

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow instructions); Hearing Date: 11/01/07; Decision Issued: 11/13/07; Agency: Jamestown-Yorktown Foundation; AHO: Carl Wilson Schmidt, Esq.; Case No. 8721; Outcome: 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: 8721**

Hearing Date: November 1, 2007  
Decision Issued: November 13, 2007

**PROCEDURAL HISTORY**

On June 28, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and failure to comply with established written policy. He was removed from employment effective June 28, 2007 based on the accumulation of disciplinary action. On July 25, 2007, 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 he requested a hearing. On October 2, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 1, 2007, a hearing was held at the Agency's regional 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 Jamestown-Yorktown Foundation employed Grievant as a Utilities Technician III. Grievant received an overall rating of "Contributor" on his November 2006 evaluation. Grievant had prior active disciplinary action. On September 22, 2006, Grievant received a Group II Written Notice.<sup>1</sup>

On May 29, 2007, the Supervisor<sup>2</sup> held a staff meeting which Grievant attended. During that meeting, Grievant was advised that his monthly reports were, "[d]ue on the 4<sup>th</sup> of every month ... No Exceptions!"<sup>3</sup> Grievant did not submit a monthly report to the Supervisor on June 4, 2007. On June 11, 2007, Grievant met with the Supervisor. The Supervisor told Grievant he could have an additional week to complete the report.

On June 13, 2007 at approximately 1:30 p.m., the Supervisor instructed Grievant to come to the Central Support Complex before the end of Grievant's shift at 2:30 p.m. Grievant was assisting a contractor in another location. Grievant did not return to the

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<sup>1</sup> Agency Exhibit 2.

<sup>2</sup> Grievant's Supervisor became the Acting Director of April 10, 2007.

<sup>3</sup> Agency Exhibit 5.

Central Support Complex to meet with the Supervisor before 2:30 p.m. At 3:10 p.m., Grievant was sent a page asking that he contact the Supervisor. Grievant did not return the page. At approximate 3:20 p.m., the Supervisor called Grievant on Grievant's cell phone. Grievant said he was staying with a contractor to oversee the work and had asked another worker to convey to the Supervisor that he would not meet with the Supervisor.

At 6:10 a.m. on June 14, 2007, the Supervisor paged Grievant to give Grievant a verbal work order. Grievant did not return the page. At approximately 6:30 a.m., the Supervisor called Grievant and asked why Grievant had not returned the Supervisor's page. Grievant answered that he did not have the pager with him. Grievant claimed to have left his pager in a work truck the day before.

On June 14, 2007, the Supervisor instructed Grievant to send an email to Ms. T upon the completion of the electrical work being performed at one of the Agency's work sites. Once the work was completed, Grievant told one of Ms. T's employees that the work had been completed, however, he did not send Ms. T an email notifying her of the work completion.

Grievant was scheduled to work from 8:30 a.m. to 5 p.m. on June 17, 2007. Grievant reported to work at 8:45 a.m. He left work early at 3:20 p.m. On June 25, 2007, Grievant submitted a leave slip for compensatory time taken in the amount of 15 minutes on June 17, 2007. He did not provide a leave slip for the one hour and 40 minutes of absence during the afternoon of June 17, 2007.

June 19, 2007 was the deadline for Grievant to submit his monthly report to the Supervisor. Grievant did not submit the report. Grievant submitted a report on June 25, 2007 to the Human Resource Manager, not to the Supervisor.

## **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."<sup>4</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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. Grievant was given several instructions by the Supervisor yet he failed to comply. In particular,

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<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Grievant testified that he intentionally did not submit the weekly report to the Supervisor to display his objection to having to write the report.<sup>5</sup>

The Agency's Facilities Management Work Policy provides:

Staff with assigned pagers will be required to maintain and wear the pagers at all times during their normal work shift and when on-call. Response time shall be within 15 minutes of receiving pager transmission.<sup>6</sup>

Grievant was paged by the Supervisor on June 14th. Grievant did not respond because he did not have his pager with him. His actions were contrary to written policy. The Agency's Facilities Management Work Policy also requires employees to report to work as scheduled or to account for their absence using approved methods of leave.<sup>7</sup> Grievant was scheduled to work until 5 p.m. on June 17, 2007, however he left work early but did not account for his absence on that day. Accordingly, Grievant acted contrary to the Agency's written policy.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.<sup>8</sup> Accumulation of a second active Group II Written Notice "normally should result in discharge."<sup>9</sup> Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on September 22, 2006. Accordingly, Grievant's removal from employment 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 Employment Dispute Resolution...."<sup>10</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> Grievant felt that other senior employees were simply filling out reports without having had looked at the equipment about which they were reporting.

<sup>6</sup> Agency Exhibit 4A.

<sup>7</sup> During the May 29, 2007 staff meeting, Grievant was reminded to keep track of his time and submit leave slips as necessary. He was also advised to call the Agency if he was unable to work due to illness.

<sup>8</sup> The Agency also alleged Grievant failed to complete work orders. The evidence is unclear regarding the nature of the orders and whether they were completed. Although this allegation is not supported by the evidence, there remains sufficient evidence to support the issuance of disciplinary action.

<sup>9</sup> DHRM Policy 1.60.

<sup>10</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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.<sup>11</sup>

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal based upon the accumulation of disciplinary action 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:

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

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<sup>11</sup> If the Hearing Officer assumes for the sake of argument that Grievant's possession of a cell phone served to mitigate this failure to have a pager with him as required by policy, there remains sufficient evidence to support the issuance of disciplinary action in this case.

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>12</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>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.