

Issues: Group II Written Notice (failure to follow instructions), and Group II Written Notice (failure to report without notice); Hearing Date: 03/10/14; Decision Issued: 04/01/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10252, 10253; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10252 / 10253

Hearing Date: March 10, 2014
Decision Issued: April 1, 2014

PROCEDURAL HISTORY

On August 29, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Also on August 29, 2013, Grievant was issued a Group II Written Notice for failure to report to work as scheduled without proper notice to a supervisor.

On September 27, 2013, Grievant timely filed grievances to challenge the Agency's first and second Group II Written Notices. The outcome of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On December 11, 2013, the Office of Employment Dispute Resolution issued Ruling No. 2014-3779, 2014-3780 consolidating the two grievances for a single hearing. On January 6, 2014, EDR assigned this appeal to the Hearing Officer. Scheduling of the hearing was suspended for just cause. On March 10, 2014, 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 Notices?
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 Corrections employs Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Corrections Officers at the Facility worked 12 hour shifts. If an employee with the oncoming shift failed to report to work, an employee from the outgoing shift had to be "drafted" to remain working until the Agency was able to fill that position. Being able to work beyond the 12 hour shift was a condition of employment and an essential job function.

On April 3, 2013, Grievant presented the Agency with a document from her physician indicating that she could no longer work more than her scheduled shift of 12 hours because of her medical condition. The document indicated that Grievant's condition was permanent.

The Agency granted Grievant a 90 day accommodation. Grievant was told that at the end of the 90 days on July 2, 2013, she would have to be released by her physician to return to full work, full duty or file for protection under the Americans with Disability Act.

As of July 25, 2013, Grievant had not provided a note from her doctor releasing her to full duty. The Personnel Assistant told Grievant that she needed to bring a doctor's note allowing her to return to full duty. Grievant failed to do so.

On August 2, 2013, the Lieutenant met with Grievant and instructed Grievant to bring the required medical documentation and give it to Human Resource staff.

On August 7, 2013, the Lieutenant asked Grievant if she brought in the required note and Grievant said she had not done so. Grievant was instructed to bring the required medical documentation and give it to the Human Resource staff.

On August 12, 2013, Grievant reported to work after three rest days. She reported without having obtained a note from her doctor returning to work. At 10:10 a.m., the Lieutenant met Grievant at her post and relieved her of her duties. The Lieutenant told her she was being sent home and could not return until she provided the doctor's note that she previously had been instructed to bring to the Facility and give to the Human Resources staff.

On August 16, 2013 at 10:50 a.m., Grievant's doctor faxed a note to the Agency stating that Grievant, "has been cleared to perform her regular job duties within her scheduled 40 hour work week."¹

On August 16, 2014, Grievant called the Human Resource Officer to confirm that HR had received a note from her doctor. The Human Resource Officer told Grievant that the Agency had received the note and that the note said Grievant was, "cleared to perform her regular job duties with her scheduled 40 hours work week." Grievant asked the Human Resource Officer if she could come in to work on Friday. The Human Resource Officer knew the note would not be sufficient to release her to return to work because of the 40 hours per week restriction. The Human Resource Officer told Grievant she would notify Grievant's supervisors of the note and that someone would let her know when she could report back to work. Grievant asked who would be contacting her and the Human Resource Officer told Grievant that either one of her supervisors or someone from Human Resources would contact her. No one from the Agency called Grievant that Friday afternoon or over the weekend.

On August 19, 2013, Grievant called the Human Resource Officer and asked "exactly what do they need from my doctor." The Human Resource Officer explained to Grievant that the note needed to state that Grievant had been released to work full time full duty.² Grievant's doctor sent the Agency a note saying, "The above named patient

¹ Grievant Exhibit 7,

² Grievant Exhibit 5.

has been cleared to perform her regular job duties with no limitations as of 08/19/2013.”³

Grievant did not report to work on August 13, 16, 17 and 18, 2013. She did not call a supervisor prior the beginning of her shift to indicate she would not be reporting to work. No supervisor called Grievant to ask why she had not reported to work even though the practice at the facility was to contact employees who did not report to work.

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.”⁴ 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.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁷ Grievant failed to comply with a supervisor’s instructions to present the Agency with a doctor’s note permitting her to return to full work full duty. She knew about the requirement several months before she was instructed to produce the document by a supervisor on August 2, 2013. Grievant should have been able to produce the note immediately had she properly planned her doctor’s appointments. Only after Grievant was instructed a second time to produce the note did she take action to obtain one and present it to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with a supervisor’s instructions.

Grievant argued that she needed time to schedule a doctor’s appointment. No credible evidence was presented to support this allegation. Grievant knew of the requirement several months before August 2, 2013 and had plenty of opportunity to schedule a doctor’s visit before then.

The Agency alleged that Grievant failed to report to work as scheduled without notice. This allegation is unsupported by the evidence. Grievant was instructed on

³ Grievant Exhibit 19.

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Augusts 12, 2013 not to report to work until she had obtained the doctor's note. She reasonably understood this instruction to mean that she was no longer scheduled to work until such time as she had presented the note. This assumption is confirmed by Grievant's conversation with the Human Resource Officer asking when she could return to work. The Human Resource Officer told her she would be notified when she could return to work. Grievant was not obligated to notify the Agency she would not be reporting to work when she had been notified not to report to work until notified otherwise. The Group II Written Notice for failure to report to work without notice must be reversed.

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"⁸ 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 Group II Written Notice for failure to follow a supervisor's instructions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. The Group II Written Notice of disciplinary action for failure to report to work without notice is **rescinded**.

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:

⁸ *Va. Code § 2.2-3005.*

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.