

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 09/30/09; Decision Issued: 09/30/09; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9178; 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: 9178**

Hearing Date: September 30, 2009  
Decision Issued: September 30, 2009

**PROCEDURAL HISTORY**

On May 26, 2009, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions.

On May 31, 2009, 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 September 1, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 1, 2009, a hearing was held at the Agency's regional office. Grievant did not appear at the hearing.

**APPEARANCES**

Agency Party Designee  
Agency Counsel  
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 Virginia Information Technologies Agency employed Grievant as an IT Specialist II. She began working for the Agency in October 2004. The purpose of her position was:

Resolve routine customer reported problems associated with the daily operation of statewide communications networks, ensuring prompt, and responsive problem tracking, analysis, and resolution for all reported problems. Research and evaluate complex, chronic, prolonged or emergency network problems related to circuit facilities and any associated network transmission and switching equipment, data terminal equipment, and/or customer premises equipment (including integrated Services Digital Network programmable features, multi-vendor ISDN terminal/stations, and multi-point voice/data ISDN configurations.<sup>1</sup>

Grievant reported to the (administrative) Supervisor. Her work shift began at 8 a.m. and ended at 4:30 p.m.

Grievant had prior active disciplinary action. On July 24, 2006, Grievant was issued a Group II Written Notice for sleeping during work hours. On January 13, 2009, Grievant was issued a Group I Written Notice for failing to provide a note from her health care provider when she failed to report to work for a medical reason.

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

On September 8, 2008, the Supervisor met with Grievant and told Grievant that she was responsible for contacting him prior to the beginning of her work schedule if she was unable to be present that day. On September 10, 2008, the Supervisor sent Grievant an email stating "When you leave early or arrive late or take time during the day not pre-arranged via VITACAL, please send me an e-mail about it rather than (or in addition to) just speaking to me about it."<sup>2</sup>

Grievant left work early on December 9, 2008 for a medical appointment. She spoke with the Supervisor on December 10, 2008 and he reminded her of her obligation to submit a doctor's note regarding her absence.

On many other occasions, the Supervisor reminded Grievant of her obligation to provide notes from her health providers and of her obligation to call him prior to the beginning of her scheduled shift when she would not report to work on time.

On March 25, 2009, Grievant failed to produce a doctor's note excusing two days of absence for medical reasons unrelated to her accommodations. On April 27, 2009, Grievant failed to report to work and did not contact the Supervisor prior to the beginning of her shift. On May 4, 2009, Grievant called the Supervisor at 8:55 a.m. instead of before the beginning of her shift at 8 a.m. Grievant did not report to work that day. On May 5, 2009, Grievant failed to report to work and only spoke with the Supervisor after he called her regarding her absence. On May 18, 2009, Grievant did not report to work and failed to contact the Supervisor before her shift began.

### **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>3</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 a supervisor's instruction is a Group II offense. Grievant was instructed to notify the Supervisor prior to 8 a.m. if she was to be late to work or absent from work. Grievant was instructed to bring a doctor's note if she was absent from work due to illness not related to her claims of FMLA and ADA. On March 25, 2009, Grievant failed to produce a medical provider's note for her two days absence for medical reasons. On April 27, 2009, Grievant failed to report to work and did not contact the

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<sup>2</sup> Agency Exhibit 7.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Supervisor. On May 4, 2009, Grievant called the Supervisor approximately 55 minutes after her shift began and did not report to work. On May 5, 2009, Grievant did not notify the Supervisor prior to the beginning of her shift and did not report to work. On May 18, 2009, Grievant did not notify the Supervisor prior to the beginning of her shift and did not report to work. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the accumulation of a second Group II Written Notice, the Agency was authorized to remove Grievant from employment.

The Supervisor was careful to advise Grievant that his instructions applied for absences other than those arising as part of the circumstances of her accommodation. Grievant had exhausted her benefits under the Family Medical Leave Act. The Agency considered whether issuance of the disciplinary action was affected by Grievant's rights under the FMLA and ADA and concluded the disciplinary action should be taken. No credible evidence was presented to contradict the Agency's judgement.

*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>4</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-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 with removal based on 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:

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<sup>4</sup> *Va. Code § 2.2-3005.*

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>5</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>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.