

Issues: Group II Written Notice with suspension (Leaving worksite without permission) and Group II Written Notice with termination (failure to follow policy); Hearing Date: 09/03/09; Decision Issued: 09/04/09; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9121, 9161; Outcome: No Relief – Agency Upheld in Full;
Administrative Review: AHO Reconsideration Request received 09/08/09; Reconsideration Decision issued 09/10/09; Outcome: Original decision affirmed;
Administrative Review: EDR Ruling Request received 09/08/09; EDR Ruling #2010-2422 issued 12/04/09; Outcome: Remanded to AHO; Remand Decision issued 12/30/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Remand Decision received 01/19/10; Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9121 / 9161

Hearing Date: September 3, 2009
Decision Issued: September 4, 2009

PROCEDURAL HISTORY

On March 25, 2009, Grievant was issued a Group II Written Notice of disciplinary action with suspension for leaving work without permission. On May 27, 2009, Grievant received a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions and written policy.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On June 30, 2009, the EDR Director issued Ruling Numbers 2009-2339 and 2009-2340 consolidating the grievances for hearing. On August 12, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 3, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 employed Grievant as a Direct Support Supervisor at one of its Facilities. He began working for the Agency on August 10, 2007. The purpose of his position was:

The Direct Support Supervisor is responsible for job development and job coaching services to individuals; must be able to perform site reviews and supervise job coaching staff in a community setting. Must be able to provide active treatment and person centered planning services.

Grievant worked in N Building. He had a badge which he was supposed to swipe on a time clock to show his arrival at work. N Building was where his home clock was located.

On February 25, 2009, Grievant received a written counseling for failing to use the time clock properly. Grievant was counseled, in part, as follows:

Failure to swipe in at home clock: [Grievant] counseled on the necessity of swiping in at home clock. [Grievant] must [notify] Area APM or Support Center Chief when leaving building.

On March 6, 2009, Grievant received a written counseling from the Supervisor for failing to use the time clock properly. The counseling states, in part:

Failure to swipe in a home clock: [Grievant] has twenty occurrences of failing to either clock in or out at home clock. ***

Failure to swipe in at home clock: [Grievant] counseled on the necessity of swiping in at home clock. He was informed that it is unacceptable to swipe in and leave building without supervisor's approval. [Grievant] must notify Area APM or Support Center Chief when leaving building.

On March 17, 2009 Grievant was working at Building N in the morning. At 9:45 a.m., Grievant signed out in the sign in/ sign out log but did not list where he was going as he had been instructed by the Supervisor to do. Grievant left the Facility to attend a previously scheduled court date. While he was away from the Facility, the Manager came to Building N and could not find Grievant. The Manager asked the Supervisor where Grievant was and the Supervisor responded that Grievant did not tell the Supervisor that he was leaving and where he was going. Grievant returned approximately two hours later.

On April 20, 2009, Grievant began work by swiping his badge at cottage 24. On April 22, 2009 and May 11, 2009, Grievant began his work day by swiping his badge at building 124.

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."¹ 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."

"[L]eaving work without permission" is a Group II offense. On March 17, 2009, Grievant left the Facility to attend court. He did so without the permission or knowledge of the Supervisor. Grievant's absence was not due to an emergency or some other unexpected circumstance. Grievant was absent from the Facility for approximately one hour longer than his set lunch period and, thus, his absence was not excused as part of his lunch period. Grievant had been counseled regarding leaving Building N without notifying a supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of the first Group II Written

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

Notice, the Agency may suspend an employee for up to ten workdays. Accordingly, Grievant's suspension of three workdays must be upheld.

Grievant argues that the Supervisor was not present at Building N when he was leaving and, thus, Grievant could not have notified the Supervisor. This argument fails. Grievant could have notified the Supervisor of the court date many days prior to March 17, 2009.

Failure to follow a supervisor's instructions is a Group II offense. Grievant was instructed by the Supervisor to begin his workday by swiping his badge at the home clock located in Building N. On April 20, 2009, April 22, 2009, and May 11, 2009, Grievant began his day by swiping his badge at a location other than the home clock. He failed to comply with the Supervisor's instructions thereby justifying the Agency's issuance of a Group II Written Notice. Upon the accumulation of two active Group II Written Notices, an employee may be removed from employment. Because Grievant has accumulated two active Group II Written Notices, the Agency's decision to remove him from employment must be upheld.

