

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 08/15/11; Decision Issued: 08/16/11; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9662; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9662**

Hearing Date: August 15, 2011  
Decision Issued: August 16, 2011

**PROCEDURAL HISTORY**

On May 20, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for unauthorized time away from work.

On June 2, 2011, 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 July 18, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 15, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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 Alcoholic Beverage Control employed Grievant as a Retail Manager I at one of its stores prior to her removal effective May 20, 2011. The purpose of her position was:

Manages and operates an ABC Store in compliance with the requirements of the policies and operational procedures of the Department of Alcoholic Beverage Control. Plans, organizes, and directs a store's operation and participates in all activities that are essential to the operation of an ABC Store.<sup>1</sup>

Grievant had prior active disciplinary action. On December 23, 2008, Grievant received a Group II Written Notice of disciplinary action with a five workday suspension for unauthorized use of state property. On December 23, 2008, Grievant received a Group II Written Notice of disciplinary action for failure to follow established written procedure.<sup>2</sup>

Grievant was scheduled to work on May 9, 2011, May 10, 2011, May 12, 2011, May 13, 2011, and May 14, 2011. On May 8, 2011, Grievant was arrested and incarcerated following a confrontation between a member of her family and the police.

---

<sup>1</sup> Agency Exhibit 7.

<sup>2</sup> Agency Exhibit 9.

On Monday, May 9, 2011, Grievant was permitted to make a phone call. She called an employee of the Store and asked that the Supervisor be informed of her circumstances. In the morning at May 9, 2011, the Supervisor learned the Grievant was in jail and would not be reporting to work. Grievant was unable to obtain a bond hearing until May 16, 2011. She was released from jail following a bond hearing. Grievant did not report to work as scheduled on May 9, May 10, May 12, May 13, and May 14, 2011. Because of Grievant's absence, the Agency moved an employee from another Store to Grievant's Store. The Store from which the employee came was understaffed as a result of moving the employee according to Agency managers.

### 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."

Absence in excess of three workdays without authorization is a Group III offense.<sup>4</sup> Grievant did not report to work as scheduled for five work days. Grievant was not authorized to be absent from work. 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, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Although Grievant contacted the Agency and sought leave to be absent from work, the Agency denied her request. The Agency's practice was to establish employee schedules in the prior work week. Grievant was scheduled to work the week beginning May 9, 2011. The Assistant Store Manager was on leave that week. The Agency chose not to grant Grievant's request for leave because the Assistant Store Manager was already on leave that week. Because of Grievant's absence, the Agency had to move an employee from another Store to Grievant's store. The Agency's decision to deny Grievant's request for leave was justified by its business needs.

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>5</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

---

<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.

<sup>4</sup> See, Attachment A.

<sup>5</sup> Va. Code § 2.2-3005.

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 she was wrongfully incarcerated and prevented from reporting to work by events beyond her control. The Agency presented Criminal Case Details showing that Grievant was convicted of Resisting Arrest and convicted of Resisting and Obstructing the Legal Process. She was sentenced to jail for 12 months with 10 months suspended for each charge. She was placed on probation for 12 months. Grievant's assertion that she was wrongfully incarcerated is not supported by the record. 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 III Written Notice of disciplinary action with removal 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>6</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.