

Issues: Group I Written Notice (Unsatisfactory Attendance), Group II Written Notice (Leaving Worksite without Permission), Group II Written Notice (Leaving Worksite without Permission) and Termination (due to accumulation); Hearing Date: 08/28/09; Decision Issued: 09/01/09; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9156, 9157, 9158; 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: 9156 / 9157 / 9158**

Hearing Date: August 28, 2009  
Decision Issued: September 1, 2009

**PROCEDURAL HISTORY**

On February 20, 2009, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. On April 30, 2009, Grievant was issued a Group II Written Notice of disciplinary action for leaving the work site during work hours without permission. On April 30, 2009, Grievant was issued a second Group II Written Notice of disciplinary action for leaving the work site during work hours without permission. Grievant was removed from employment based on the accumulation of disciplinary action.

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 July 7, 2009, the EDR Director issued Ruling Numbers 2009-2344, 2009-2345, 2009-2346 consolidating the grievances. On August 10, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2009, 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 Notices?
2. Whether the behaviors 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 actions, 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 Alcoholic Beverage Control employed Grievant as a Retail Specialist II at one of its stores. The purpose of his position was:

Assists the store manager in planning, organizing and directing a store's operations and participates in all activities that are essential to the operation of an ABC Store. Assumes full responsibility for the operation of the store in the absence of the store manager.<sup>1</sup>

No evidence of prior act of disciplinary action against Grievant was introduced during the hearing.

On January 13, 2009, Grievant received a written letter of counseling from the Regional Manager stating, in part:

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<sup>1</sup> Agency Exhibit 4.

In the future, you will be expected to perform your duties, as scheduled and directed, unless your Store Manager or me grant exceptions to your schedule for legitimate business reasons.<sup>2</sup>

On February 19, 2009, the Supervisor presented Grievant with a written counseling stating:

As a follow-up to our verbal conversation on Thursday, February 12, 2009 I want to reiterate that one-hour lunch breaks are required when you are scheduled to work an 8 hour shift. This one-hour lunch break may not be used to schedule adjust your work hours to arrive late or depart early. Additionally, you are expected to return timely and not extend your lunch break any longer than the one hour that is allotted. Any deviation from this requirement will be considered a violation of my instructions and may result in formal disciplinary action.<sup>3</sup>

On February 14, 2009, Grievant was scheduled to report to work at 9:15 a.m. At 9:15 a.m., Grievant called the Supervisor and said he was having issues and would be in later. The Supervisor told Grievant he needed to get change. Grievant said that would not be a problem because he would be at work by 10 a.m. The Supervisor did not object to Grievant reporting to work at 10 a.m. The Supervisor expected Grievant to report at 10 a.m. Instead, Grievant reported to work at 11:15 a.m.

On April 24, 2009, Grievant was scheduled to work from 12:15 p.m. until 9:15 p.m. Grievant left the worksite at 3 p.m. and returned at 5 p.m. Grievant did not tell the Supervisor where he was going or when or if he would return. When Grievant reported his time keeping, Grievant attempted to claim one of the two hours as his lunch break. Grievant had not been authorized to extend his lunch break.

On April 25, 2009, Grievant was scheduled to work from 9:15 a.m. until 6:15 p.m. At 3:45 p.m., Grievant removed his cash drawer from his cash register. He told the Supervisor that he was leaving because he would be in overtime status. The Supervisor reminded Grievant that Grievant was scheduled to work until 6:15 p.m. Grievant ignored the Supervisor's comment and left the Store to go home.

## **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>4</sup> Group II offenses "include acts of misconduct of a more serious

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

<sup>3</sup> Agency Exhibit 1.

<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.

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.”

Under DHRM Policy 1.60, employees are expected to:

Report to work as scheduled and seek approval from their supervisors in advanced for any changes to the established work schedule, including the use of leave and late early arrivals and departures.

"Tardiness" is a Group I offense. On February 14, 2009, Grievant had obtained permission to arrive at work at 10 a.m. Instead, he was tardy and arrived at 11:15 a.m. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for tardiness.

"[L]eaving work without permission" is a Group II offense. On April 24, 2009, Grievant left the worksite without obtaining permission or authorization from the Supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for leaving work without permission on April 24, 2009. On April 25, 2009, Grievant left work site without obtaining permission or authorization from the Supervisor. Grievant ignored the Supervisor's reminder that Grievant was scheduled to work until 6:15 p.m. The agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for leaving work without permission on April 25, 2009.<sup>5</sup>

Accumulation of a second active Group II Written Notice “normally should result in termination.”<sup>6</sup> Grievant has accumulated two active Group II Written Notices. Accordingly, the Agency's decision to remove Grievant 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>7</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 hearing officer shall state in the hearing decision the basis for mitigation.” A non-

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<sup>5</sup> Grievant argued that had he remained at work, he would have entered overtime status. The Supervisor testified that Grievant would not have entered overtime status.

<sup>6</sup> DHRM Policy 1.60(B)(2)(b).

<sup>7</sup> *Va. Code § 2.2-3005.*

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 suggested the disciplinary action should be mitigated because of his health concerns. Grievant did not testify during the hearing. Insufficient facts exist for the Hearing Officer to determine the extent of Grievant's medical condition, and the effect that his condition and treatment may have had with respect to any disciplinary 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 I Written Notice of disciplinary action for unsatisfactory attendance is **upheld**. The Group II Written Notice of disciplinary action for leaving the worksite on April 24, 2009 is **upheld**. The Group II Written No those of disciplinary action from leaving the worksite on April 25, 2009 is **upheld**. Grievant's removal from employment 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  
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>8</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>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.