

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 01/19/16;
Decision Issued: 01/20/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10718; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10718

Hearing Date: January 19, 2016
Decision Issued: January 20, 2016

PROCEDURAL HISTORY

On June 9, 2015, Grievant was issued a Group II Written Notice of disciplinary action 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 November 17, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 19, 2016, 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 Corrections employs Grievant as a Corrections Lieutenant at one of its facilities. She has been employed by the Agency since May 2007. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked as a Shift Commander at Facility 1. Grievant planned to transfer from Facility 1 to Facility 2. She was scheduled to transfer to Facility 2 on May 10, 2015.

On May 7, 2015, Grievant attended a farewell luncheon for another employee at Facility 1. She told some of the other people at the luncheon that May 7, 2015 was also her last day at Facility 1. The Major spoke with Grievant and said that she was scheduled to report to work on May 8, 2015 and that he expected her to report to work. Grievant reiterated that she would not report to work May 8, 2015. The Major again instructed Grievant to report to work on May 8, 2015. Grievant again said she would not be reporting to work May 8, 2015.

When Grievant left the Facility on May 7, 2015, she told Lieutenant P that she would not be relieving Lieutenant P in the morning on May 8, 2015.

On May 7, 2015 at 10:52 p.m., Grievant called Facility 1 staff and stated that she would not be reporting for duty on May 8, 2015 and that she was using Family Personal Leave. Grievant did not report to work on May 8, 2015. The Major reported to work in place of Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”¹ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴ Grievant was scheduled to work on May 8, 2015. She told the Major and other employees that she would not be working on May 8, 2015. The Major reminded her she was scheduled to work on May 8, 2015 and instructed her to report to work. Grievant failed to report for work as instructed. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she was “joking” with the Major and she intended to report to work May 8, 2015 but that “something came up” and she was unable to report to work on May 8, 2015. She argued she complied with the requirement of calling in advance of her shift.

The evidence showed that Grievant was not “joking”. On May 7, 2015, Grievant did not intend to report to work on May 8, 2015 and she did not report to work as scheduled. The Major believed Grievant was sincere in her denial of his instruction. The Major asked Grievant several times if she would be reporting to work and she repeatedly said she would not be reporting to work.

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 Human Resource Management”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

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁵ Va. Code § 2.2-3005.

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 argued that the Agency should have issued lesser disciplinary action given her prior good work performance. Agencies are encouraged to implement progressive disciplinary action but nothing requires them to do so. The Agency met its burden of proof to support the issuance of a Group II Written Notice. 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 II 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 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

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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.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 EDR before filing a notice of appeal.