

Issues: Group II Written Notice (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 03/19/19; Decision Issued: 03/20/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11323; 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: 11323**

Hearing Date: March 19, 2019

Decision Issued: March 20, 2019

#### **PROCEDURAL HISTORY**

On January 11, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. He was removed from employment based on the accumulation of disciplinary action.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 13, 2019, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 19, 2019, 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. 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 Behavioral Health and Developmental Services employed Grievant as a Security Officer III. Grievant had prior active disciplinary action. On April 27, 2018, Grievant received a Group II Written Notice for failure to follow instructions.

The Agency had a Facility with a Hospital nearby. The Facility usually had two security officers working during the night shift. Sometimes patients at the Facility had to be taken to the Hospital. If a patient was moved to the Hospital, a security officer stayed with the patient at the Hospital until another security officer relieved him or her.

Officer S started his first shift on December 18, 2018. He stayed with a Patient in the Forensic Unit at the Hospital. He was obligated to remain in constant contact with the Patient until another security officer relieved him. Grievant was scheduled to work a second shift from midnight until 8:30 a.m. on December 19, 2018. He was supposed to work his second shift at the Facility and not at the Hospital. Officer S remained at the Hospital after midnight observing the Patient because no one came to relieve him to allow him to return to the Facility.

On December 19, 2018 Officer S called Grievant several times to ask to be relieved from his post at the Hospital. Grievant said he would not relieve Officer S.

On December 19, 2018 beginning at .03 a.m., Officer S began sending text messages to the Supervisor indicating that he was being refused a break or relief. Officer S sent the Supervisor similar text messages at .34 a.m., 1:52 a.m., 2:48 a.m., 3:55 a.m., and 4:52 a.m.

Officer S also made several telephone calls to the Supervisor's cell phone and left voice messages.

Grievant began feeling sick at 1 a.m. At about 3 a.m., he was feeling cold so he got his jacket to wear.

The Supervisor awoke at approximately 5:10 a.m. and checked her cell phone. She learned that no one had relived Officer S. At 5:18 a.m., the Supervisor called Officer S and said she would have someone from the front desk relieve him. The Supervisor called Grievant at the Facility and Grievant answered the telephone call. She told him to go to the Hospital to relieve Officer S. Grievant refused to do so. He said that the Hospital is where Officer S was assigned and that is where Officer S should work. The Supervisor asked Grievant again to relieve Officer S. Grievant again refused to do so. The Supervisor ordered Grievant to relieve Office S and Grievant refused to do so. Grievant said he was sick. Grievant did not explain the nature of his illness. The Supervisor said she "wasn't going back and forth on this" and asked where was Officer H. Grievant said Officer H was outside and he would ask her to go to relieve Officer S. Grievant hung up the telephone.

The Supervisor was unsure whether Grievant would contact Officer H and ask her to go to relieve Officer S, so the Supervisor called Officer F. Officer F was scheduled to work the morning shift and the Supervisor was going to instruct Officer F to go immediately to the Hospital after "clocking in."

Grievant contacted Officer H and Officer H went to the Hospital to relieve Officer S. At 5:50 a.m., Officer H relieved Officer S at the Hospital.

The Supervisor called Grievant to see if Officer H had gone to relive Officer S. Grievant told the Supervisor he spoke with Officer H and Officer H would relieve Officer S.

Grievant left the Facility at about 7:30 a.m.

On December 20, 2018, Grievant submitted a note from is doctor indicating he would be out of work for five days.

### **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.”<sup>1</sup> 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.”

Failure to follow a supervisor’s instructions is a Group II offense.<sup>2</sup> On December 19, 2018, the Supervisor instructed Grievant to leave the Facility and go to the Hospital to relieve Officer S who was with the Patient. Grievant was instructed to relieve Officer S three times. Each time Grievant refused. Grievant understood that the Supervisor had ordered him to relieve Officer S but he refused to do so because he was sick. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

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

Grievant argued that he was not obligated to relieve Officer S because he felt sick and wanted to wait at the Facility until Officer F arrived to relieve Officer S. The evidence showed that Grievant’s sickness was not an excuse for him to refuse the Supervisor’s instruction. By remaining at the Facility, Grievant could have come into contact with other employees or patients thereby transferring his illness. If he went to the Hospital, he would have come into contact with only one patient and with several employees. His decision to remain at the Facility and not the Hospital did not adversely affect other employees or patients. By choosing to remain at work, Grievant was obligated to comply with the Supervisor’s instruction.

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 ....”<sup>3</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

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

<sup>2</sup> See, Attachment A. DHRM Policy 1.60.

<sup>3</sup> Va. Code § 2.2-3005.

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.

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>

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR 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 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