

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (absence in excess of 3 days without authorization) and Termination; Hearing Date: 02/17/09; Decision Issued: 02/18/09; Agency: DHP; AHO: Carl Wilson Schmidt, Esq.; Case No. 9023; 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: 9023**

Hearing Date: February 17, 2009  
Decision Issued: February 18, 2009

**PROCEDURAL HISTORY**

On September 5, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. Also on September 5, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three workdays without authorization.

On October 1, 2008, 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 January 6, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 17, 2009, a hearing was held at the Agency's regional office. Grievant did not appear at the hearing.

**APPEARANCES**

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. 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 Health Professions employed Grievant as a Computer Administrative Specialist II. She began working for the Agency in September 2006 until her removal effective September 5, 2008. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant developed a pattern of absences from work. She exhausted her Family Medical Leave benefits in the first half of 2008. On July 8, 2008, Grievant's Supervisor counseled Grievant regarding her attendance. The Supervisor instructed Grievant to present documentation excusing or explaining Grievant's unplanned or unscheduled absences. For example, if Grievant was absent from work due to personal sick leave, Grievant was obligated to present a doctor's note to excuse the absence. From July 14, 2008 through August 4, 2008, Grievant was scheduled to work approximately 128 hours. She only worked 11.9 hours. The Supervisor left messages on Grievant's voicemail advising her to present the necessary documentation to excuse her absences. Grievant failed to provide any documentation to excuse her absences. The Human Resource Director sent Grievant two letters asking for the necessary documentation. Grievant never presented any documentation supporting her absences.

In a letter dated August 1, 2008, the Human Resource Director advised Grievant that she had no accrued annual, family personal or sick leave balances and that she remained in leave without pay status. The Human Resource Director advised Grievant that in order to obtain authorization to be absent from work, Grievant was obligated to

call either of two supervisors between 8:15 a.m. and 8:30 a.m. and speak with them directly. Grievant was given the home, work, and cell phone numbers to call.

Grievant was scheduled to work on August 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, and 22 in 2008. Grievant did not report to work. Grievant did not call either supervisor to obtain authorization to be away from work.

## 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.”

“Failure to follow supervisor’s instructions” is a Group II offense. Grievant was repeatedly instructed by the Supervisor to present documentation to excuse her absences from July 14, 2008 to August 4, 2008. Grievant did not provide the documentation or even reply to the Supervisor’s request. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

“Absence in excess of three workdays without authorization” is a Group III offense. Grievant was absent from work from August 6, 2008 through August 22, 2008 without authorization from the Agency. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove an employee. The Agency’s removal of Grievant must be upheld.

Grievant exhausted her Family Medical Leave Act benefits prior to the facts giving rise to the disciplinary action. Grievant did not present evidence to the Agency or during the hearing that would suggest the Agency should have engaged the interactive process for analysis under the Americans with Disabilities Act. Neither the FMLA nor the ADA affect the outcome of this case.

*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>2</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

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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.*

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 for failure to follow a supervisor's instruction is **upheld**. The Agency's issuance to Grievant of a Group III Written Notice with removal for absence in excess of three workdays without authorization 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  
600 East Main St. STE 301

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>3</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>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.