

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (threatening/coercing another State employee), and Termination; Hearing Date: 08/01/07; Decision Issued: 08/06/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8650; Outcome: Partial Relief (Group II rescinded – Full Relief) (Group III upheld – No Relief/Agency Upheld in Full) (Termination upheld – No Relief/Agency Upheld in Full).



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8650**

Hearing Date: August 1, 2007  
Decision Issued: August 6, 2007

**PROCEDURAL HISTORY**

On February 26, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. She also received a Group III Written Notice of disciplinary action with removal for threatening or coercing persons associated with any agency department.

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 9, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 1, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representatives  
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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Developmental Disabilities Specialist II at one of its Facilities. She had been working for the Agency for more than five years. Her work performance was satisfactory to the Agency. In 2003, she was recognized for her outstanding service by the Facility Director.

The Supervisor began working at the Facility on November 13, 2006. She wanted to make sure that staff were aware of the procedure they should follow to notify the Facility when they would be unable to work their scheduled shifts.<sup>1</sup> On January 17, 2007, the Supervisor held an "in-service" training with her subordinates. Grievant attended the training. The Supervisor instructed employees regarding the Agency's policy governing unscheduled absences. She distributed to each employee, including

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<sup>1</sup> The Facility was audited by the Department of Medical Assistance Services who informed the Facility managers of its expectation for the minimum number of staff who had to be present on each shift at the Facility. The Supervisor wished to ensure adequate staffing at the Facility by ensuring staff compliance with the call-in procedure.

Grievant, a document entitled, "Guidelines For Calling In". The document stated as follows:

Reference: Programming Guidelines No. 49

"The use of sick leave creates a burden on fellow staff members and should be avoided whenever possible. Employees who are ill and unable to come to work as scheduled should call-in by the hours listed below at the latest in order to permit time for coverage assignments: AM shift: 5 a.m.; PM shift: 11 a.m.; Night Shift: 5 p.m. The team leader will provide additional instructions regarding call-in procedures."

When calling-in you will need to do the following:

Step one: Call the Team Leader on cell [cell phone number] within the above timeline. If you receive voicemail you **MUST** leave a message along with the time you are calling.

Step Two: call the cottage within the above timeline.

Step Three: provide a doctor's note. \*If a doctor's note is not submitted upon your return then it will be considered lost time. If you continued to call-in without a doctor's note it will result in disciplinary action.

Failure to do any of the following steps will result in disciplinary action.

Your signature below indicates your understanding of the above.

Please sign and return to me no later than January 19, 2007. Failure to do so will result in a written memo.<sup>2</sup>

Grievant was scheduled to work at the Cottage on February 9, 2007. She had been sick for a while but, prior to going to bed, expected to work on February 9, 2007. She awoke at approximately 4 a.m. and was not feeling well. She had taken medication that made her drowsy. She decided she would not work that day. She called the telephone number at the Cottage and spoke with an employee working there. She told the employee that she would not be reporting as scheduled at 6 a.m. Grievant did not call the Supervisor because Grievant did not remember the Supervisor's cell phone number and would have had to get out of her bed and retrieve the telephone number from her bag. Grievant felt too sick to get out of the bed. Grievant also knew that the Supervisor would not be answering her cell phone so early in the morning. Grievant knew she would only hear the Supervisor's answering service rather than speaking with the Supervisor directly. Grievant fell asleep. At approximately 10 a.m., Grievant called the Supervisor regarding her absence from work that day.

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<sup>2</sup> Agency Exhibit 2.

The Supervisor concluded that Grievant had not followed the call-in procedure and should not be permitted to use leave for her absence on February 9, 2007. The Supervisor adjusted Grievant's timesheet so that it could be submitted to the timekeeper with accurate information.<sup>3</sup>

Grievant returned to work on February 12, 2007. She went to the Supervisor's office to retrieve her timesheet. The Supervisor told Grievant that the Supervisor would require Grievant to treat February 9, 2007 as lost time. This meant that Grievant would not receive pay for that day. Grievant became upset. Grievant said she was sick and tired of the Supervisor and was going to quit.<sup>4</sup> Grievant left the Supervisor's office and began walking down the hall. The Supervisor heard the sound of something crashing down the hall. The Supervisor walked down the hall towards Grievant. When the Supervisor approached Grievant, Grievant said in a loud voice "You don't know me! You better watch yourself!" The Supervisor asked Grievant to lower her voice three times. Grievant disregarded the Supervisor's request. Grievant said, "You better watch yourself!" The Supervisor asked Grievant if she was making a threat. Grievant responded, "Take it as you want!" The Supervisor was very frightened of Grievant. The Supervisor had supervised employees for 10 years and never had an employee speak to her the way Grievant spoke to her.

