

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 01/07/14; Decision Issued: 02/05/14; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10230; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 02/18/14; EDR Ruling No. 2014-3820 issued 03/10/14; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 02/18/14; DHRM Ruling issued 03/11/14; Outcome: AHO's decision affirmed.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10230**

Hearing Date: January 7, 2014  
Decision Issued: February 5, 2014

#### **PROCEDURAL HISTORY**

On August 30, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and failure to follow policy.

On September 25, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 2, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 7, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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:

Virginia Commonwealth University employs Grievant as a Business Services Administrator. The purpose of his position is:

Provide fiscal and administrative support for Physical Plant to include but not limited to Support Shops, Zones, Grounds, Utilities, Sustainability, Steam Plant, and Administrative staff. Provide administrative and fiscal support to the Administrative Supervisor. Provide fiscal, administrative, and computer training to all PPD Departments. Create and maintain codified financial and administrative work processes to ensure efficiency of operations. Review all PPD billing to ensure proper charges and payments are made.<sup>1</sup>

Students were scheduled to move into their dorms during the weekend of August 16, 2013. Grievant and several other employees were expected to complete their normal work duties at their offices and then perform additional duties at dorms on campus. Grievant was to serve as a point of contact as students moved into their rooms. If a student discovered a problem with his or her room such as it not having been cleaned or having broken light bulbs, etc., the student was to notify Grievant and Grievant would coordinate resolution of the problem.

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<sup>1</sup> Grievant Exhibit 1.

The Supervisor instructed Grievant to work overtime at Hall J. Grievant was instructed to work on Friday August 16, 2013 from 6 p.m. until 8 p.m. He was instructed to work on Saturday August 17, 2013 from 8 a.m. to 6:30 p.m. or 7:30 p.m. He was instructed to work on Sunday August 18, 2013 from 6 a.m. until approximately 6 p.m.

On Sunday August 11, 2013, Grievant sent the Supervisor an email stating:

I will not be able to work Friday evening, Sunday and potentially Saturday this week. If I am able to work Saturday, it will be from 8-4:30. If you need further clarification about this, please let me know.<sup>2</sup>

The Supervisor read the email on Monday August 12, 2013. She met with Grievant on Tuesday August 13, 2013 and told him that the overtime was mandatory for her subordinates including Grievant.

On August 14, 2013, Grievant sent the Supervisor an email stating, in part:

Secondly, you informed me that this weekend's overtime is mandatory. I will not be staying late nor coming in this weekend because of a family situation that precludes the move-ins.<sup>3</sup>

Grievant reported to work on Friday August 16, 2013 and worked his regular shift until 4:30 p.m. Grievant did not report to Hall J at 6 p.m. that day to perform his additional work duties.

On Saturday August 17, 2013, Grievant did not report to work at Hall J as scheduled. On Sunday August 18, 2013, Grievant did not report to work at Hall J as scheduled.

## 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>4</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."

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<sup>2</sup> Grievant Exhibit 1.

<sup>3</sup> Grievant Exhibit 1.

<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Failure to follow a supervisor's instructions is a Group II offense.<sup>5</sup> The Supervisor instructed Grievant to work overtime on August 16, 2013, August 17, 2013, and August 18, 2013. He knew that the overtime was mandatory. He failed to report to work on those days thereby failing to comply with the Supervisor's instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that he did not refuse to work overtime and he had not established a pattern of refusing to work overtime. The evidence showed that he refused to work overtime. It is not necessary for the Agency to show a pattern of refusal to work overtime in order to take disciplinary action.

Grievant argued that he gave notice of his inability to work schedule and, thus, the Agency should not take disciplinary action against him. DHRM Policy 1.25 states that "[e]mployees are expected to work overtime hours as required by their supervisor or manager." The Agency was authorized to require Grievant to work overtime hours and the Supervisor instructed Grievant to do so. Grievant did not excuse his absence by giving notice of his refusal to work overtime.

*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>6</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.

Grievant contends the disciplinary action should be mitigated because he experience a family emergency. Insufficient evidence was presented to establish that the reason Grievant was unable to work overtime was a reason beyond his control. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

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<sup>5</sup> See Attachment A, DHRM Policy 1.60.

<sup>6</sup> *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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 14<sup>th</sup> St., 12<sup>th</sup> 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 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 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.<sup>7</sup>

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<sup>7</sup> 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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer