

Issue: Group II Written Notice with Suspension (failure to report to work without notice);
Hearing Date: 12/01/11; Decision Issued: 12/02/11; Agency: DRS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9707; Outcome: No Relief – Agency Upheld;



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9707

Hearing Date: December 1, 2011
Decision Issued: December 2, 2011

PROCEDURAL HISTORY

On August 2, 2011, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to report to work without notice.

On August 15, 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 he requested a hearing. On November 1, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 1, 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 Rehabilitative Services employs Grievant as a Housekeeping Worker at one of its facilities. The purpose of his position is to "provide a clean, safe and aesthetically pleasing environment for clients, visitors, and staff."¹ Grievant's work day typically began at 6 a.m.

Grievant had a history of arriving to work late and leaving work early. On March 2, 2011, the Supervisor provided Grievant with a counseling memorandum stating:

You have a pattern of being late for work or leaving early. On January 20, 2010, February 24, 2010, and March 3, we discussed with you the importance of reporting to work on time and being at work on a regular basis. On each of these occasions you stated you understood but had personal issues you needed to take care of. At your request, we adjusted your schedule, to allow you to come in early, due to personal issues. When you continued to come in late, we offered to adjust your schedule a second time, you refused. You need to be on time to work and work on a regular basis. During 2010, there were only two weeks that you worked the entire week. So far in 2011, there are only three weeks where you worked the entire week. This is not acceptable attendance. For the next 3 months, any annual leave requests must be submitted in advance. If

¹ Agency Exhibit A.

your pattern of unacceptable attendance continues, further disciplinary actions will be taken.²

Grievant missed time from work on April 8, 2011. The Supervisor spoke with Grievant and told him he was to give the Agency 24 hours notice if he needed to take time off from work.

Grievant was approved to take vacation from July 14, 2011 through July 24, 2011. He was scheduled to return to work on July 25, 2011 and to work on July 26, 2011.

Grievant did not report to work on July 25, 2011. The Supervisor called Grievant on July 25, 2011 when she arrived at work and left messages on his voice mail for him to call her. At 8:02 a.m. on July 25, 2011, the Supervisor spoke with Grievant to ask about his status. Grievant told the Supervisor he intended to call her but had not done so. Grievant said that he was in Pennsylvania and that his mother became ill and he had to remain with her in the hospital. The Supervisor asked Grievant if he would be reporting to work on July 26, 2011. Grievant said he would be at work on July 26, 2011. At 6:51 p.m., on July 25, 2011, Grievant called the Supervisor and said that his mother was in pretty bad shape but he was leaving Pennsylvania and was headed back home and would be at work on Tuesday, July 26, 2011. Grievant did not report to work on July 26, 2011 at 6 a.m. as scheduled. At 7:47 a.m., Grievant called the Supervisor and told her he was still travelling and was a "good distance" away.

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."³ 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."

DHRM Policy 4.10 provides that, [e]mployees must request and receive approval from their supervisors to take annual leave." DHRM Policy 1.60 requires that employees, "[r]eport to work as scheduled and seek approval from their supervisors in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures."

² Agency Exhibit B.

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

"[F]ailure to report to work without proper notice" is a Group II offense.⁴ Grievant was scheduled to work on July 25, 2011. He failed to report to work as scheduled and failed to notify the Agency in advance of his work shift that he would not be working that day. Grievant was scheduled to work on July 26, 2011. When the Supervisor spoke with Grievant by telephone on July 25, 2011, Grievant confirmed that he would be at work on July 26, 2011. Grievant did not report to work on July 26, 2011 and did not notify the Agency in advance of his scheduled start time that he would not be working that day. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to report to work without proper notice. Upon the issuance of a Group II Written Notice, an employee may be suspended for up to ten workdays. According, the Agency's suspension of Grievant for five workdays 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..."⁵ 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. He argued in his grievance documents that personal family difficulties prevented him from working on July 25 and July 26, 2011. Insufficient evidence was presented to form a basis for mitigation. Grievant did not testify and did not present any witnesses to show that he was incapable of notifying the Supervisor that he would be absent on July 25, 2011. The Agency presented evidence that Grievant told the Supervisor he would be present on July 26, 2011. Grievant did not offer any evidence that would otherwise have excused his absence on July 26, 2011 and his failure to give proper notice.

Grievant offered an exhibit to support his contention that the Agency singled him out for disciplinary action. Insufficient evidence was presented to establish the facts surrounding the counseling of two other employees. The Agency presented evidence showing that the counseling did not involve circumstances similar to those underlying Grievant's 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.

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ Va. Code § 2.2-3005.

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**.

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.⁶

[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

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