Following the confrontation, the Supervisor walked to the Manager's office and interrupted a meeting. The Manager could see the Supervisor's face and observed that the Supervisor was visibly upset. The Manager initially thought something terrible had happened to a resident or to a family member of the Supervisor. The Manager and the Supervisor spoke privately. The Supervisor told the Manager about the interaction she had with Grievant. The Supervisor cried while speaking with the Manager. The Supervisor said she was afraid to go back to the Cottage. The Manager decided that Grievant should leave for the day. The Manager told the Supervisor to return to the Cottage and tell Grievant to leave for the day. The Manager instructed that the Security Officer would accompany the Supervisor and be present when the Supervisor told Grievant to leave.

The Supervisor and the Security Officer walked into the Cottage and the Supervisor told Grievant to leave. Grievant collected her belongings and left without incident.

Later in the day, the Supervisor met again with the Manager. The Manager observed that the Supervisor remained upset but was calmer than she was earlier in the day. The Supervisor remained concerned even after she left the Facility and returned home for the evening.

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<sup>3</sup> According to the Agency, this practice was not unusual and was within the Supervisor's authority. Supervisors had to adjust timesheets when necessary and submit them to the accounting department without the employee's approval in order to ensure that employee paychecks were sent out timely.

<sup>4</sup> Grievant also told the Supervisor, "I told you before not touch my time card."

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).<sup>5</sup> Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

### Group II Written Notice for Failure to follow a Supervisor's Instructions

A serious health condition is defined as an “illness, injury, impairment or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing treatment by a health care provider.”<sup>6</sup> Insufficient evidence was presented during the hearing to determine whether Grievant had been an inpatient or was receiving continuous treatment regarding her illness on February 9, 2007. It is unclear whether Grievant had a serious health condition on that date.<sup>7</sup> Thus, the Hearing Officer will not examine this case within the context of the Family Medical Leave Act.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>8</sup> Grievant failed to call the Supervisor's cell phone number at approximately 5 a.m. on February 9, 2007. Grievant had been instructed regarding the Facility's call-in procedure. Grievant failed to comply with the procedure.

*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 Employment Dispute Resolution...”<sup>9</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

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<sup>5</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>6</sup> DHRM Policy 4.20.

<sup>7</sup> Grievant did not provide a detailed description of her medical condition as it existed on February 9, 2007.

<sup>8</sup> DHRM Policy 1.60.

<sup>9</sup> *Va. Code § 2.2-3005.*

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.

Mitigating circumstances exist to resend the Group II Written Notice issued to Grievant. Grievant's illness prevented her from calling the Supervisor's cell phone number. She was too sick to leave her bed, locate her bag, obtain the Supervisor's cell phone number, and then call the Supervisor. Grievant was able to remember the telephone number for the Cottage and notified staff in the Cottage that she would not be attending.

### Group III Written Notice for Workplace Violence

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and

- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

Grievant threatened the Supervisor when she said in a loud voice "You don't know me! You better watch yourself!" Grievant refused to lower her voice even though the Supervisor asked her to do so. When the Supervisor asked Grievant if she was making a threat, Grievant responded, "Take it as you want!" If Grievant did not intend to threaten the Supervisor, Grievant should have responded that she was not making a threat. Grievant failed to do so. The Supervisor felt threatened<sup>10</sup> and became afraid of Grievant.

Grievant denied that she intended to threaten the Supervisor. She presented testimony of another employee who testified that she observed the interaction between Grievant and the Supervisor and did not hear any offensive or threatening statements from Grievant. This case must be resolved based upon witness credibility.

The Supervisor is the most credible witness. The Supervisor's testimony during the hearing was credible. When the Manager first observed the Supervisor on December 12, 2007, it was clear to the Manager that the Supervisor was shaken and upset. When the Security Officer met the Supervisor, he observed that the Supervisor was upset. No credible evidence was presented at the hearing to establish that the Supervisor would have a reason to lie about Grievant. No credible evidence was presented at the hearing to suggest that the Supervisor was unusually sensitive to confrontation. Based on these factors, the Agency has established by a preponderance of the evidence that Grievant threatened the Supervisor.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for workplace violence 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:

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<sup>10</sup> In light of Grievant's demeanor and behavior, it was reasonable for the Supervisor to believe Grievant may have intended to physically harm the Supervisor.



1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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 give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.<sup>11</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.