

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 11/28/12; Decision Issued: 11/28/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9950; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 12/10/12; EDR Ruling No. 2013-3497 issued 01/08/13; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9950**

Hearing Date: November 28, 2012

Decision Issued: November 28, 2012

#### **PROCEDURAL HISTORY**

On August 20, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow policy.

On September 2, 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 November 6, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 28, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant

#### **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:

During a prehearing conference, the hearing date and time were scheduled for November 28, 2012 at 9 a.m. The parties were notified of the hearing date, hearing time, and location by letter dated November 14, 2012. A few minutes after 9 a.m. on November 28, 2012, the Agency Representative called the Facility where the hearing was to be held and spoke with the Hearing Officer. The Representative said that he was a witness in another Agency grievance hearing involving a termination and that he was scheduled as the first witness and would be approximately 30 minutes late. The Hearing Officer said he would wait that time for the Representative to appear but not too much longer. The Hearing Officer waited for an hour but the Representative did not appear. The hearing began at 10 a.m. The Agency presented no evidence. Grievant argued that the disciplinary action against him should be reversed.

### **CONCLUSIONS OF POLICY**

The burden of proof in disciplinary actions is upon the Agency. The Agency did not present any evidence and, thus, did not meet its burden of proof. There is no basis to uphold 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 **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings

that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

## 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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>1</sup>

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<sup>1</sup> Agencies must request and receive prior approval from 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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer