H at 2 p.m. She left the meeting. The Assessor complained to Facility managers that no staff were in the meeting. The Manager attempted to locate Grievant. Grievant went to the front desk and spoke with the Manager by telephone at 2:45 p.m. Grievant told the Manager she had to leave to pick up her child at 3 p.m. The Manager told Grievant to stay in the meeting. Grievant did not return to the meeting.

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.”

Failure to follow instructions is a Group II offense.⁴

Group II Written Notice – Failure to Complete Training

Grievant was instructed to complete Part II of Supervisor’s training. She was given two opportunities to complete the training. She knew the training began at noon on June 1, 2017 but reported to the training room one and a half hours after the training began. Grievant failed to follow a supervisor’s instructions thereby justifying the issuance of a Group II Written Notice.

Grievant argued that she was unable to attend to the training on time because her unit was short-staffed and she had to attend to the needs of the individuals in her unit. This argument is not persuasive. Once she recognized she needed assistance, Grievant did not contact her supervisor to seek assistance or obtain permission to report late to the training.

² Agency Exhibit 4.

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.

Group II Written Notice – Attending SIS Meeting

Grievant was instructed to attend the SIS meeting for Individual H on June 13, 2017 at 2 p.m. She was told the meeting could last two hours. Grievant left the meeting. The Manager instructed her to return to the meeting and she refused. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.

Grievant argued that she had someone else “cover” for her and that person was more knowledgeable of Individual H’s needs. However, Grievant was instructed by the Manager to return to the meeting. She should have followed that instruction regardless of whether she had someone to serve as her substitute.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove her from employment.

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”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. 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 two Group II Written Notices of disciplinary action is **upheld**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

⁵ *Va. Code § 2.2-3005.*

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.