Grievant argued that he did not receive adequate training regarding the requirements of clocking in and out of Building N. No credible evidence was presented suggesting Grievant required training regarding how to swipe his badge. He regularly swiped his badge using the Agency's time clock system and had been instructed to first swipe his badge at Building N.

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...."² 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.

Grievant contends the disciplinary action should be mitigated because other employees also began their day by swiping their badges at locations other than their home clocks. The evidence showed that other employees, who swiped their badges at locations other than their home clock, were authorized to do so by the Supervisor because they had duties at those locations. Grievant was not authorized to report to locations other than Building N. The Agency did not single out Grievant for disciplinary

² *Va. Code § 2.2-3005.*

action. In light of the standard set forth in the Rules, 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 with suspension for leaving work without permission is **upheld**. The Agency's issuance of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. Grievant's removal from employment is **upheld** based on the accumulation of disciplinary action.

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
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.³

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9121 / 9161-R

Reconsideration Decision Issued: September 10, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends the Hearing Officer erred by failing to consider his exhibit showing he returned to the Facility at 10:45 a.m. The Hearing Officer accepted the exhibit but believes greater weight should be given to the statement of Grievant’s Supervisor who said Grievant returned approximately two hours after leaving. Grievant did not write where he was going when he left at 9:45 a.m. and he did not testify regarding when he returned or when he completed his exhibit appearing to show that he returned at 10:45 a.m. Regardless of how long Grievant was away from the Facility, he knew or should have known not to leave the Facility without obtaining permission from a supervisor. Grievant failed to do so thereby justifying disciplinary action.

No credible evidence was presented to suggest Grievant was singled out for disciplinary action.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9121 / 9161-R2

Reconsideration Decision Issued: December 30, 2009

SECOND RECONSIDERATION DECISION

EDR Ruling No. 2010-2422 states:

As to the second Written Notice (issued for not signing out on March 17th), the hearing officer seems to address the issue of being singled out only in a very general manner. He simply states that “[n]o credible evidence was presented to suggest Grievant was singled out for disciplinary action.” Yet, testimony at hearing appeared to reveal that another employee, a peer of the grievant’s supervisor (also an APM) who was on duty on March 17th, left the building and did not sign out. The hearing officer asked the grievant’s supervisor if the other APM should have signed out when he left. The grievant’s supervisor replied “yes.” Under further questioning by the hearing officer, the grievant’s supervisor explained that he did not supervise the peer APM.

The hearing officer did not address in his decision the apparent failure of the peer APM to sign out. While the fact that the peer APM was not supervised by the grievant’s supervisor may be relevant, it is not necessarily dispositive. In cases involving a claim of inconsistent treatment of employees, we have held that treatment of employees in the grievant’s reporting line, division/department, and/or at the same facility are all potentially relevant. Moreover, in addition to the testimony by the grievant’s supervisor that the other APM did not sign out (and apparently was not disciplined), there was also testimony by another witness who appeared to indicate that others may have routinely left without signing out. Thus, it is unclear how the hearing officer reached his determination that no credible evidence was presented to suggest grievant was singled

out for disciplinary action. Accordingly, this decision is remanded for further consideration and/or clarification consistent with this decision.

By remanding this decision, we do not express any opinion as to whether the discipline should have been mitigated or should be now. (The hearing officer is not precluded from doing so if he finds mitigation appropriate under the *Rules*.) Rather, it is unclear as to whether the hearing officer considered the evidence cited above, and, if so, why he viewed it as not credible.⁴

The Agency's Facility has numerous supervisors who may have different management styles. Management styles may include different expectations for employees working in different areas of the Facility. If a supervisor concludes that attendance is not a problem among his or her employees, that supervisor may create different expectations for employees than would a supervisor who considers attendance to be a problem for his or her employees. Grievant demonstrated attendance problems and the APM set his expectations for Grievant and the other employees he supervised. The APM issued the written notice based on his expectations for employees within his control and not based on the expectations of other supervisors at the Facility. The fact that other supervisors may have had different standards or failed to tightly enforce their standards does not show that the Supervisor who issued the written notice to Grievant singled out Grievant for discipline. At best, this would show that the other supervisors had different standards for their subordinates or that they were poor managers in the enforcement of standards. Grievant knew what was expected of him by the Supervisor, yet he disregarded that expectation. There is no credible evidence to show that the Supervisor singled out Grievant for disciplinary action. There is no basis to mitigate the disciplinary action against Grievant.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the

⁴ Footnotes are omitted.

circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer