

Issue: Group II Written Notice with Suspension (dress code violation and failure to follow policy); Hearing Date: 03/08/16; Decision Issued: 03/09/16; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No, 10760; Outcome: Partial Relief;
Administrative Review: EDR Ruling Request received 03/23/16; EDR Ruling No. 2016-4327 issued 04/19/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 03/23/16; DHRM Ruling issued 05/16/16; 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: 10760

Hearing Date: March 8, 2016
Decision Issued: March 9, 2016

PROCEDURAL HISTORY

On December 7, 2015, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for a uniform violation and failure to follow a supervisor's instructions.

On December 14, 2015, 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 January 26, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 8, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Veterans Services employs Grievant as a Unit Secretary at one of its facilities. She began working for the Agency on November 10, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant did not wear a uniform to work except that she was expected to wear a plaid jacket. On December 2, 2015, Grievant wore pants made of polyester but appeared to be made of fleece. The pants were white with green Christmas trees printed on the pants. The pants had a draw string that hung from the front to tie and keep the pants from falling. Grievant described her pants as "loungewear."

Grievant's Supervisor observed the pants and concluded they were not appropriate. He told Grievant to "go home and change." Grievant met with the Director of Nursing. She told Grievant that the pants looked like pajama pants and were inappropriate. The Director of Nursing told Grievant to "go home and change."

Grievant left the Facility with permission and went home. She did not return to work.

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.”

The Agency’s Dress Code policy provides:

Staff may not wear jeans to include all colored denim, sweat pants, shorts or T-shirts unless on special occasions with permission given by the administration. Yoga pants, leggings, or tights are not permitted as pants and may only be worn with a dress covering to mid-thigh length or longer. Capri pants below the knee are acceptable per department manager’s discretion. ***

Administrative staff: Staff may wear corporate casual. ***

Staff may be requested to go home to change clothing if they are not in compliance with this policy. The management staff will follow the Standards of Conduct in regards to this policy. Failure to follow policy may result in disciplinary action.²

Unsatisfactory work performance is a Group I offense. Grievant was expected to wear appropriate clothing to work. On December 2, 2015, Grievant wore pants that had a pattern of Christmas trees on them. The Director of Nursing described the pants as pajamas and testified they were inappropriate for the workplace. Ms. R described the pants as “pajama pants” and indicated the pants were not appropriate in the workplace absent permission from Agency managers. Pajamas are typically worn while sleeping at home and not at work. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency argued that Grievant should receive a Group II Written Notice with a suspension because Grievant failed to comply with the Agency’s Dress Code and Grievant failed to return to work as instructed. Insufficient evidence was presented to support the issuance of a Group II Written Notice with suspension.

The Agency did not show that Grievant violated the wording of the Dress Code policy. The policy addressed specific items of clothing such as jeans, sweat pants, shorts, yoga pants, leggings, or tights. The policy does not mention pajamas or “loungewear.” Grievant did not wear pants that were jeans, shorts, yoga pants, leggings, or tights. The Agency argued that Grievant’s pants were sweat pants. Sweat pants are pants often used for exercise (hence the word “sweat”). Grievant’s pants related to the

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

² Agency Exhibit 4.

Christmas holiday season and did not relate to exercise. The Agency has not established that Grievant violated its Dress Code policy.³

The Agency argued that sweat pants were an example of loungewear and by wearing lounge pants, Grievant violated the Agency's policy prohibiting the wearing of sweat pants. The Agency's argument is not persuasive. Simply because pants are loungewear does not mean they are sweat pants. For example, pajamas are loungewear but pajamas are not sweat pants. The policy mentions sweat pants; it does not mention loungewear or pajamas.

The Agency argued that Grievant disregarded a supervisor's instruction by failing to return to work after being sent home to change. Neither the Supervisor nor the Director of Nursing instructed Grievant to "return to work." Both instructed Grievant to "go home and change." The Agency argued that the instruction to return to work was implied as part of the instruction to go home and change. Grievant interpreted the instruction to go home and change to mean she was being sent home from work without any expectation of returning. The Agency has not established that Grievant should have recognized the assumptions made by the Supervisor and Director of Nursing. There is no basis to conclude that Grievant knew she was instructed to return to work and refused to do so.

Grievant argued that she wore the pants in prior years without objection. The evidence showed that on some occasions, Agency employees were permitted to dress differently from their normal attire. Whether Agency managers failed to object when Grievant previously wore her Christmas tree pants does not prevent them from making future objections.

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"⁴ 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.

³ It is arguable that Grievant violated the "spirit" of the policy. Violating the spirit of a policy would be a Group I offense at most.

⁴ Va. Code § 2.2-3005.

Grievant argued that other employees violated the Dress Code policy but were not disciplined. Insufficient evidence was presented to show that other employees violated the Dress Code and Facility managers tolerated those violations of policy. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further 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 **reduced** to a Group I Written Notice. 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 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.