

Issue: Group I Written Notice (leaving work without permission and failure to follow policy); Hearing Date: 06/07/13; Decision Issued: 06/10/13; Agency: W&M; AHO: Carl Wilson Schmidt, Esq.; Case No. 10090; 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: 10090

Hearing Date: June 7, 2013

Decision Issued: June 10, 2013

PROCEDURAL HISTORY

On January 14, 2013, Grievant was issued a Group II Written Notice of disciplinary action for leaving work without permission and failure to follow instructions or policy.

On February 8, 2013, Grievant timely filed a grievance to challenge the Agency's action. During the Step Process, the Agency reduced the discipline from a Group II Written Notice to a Group I Written Notice. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 20, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 7, 2013, 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 College of William and Mary employs Grievant as a Custodial Lead Worker. She has been employed by the Agency for approximately 15 years.

Grievant was scheduled to work from 5 a.m. until 2 p.m. She had a break from 9 a.m. until 10 a.m. Grievant worked in the Building on the first floor and had been told not to leave her area without obtaining permission of the Supervisor. Grievant had been instructed that if the Supervisor was not at work, she was to obtain permission from the Manager to leave her work area.

When Grievant began her shift she was expected to report to the Supervisor to obtain her keys. At the end of her shift she was expected to report to the Supervisor and give him her keys. Ms. F was also a lead worker and when the Supervisor was not present at the end of the shift, employees were supposed to deliver their keys to Ms. F.

On March 24, 2011, the Supervisor received an email from the Manager stating, in part, "No employee is to turn in another employee[s] keys. When employee[s] go to lunch they are to leave [their] building at 9 a.m. And not ten minute[s] till. And they need to be back at 10 a.m."¹ When the Supervisor received the email, he made copies of the email for all of his staff including Grievant and gave them a copy of the email.

¹ Agency Exhibit 8.

On November 6, 2012, Grievant was scheduled to work her regular shift. The Supervisor was not working that day. Grievant obtained her keys from Ms. F at the beginning of her shift and reported to her work area. At approximately 8:20 a.m., Grievant left her work area and went to her vehicle. Another woman also left her work area and walked with Grievant to their vehicles. Grievant drove away from the campus to the payroll office. She did not return to her work area for the rest of the day. At some point, Grievant had given her keys to the other woman to return. The other employee returned to the campus and turned in her keys with Grievant's keys at the end of their shifts.

On November 7, 2012, Grievant turned in a time sheet claiming to have worked 8 hours on November 6, 2012 even though she had left early.

On November 16, 2012, the Manager confronted Grievant about leaving work on November 6, 2012. Grievant initially denied leaving work. Later she admitted she left early and claimed to have placed a leave slip on the Supervisor's desk before leaving. No leave slip was found on the Supervisor's desk.

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."² 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."

"[L]eaving work without permission" is a Group II offense.³ On November 6, 2012, Grievant was scheduled to work from 5 a.m. until 2 p.m. She left her work area and the campus at approximately 8:20 a.m. She did not have permission from the Supervisor because he was absent that day. She knew she was obligated to seek permission to leave from the Manager in the Supervisor's absence. Grievant did not obtain permission from the Manager or anyone else before leaving.

"Failure to follow [a] supervisor's instructions" is a Group II offense.⁴ Grievant was instructed not to have another employee turn in her keys at the end of the shift. On November 6, 2012, Grievant had another employee turn in her keys at the end of her shift.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

⁴ See, Attachment A, DHRM Policy 1.60.

The Agency has presented sufficient evidence to show that Grievant left work without permission on November 6, 2012. The Agency has presented sufficient evidence to show that Grievant had another employee turn in her keys at the end of her shift contrary to the Manager's instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency reduced the disciplinary action to a Group I Written Notice.

Grievant argued that she placed a leave slip on the Supervisor's desk on November 6, 2012. This argument is not credible. On November 6, 2012, Grievant left a voice message for the Supervisor saying she was leaving to go to the payroll office but she did not say she wanted to take leave for the rest of the day. Had she intended for the Supervisor to know that she was leaving for the entire day, she would have included that information in a voice message. The Supervisor looked at the papers on his desk when he returned to work and found a timesheet signed by Grievant reporting that she worked eight hours on November 6, 2012. He did not find a request for leave on November 6, 2012. If Grievant had requested leave on November 6, 2012, she would not have submitted a timesheet reporting that she had worked eight hours on November 6, 2012.

Grievant argued that many employees often put their keys behind a door to turn them in at the end of their shift. Even if this were true, Grievant did not put her keys behind the door. She had another employee turn in the keys and doing so was contrary to the instruction she received from the Manager and Supervisor.

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 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

⁵ *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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.⁶

⁶ 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