

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 12/01/10; Decision Issued: 12/02/10; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9397; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9397

Hearing Date: December 1, 2010
Decision Issued: December 2, 2010

PROCEDURAL HISTORY

On July 1, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a five work day suspension for failure to follow a supervisor's instructions.

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 October 18, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision based upon the request of a party. On December 1, 2010, a hearing was held at the Agency's 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:

Virginia Commonwealth University employed Grievant as a Fiscal Assistant. She had been employed by the Agency for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had a history of poor attendance and poor notification of possible absences from work. For example, during the school's winter break, the Agency became concerned that Grievant would not have sufficient leave to cover the time the school was closed.

On May 19, 2010, the Supervisor met with Grievant and instructed Grievant to call the Supervisor to obtain permission to be absent prior to the beginning of Grievant's work shift whenever Grievant expected that she would not report to work. In the past, Grievant had been contacting the Executive Associate Dean to inform the Supervisor that Grievant would be absent. Grievant was instructed to speak directly with the Supervisor.

On June 26, 2010, Grievant became involved in a physical altercation with her husband. She was taken to the Emergency Room at a local hospital. Upon her release from the hospital on June 27, 2010, she was taken to a local jail where she was arrested and charged with assault on a family member. Grievant was scheduled to work on June 28, 2010 but remained in jail. Although Grievant had the ability to make collect calls from the jail, she did not call the Supervisor on June 28, 2010 to explain her absence. On June 29, 2010, Grievant was scheduled to work. At 7:30 a.m., Grievant

sent the Supervisor an email indicating that she might or might not be in at work that day. At 8:15 a.m., Grievant called the Human Resource Assistant and said she would not be in to work that day. The Supervisor arrived at work an 8:25 a.m. The Human Resource Assistant told the Supervisor that Grievant had called and indicated she would not be at work that day.

Grievant was required to appear in court on June 29, 2010 at 9 a.m.¹ Grievant attended court that day and left the courthouse by approximately 2 p.m. She did not return to work to finish her shift.

In response to the Agency's request that Grievant provide the Agency with information about her failure to contact the Supervisor, Grievant presented the Agency with a note from a medical provider who worked in the Emergency Room. The note stated that Grievant was unable to return to work from June 26, 2010 through June 28, 2010.

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."² 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 instructions is a Group II offense.³ On May 19, 2010, the Supervisor instructed Grievant to speak directly with the Supervisor to obtain permission to be absent from work. On June 28, 2010, Grievant was absent from work but did not call the Supervisor prior to the beginning of her shift. On June 29, 2010, Grievant was absent from work but did not call the Supervisor prior to beginning of her shift. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instruction.

Grievant argued that she did not call the Supervisor on June 28, 2010 because she did not believe that the Agency would accept collect telephone calls. The evidence showed that the Agency would have accepted a collect telephone call from Grievant and had accepted collect telephone calls from other employees in the past.

¹ It appears the Grievant was a defendant in a criminal matter and thus would not be entitled to Civil or Work Related leave for her absence on June 29, 2010.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

Grievant argues that she had a note from a medical provider excusing her absence on June 28, 2010. The question is not whether Grievant's absence on June 28, 2010 should be excused. The question is whether Grievant spoke with the Supervisor in accordance with the Supervisor's instructions. If the Hearing Officer considers Grievant's absence on June 28, 2010 to be an excused absence, the outcome of this case does not change. Grievant did not timely contact the Supervisor directly to discuss Grievant's proposed absence from work.

Grievant argued that she gave sufficient notice to the Supervisor of her absence on June 29, 2010 because she sent the Supervisor an email at approximately 7:30 a.m. and called the Human Resource Assistant at approximately 8:15 a.m. The evidence showed that the Supervisor instructed Grievant to speak directly with the Supervisor rather than relying on other means of communication such as email or other employees working for the Agency. The Supervisor's instruction was based on the Agency's objective of approving or disapproving Grievant's leave prior to her absence from work rather than being notified after she had decided she would not be working on a particular date. By announcing in an email that she would be absent from work and informing the Human Resource Assistant that she would be absent from work, Grievant circumvented any discussion from or decision-making by the Supervisor. Grievant's failure to directly contact the Supervisor on June 29, 2010 was contrary to the Supervisor's instruction.

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..."⁴ 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 a five workday suspension is **upheld**.

⁴ *Va. Code § 2.2-3005.*

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.⁵

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

[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