

Issues: Group II Written Notice (failure to follow policy), and Termination due to accumulation; Hearing Date: 03/13/17; Decision Issued: 03/14/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10956; 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: 10956

Hearing Date: March 13, 2017

Decision Issued: March 14, 2017

PROCEDURAL HISTORY

On December 14, 2016, Grievant was issued a Group II Written Notice of disciplinary action for violation of Departmental Instruction 506. Grievant was removed from employment based on the accumulation of disciplinary action.

On December 26, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 31, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 13, 2017, 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 Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate II at one of its facilities. Grievant had prior active disciplinary action. He received two Group II Written Notices on December 3, 2014 for violating policies.

On October 11, 2016, Grievant was found guilty of driving on a revoked license for the fifth time. His offense was a misdemeanor for violating *Va. Code § 46.2-301*. He was sentenced to six months in jail with five months and 15 days suspended.

Grievant did not report his conviction to the Agency.

On June 15, 2010, Grievant signed an Acknowledgement of Understanding of DI 506. Every year Grievant received in-service training regarding DI 506 and other Agency policies.

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

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

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.”

Departmental Instruction 506 governs Criminal History Checks and Background Verification Requirements. Under this policy:

Conviction: This means a finding of guilty (including a plea of guilty or nolo contendere), or imposition of sentence, or both, by a judicial body charged with the responsibility of determining violations of the federal or state criminal laws, alcohol beverage control laws, or laws that govern driving while intoxicated. ***

Workforce members shall notify their supervisors of any arrests, charges (to include pending), convictions, and motor vehicle violations (such as DUI and reckless driving) that could result in a suspended or revoked license within five workdays of the event.

On October 11, 2016, Grievant was convicted of a misdemeanor that could result in suspension or revocation of his driver’s license. Grievant did not report his conviction to a supervisor thereby justifying the Agency’s issuance to the Grievant of a Group II Written Notice for failure to follow policy.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated three Group II Written Notices. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that he notified his supervisors of the conviction and that everyone knew he did not have a driver’s license. Grievant did not identify the supervisors with whom he spoke or call any of them as witnesses. He did not identify the date or method of informing his supervisors. Grievant’s assertion is not sufficient to show that he notified his supervisors of his conviction.

Grievant argued that he did not have notice of DI 506. The Agency’s evidence showed he was notified of the policy.

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”² 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

² Va. Code § 2.2-3005.

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 II Written Notice of disciplinary action with removal 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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.