

Issue: Group II Written Notice (refusal to work overtime); Hearing Date: 07/27/17;  
Decision Issued: 07/28/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 11022; 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: 11022**

Hearing Date: July 27, 2017

Decision Issued: July 28, 2017

#### **PROCEDURAL HISTORY**

On January 5, 2017, Grievant was issued a Group II Written Notice of disciplinary action for refusal to work overtime.

On February 2, 2017, 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 May 30, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 27, 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 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:

The Department of Behavioral Health and Developmental Services employs Grievant as a CNA at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility operates on a 24 hour basis with three employee shifts. The first shift begins at 7 a.m. and ends at 3:30. The second shift begins at 3:30 p.m. and ends at 11:30 p.m. The third shift begins at 11:30 p.m. and ends at 7:30 a.m. The Facility must have adequate staffing to provide services to individuals residing at the Facility. If a shift is expected to be understaffed, the Agency will compel an employee who is working at the Facility to continue working beyond his or her regular shift. The Agency refers to this as Emergency Overtime. An employee working Emergency Overtime may work some or a part of the subsequent shift up to 16 consecutive hours. The Agency selects employees for Emergency Overtime on a rotating basis.

Grievant began her shift on December 9, 2016 at 11:30 p.m. Her shift was scheduled to end at 7:30 a.m. The first shift began at 7 a.m. and would end at 3:30 p.m. on December 10, 2016. An insufficient number of staff on the first shift were expected to report on December 10, 2016. Grievant was informed that she was expected to work Emergency Overtime and continue working into the first shift. Grievant refused to work overtime. She told the Supervisor that it would be unsafe for the individuals, unsafe for her co-workers, and unsafe for Grievant if Grievant worked an additional shift.

## 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.”<sup>1</sup> 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.”

“[R]efusal to work overtime” is a Group II offense. On December 10, 2016, Grievant was instructed to work overtime. She refused thereby justifying the Agency’s issuance of a Group II Written Notice.

Grievant argued that she could not work because doing so was unsafe for the individuals, her co-workers, and herself. Grievant did not present any evidence showing how it would have been unsafe for her to work overtime. The Agency had restrictions governing how many “back to back” days of overtime an employee could work. Grievant was not asked to exceed the Agency’s limitations.

*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 ....”<sup>2</sup> 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 is **upheld**.

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> *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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.