

Issue: Group III Written Notice with Termination (failure to report without notice, failure to follow instructions, insubordination); Hearing Date: 03/18/16; Decision Issued: 04/07/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10765; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 04/13/16; EDR Ruling No. 2016-4353 issued 05/16/16; Outcome: AHO's decision affirmed; Administrative Review: EDR Reconsideration Ruling Request received 05/26/16; EDR Ruling No. 2016-4363 issued 06/01/16; Outcome: Request denied; Judicial Review: Appealed to Southampton County Circuit Court; Outcome: AHO's decision found not contradictory to law (07/18/16) [CL16000434-00].**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10765

Hearing Date: March 18, 2016

Decision Issued: April 7, 2016

PROCEDURAL HISTORY

On December 31, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to report to work without notice, failure to follow instructions, and insubordination.

On January 12, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 8, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 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 employed Grievant as a Utility Plant Specialist II at one of its facilities. Grievant had prior active disciplinary action consisting of a Group II Written Notice for failure to report to work.

Grievant and four other water treatment specialists reported to the Supervisor. The Supervisor had given his subordinates his two cell phone numbers so they could reach him in the event they could not report to work as scheduled. The Supervisor was responsible for assigning employees to work on specific days.

The Agency was required to have an employee working at the Facility to address water treatment duties on a daily basis including holidays. Employees in Grievant's unit rotated working on weekends and holidays.

On November 12, 2015, the Supervisor scheduled Mr. B to work on December 24, 2015, Grievant to work on December 25, 2015, and Mr. R to work on December 26, 2015.

On December 21, 2015, Grievant told the Supervisor he would not work on December 25, 2015. The Supervisor told Grievant that he was scheduled to work December 25, 2015. Grievant became loud and angry and again said he would not work on December 25, 2015. The Supervisor again told Grievant to report to work on December 25, 2015 or fill out the appropriate paperwork to make a request for leave.

On December 25, 2015, Grievant did not report to work. He did not call the Supervisor to inform the Supervisor that he was not at work because of illness or for some other appropriate reason. The Supervisor worked in Grievant's place on December 25, 2015.

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 "Failure to report to work as scheduled without proper notice to supervisor" is a Group II offense.⁵ Insubordination is a Group II offense.

Grievant was scheduled to work on December 25, 2015. He was notified of his obligation in November 2015. On December 21, 2015, Grievant told the Supervisor he refused to work on December 25, 2015. The Supervisor instructed Grievant to report to work on December 25, 2015 or fill out the appropriate paperwork to make a request for leave. Grievant did not report to work as scheduled. He did not call prior to his shift and did not provide any excuse that would have justified Grievant's failure to report to work as scheduled. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.⁶

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

⁶ There is no basis to elevate the disciplinary action from a Group II Written Notice to a Group III Written Notice. Grievant's behavior was not an extreme circumstance justifying elevation of the offense. An employee who receives a Group I Written Notice and repeats that behavior may receive a Group II Written Notice. This principle does not apply when an employee has received a Group II Written Notice and then repeats that behavior. Such an employee would receive a second Group II Written Notice, not a Group III Written Notice.

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant had a prior active Group II Written Notice. With the issuance of the written notice in this case, Grievant has accumulated two active Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued he had difficulty using the Agency's computer to enter leave requests. Whether the Agency's computer system operated sufficiently for Grievant to enter his leave requests has no bearing on this case. Grievant was expected to report to work as scheduled regardless of any leave requests he sought. He did not present evidence that he was ill or otherwise incapable of reporting to work.

Grievant argued that he asked the Supervisor for leave and his request was turned down. The Supervisor had discretion whether to grant Grievant's request for annual leave and he made it clear to Grievant that Grievant was expected to work on December 25, 2015.

Grievant argued that the process was not followed properly. No credible evidence was presented to show that the Agency materially failed to follow any procedures regarding its discipline of Grievant.

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"⁷ 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

⁷ *Va. Code § 2.2-3005.*

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.⁸

⁸ 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

Carl Wilson Schmidt, Esq.
Hearing Officer