

Issue: Group II Written Notice (failure to follow instructions), and Termination due to accumulation; Hearing Date: 03/03/17; Decision Issued: 03/06/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10947; 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: 10947

Hearing Date: March 3, 2017
Decision Issued: March 6, 2017

PROCEDURAL HISTORY

On December 14, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. Grievant was removed from employment based on the accumulation of disciplinary action.

On December 16, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 9, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 3, 2017, 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 Corrections Officer at one of its facilities. Grievant had been employed by the Agency for approximately 10 years. Grievant had prior active disciplinary action. On June 17, 2016, Grievant received a Group II Written Notice for failure to follow instructions. On July 27, 2016, Grievant received a Group II Written Notice for failure to report to work without following call-in procedures.

Grievant was scheduled to attend in-service training on November 7, 2016. The training was to "re-certify" him as a corrections officer. The training would have provided Grievant with policy updates and allowed him to review policies governing use of force, the Prison Rape Elimination Act, and other topics.

Grievant was absent from work while out on short-term disability. When he returned to work, the Captain told Grievant to attend the training on November 7, 2016.

On October 22, 2016, the Captain verbally informed Grievant of his obligation to attend the training.

On November 4, 2016, the Captain reminded Grievant that he was to attend training on the following Monday, November 7, 2016.

Grievant did not attend the training on November 7, 2016.

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 The Captain told Grievant three times to attend training on November 7, 2016. Grievant did not attend the training thereby justifying the issuance of a Group II Written Notice for failure to comply with a supervisor’s instructions.

An employee who accumulates two Group II Written Notices may be removed from employment. Grievant has accumulated three Group II Written Notices thereby justifying the Agency’s decision to remove him from employment.

Grievant asserted that he was not aware of the training date or the location of the training. Grievant did not present any testimony or documentary evidence. There is no evidence upon which the Hearing Officer could conclude that Grievant’s assertion is true.

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 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

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

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

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

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

⁵ *Va. Code § 2.2-3005.*

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 II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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.