

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow instructions); Hearing Date: 11/27/07; Decision Issued: 11/27/07; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 8747; 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: 8747

Hearing Date: November 27, 2007
Decision Issued: November 27, 2007

PROCEDURAL HISTORY

On February 1, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to request leave without prior approval. Grievant was removed from employment effective February 2, 2007 based on the accumulation of disciplinary actions.

On March 2, 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 she requested a hearing. On August 8, 2007, the Director of the Department of Employment Dispute Resolution issued Ruling No. 2008-1751 qualifying this grievance for hearing. On October 22, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 27, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Agency Representative
One witness

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 the witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Health employed Grievant as an Office Service Assistant II at one of its Facilities. Grievant had prior active disciplinary actions. On February 14, 2006, Grievant received a Group II Written Notice with suspension for not reporting to work on time and absence without prior approval from a supervisor. On October 26, 2006, Grievant received a Group II Written Notice with suspension for failure to provide a supervisor with adequate notice that she would not be reporting to work as scheduled.

The Supervisor spoke with Grievant and the nine other employees reporting to the Supervisor and told them they had to obtain her approval prior to taking leave. The Supervisor told the employees to submit a leave slip to her and obtain the Supervisor's written approval before taking leave.

Grievant was scheduled to work on January 3, 2007. At approximately 1:30 p.m., the Supervisor noticed that Grievant was absent from the workplace. Another employee informed the Supervisor that Grievant had left for the day. Grievant had not

requested approval from the Supervisor to take leave on January 3, 2007. Grievant had not submitted a leave request to the Supervisor to take leave on January 3, 2007. The Supervisor had not authorized Grievant to take leave on January 3, 2007.

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.”¹ 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 ...” is a Group II offense.² The Supervisor instructed Grievant to obtain the Supervisor’s approval prior to taking leave. On January 3, 2007, Grievant left work early without obtaining approval from the Supervisor. The Agency has presented sufficient evidence to support the issuance to Grievant of a Group II Written Notice for failing to follow a supervisor’s instructions.³

Accumulation of a second active Group II Written Notice “normally should result in discharge.”⁴ With the disciplinary action giving rise to this grievance, Grievant has accumulated three active Group II Written Notices thereby justifying the Agency’s decision to remove her from employment.

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...”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

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

² The Supervisor’s instruction was consistent with DHRM Policy 1.60 which states, “Employee should arrange planned absences, including reporting to work late or leaving work early, in advance with supervisors.”

³ The Agency could have issued its disciplinary action against Grievant for, “Leaving the work site during work hours without permission”, a Group II offense under DHRM Policy 1.60.

⁴ DHRM § 1.60(VII)(D)(2)(b).

⁵ *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.

As part of the grievance Step Process, Grievant raised several defenses to the Agency’s case in chief and also in support of her argument that the discipline should be mitigated. Grievant did not appear and testify at the hearing and did not present any documents as evidence. Accordingly, there are no facts upon which to support any of Grievant’s defenses to the Agency’s evidence and to support mitigation.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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 14th St., 12th 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.⁶

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.