

Issues: Group II Written Notice (leaving work without permission), and Termination due to accumulation; Hearing Date: 03/05/18; Decision Issued: 03/06/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11158; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11158**

Hearing Date: March 5, 2018  
Decision Issued: March 6, 2018

**PROCEDURAL HISTORY**

On November 30, 2017, Grievant was issued a Group II Written Notice of disciplinary action for leaving the worksite without permission. Grievant was removed based on the accumulation of disciplinary action.

On December 12, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 17, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 5, 2018, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Food Service Supervisor. He had prior active disciplinary action. On November 6, 2017, Grievant received a Group II Written Notice.

Grievant was standing in front of the food line. Ms. H believed Grievant should have been standing behind the line. Ms. H pulled Grievant aside and started talking about her concerns. They expressed different opinions and decided to speak about the issue at a later time.

At some point, Grievant spoke with Ms. R who held a position similar to Grievant's position. Ms. R believed Grievant used a curse word and this offended her.

Later in the day, Grievant, the Supervisor, the Manager, and Ms. R met in the Supervisor's office. Ms. R expressed her concerns about the conflict. Grievant expressed his concerns about the conflict. Grievant and Ms. R left the meeting.

At approximately 12:30 p.m., Grievant gathered his personal items and went to the Facility's Human Resource Office. He told an HR employee he was leaving. The HR employee said, "I'm sorry." Grievant left the Facility and did not return that day.

In order to leave the Facility, Grievant was required to obtain permission from the Supervisor or the Manager. Grievant did not do so.

Facility Managers had another employee perform Grievant's responsibilities for the remainder of his shift.

## 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."<sup>1</sup> 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."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

"Leaving the work site during working hours without permission" is a Group II Offense.<sup>4</sup> On November 21, 2017, Grievant began working at 10 a.m. He had a heated confrontation with Ms. R and the Supervisor. After he left a meeting with the Manager, Supervisor, and Ms. R, Grievant gathered his personal items and left the Facility. He did not obtain permission from the Supervisor or Manager to leave the Facility. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove Grievant from employment.

Grievant argued that his workplace was hostile because of Ms. R's and the Supervisor's statements and attitudes towards him on November 21, 2017. He argued he notified the HR employee before leaving. Grievant could have asked the Manager for permission to leave but did not do so. Grievant did not demonstrate that his workplace was so hostile that he could not have been expected to obtain permission to leave. His failure to obtain permission to leave supports the Agency's decision to issue disciplinary action.

*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

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>4</sup> DOC Operating Procedure 135.1(V)(C)(2)(c).

Management ....”<sup>5</sup> 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 II Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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<sup>5</sup> Va. Code § 2.2-3005.

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.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.