

Issue: Group I Written Notice (failure to report without notice); Hearing Date: 04/04/12; Decision Issued: 04/09/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9783; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9783

Hearing Date: April 3, 2012
Decision Issued: April 9, 2012

PROCEDURAL HISTORY

On January 4, 2012, Grievant was issued a Group I Written Notice of disciplinary action for failing to report without notice and failure to follow a supervisor's instructions.

On January 10, 2012, 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 March 7, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 3, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency's 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?
5. Whether the Agency retaliated against Grievant?

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 Behavioral Health and Developmental Services employs Grievant as a Trades Technician at one of its facilities. Grievant has been employed by the Agency for approximately 12 years. On October 26, 2011, Grievant received an overall rating of "Contributor" on his annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's work shift began at 7:30 a.m. He was expected to contact his supervisor directly prior to 7:30 a.m. in the event he would be absent from work.

On September 29, 2011, Grievant did not report to work at 7:30 a.m. as scheduled. Grievant called a co-worker, Mr. J, instead of calling the Supervisor to tell the Supervisor that he would not be reporting to work as scheduled. The Supervisor counseled Grievant that under the Facility's call-in policy, he was expected to call the Supervisor or the front desk before 7:30 a.m. when he was not going to report to work.

On October 11, 2011, Grievant received a copy of the Facility's call-in policy.

On December 5, 2011, Grievant was scheduled to work. He felt ill prior to the beginning of his shift and concluded he would not be able to report to work at 7:30 a.m. Approximately a year earlier, the Supervisor had provided Grievant and other employees at the Facility with his personal cell phone number. Grievant had obtained a

new telephone but had not programmed the Supervisor's phone number into his new phone. Grievant did not call the Supervisor to inform the Supervisor that he would not report for his shift. Grievant did not call the front desk because it did not open until 7:30 a.m. and he needed to sleep. He had taken medication that made him sleepy. At 7:07 a.m., Grievant called a co-worker, Mr. B, who was already at work and asked Mr. B to inform the Supervisor that Grievant would not be reporting to work at 7:30 a.m. Mr. B informed the Supervisor about Grievant when the Supervisor arrived at work. At approximately 12:45 p.m., Grievant called the front desk receptionist to ensure that the Supervisor was notified that Grievant would not be at work that day.

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."¹ 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."

Policy 053-19 governs attendance at the Facility. Under this policy, employees are expected to "call-in" by "[n]otifying supervisor via telephone of an absence." Grievant had been instructed to contact his supervisor prior to the beginning of his shift at 7:30 a.m. to inform the supervisor that he would be absent. On September 29, 2011, Grievant was counseled to call the Supervisor or the front desk receptionist if he could not report to work at the beginning of his shift.

Failure to follow a supervisor's instructions and failure to follow policy is a Group II offense.² On December 5, 2011, Grievant failed to call the Supervisor prior to the beginning of his shift. Grievant acted contrary to policy and to the Supervisor's instructions thereby justifying the issuance of a Group II Written Notice. The Agency reduced the disciplinary action to a Group I Written Notice.

Grievant argued that he was unable to call the Supervisor because he became ill in the early morning of December 5, 2011 and had to take medication that made him sleepy so that he could not wait until 7:30 a.m. to call when the Supervisor arrived at work or the front office was open. Grievant had gotten a new cell phone and had not programmed it with the Supervisor's telephone number. Grievant called Mr. B who was a former supervisor and who informed the Supervisor when the Supervisor arrived at work. Grievant's argument fails. The Agency has the authority to instruct its employees to speak directly with a supervisor when an employee expected to be absent from work.

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

The Supervisor provided Grievant with his personal cell phone number and it was Grievant's responsibility to retain that information. Grievant established that he was ill and unable to report to work as scheduled. He did not establish that his illness prevented him from calling the Supervisor directly. Grievant was capable of calling Mr. B at 7:07 a.m. Grievant was not disciplined for failing to call prior to his shift; he was disciplined for failing to call the right person.

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...."³ 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.⁴

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁵ (2) suffered a materially adverse action⁶; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a

³ Va. Code § 2.2-3005.

⁴ Grievant argued that other employees had engaged in similar or worse behavior but had not been disciplined. No credible evidence was presented to establish the details of a similarly situated employee who had not received disciplinary action.

⁵ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁶ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁷

Grievant engaged in protected activity because he filed a grievance in June 2011. He suffered a materially adverse action because he received disciplinary action. Grievant did not present any testimony or explanation to establish a connection between the protected activity and the materially adverse action. The Agency has established that it took disciplinary action against Grievant because it believed Grievant engaged in behavior contrary to the Standards of Conduct and not as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice 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 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

⁷ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.