

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 05/23/14; Decision Issued: 05/27/14; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No.10322; 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: 10322

Hearing Date: May 23, 2014

Decision Issued: May 27, 2014

PROCEDURAL HISTORY

On February 28, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without authorization and failure to follow instructions and written policies.

On March 7, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 7, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 Tech employed Grievant as a Real Estate Officer. He began working for the Agency on July 2, 2012. His duties included analyzing, negotiating, and administering lease and other real estate transactions for the Agency.

On January 21, 2014, Grievant was placed on administrative leave while the Agency investigated the transactions and work performed by current and former employees in Grievant's unit. He was instructed not to return to the Agency's campus without authorization or he risked being arrested.

After reviewing the results of the investigation, the Supervisor decided initially to issue Grievant a Group III Written Notice with removal and informed Grievant of the pending disciplinary action. She met with Grievant in the morning of February 10, 2014 to enable Grievant to present any reasons why the disciplinary action should not be issued. Grievant told her several reasons why the discipline should not be taken. The Supervisor considered Grievant's comments and called him on the telephone that afternoon. She told Grievant that he would receive a Group III Written Notice but that he would not be suspended or removed from employment. She told him that he could appeal the Group III Written Notice and that she would move him to a new office to enable him to have a fresh start with the Agency. She told Grievant to report to work at 8 a.m. on February 11, 2014.

On February 11, 2014 at 3:11 a.m., the Supervisor sent Grievant an email stating, in part, "I do plan to provide you with written documentation of your current

status when you arrive this morning. Please allow this to serve as written documentation until you arrive at 8 a.m. this morning to work that you are no longer on administrative leave.” At 7:17 a.m., Grievant responded, in part, “I would appreciate the opportunity to review the documentation before committing to anything.” The Supervisor responded at 7:23 a.m.:

It is standard practice for an employee to be present to receive the written notice so they can review and sign. As I advised yesterday, you are being removed from paid administrative leave and are expected to be at work on time this morning at 8 a.m. Failure to report on time may result in additional disciplinary action.¹

Grievant did not report to work on February 11, 2014. The Supervisor sent Grievant a letter dated February 12, 2014 informing him that his “absences yesterday and today are unapproved.”² The Agency closed at noon on February 12, 2014 due to inclement weather. The Agency was also closed on February 13, 2014 and February 14, 2013 because of poor weather. On February 17, 2014, employees were expected to report to work unless they obtained approval from their supervisors to take holiday leave. Grievant did not request holiday leave for February 17, 2014 and did not report to work. Grievant did not report to work on February 18, 2014, February 19, 2014, February 20, 2014, or February 21, 2014. On February 21, 2014, the Supervisor sent Grievant an email with an attached letter dated February 21, 2014 informing Grievant the Supervisor intended to issue Grievant a Group III Written Notice with removal for failure to report to work for more than three days. She scheduled a meeting on February 27, 2014 for Grievant to appear and present any reasons why the disciplinary action should not be taken. Grievant did not appear at the scheduled meeting.

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.”³ 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.”

Absence in excess of three days is a Group III offense.⁴ Grievant was scheduled to work beginning February 11, 2014. The Supervisor informed Grievant of his

¹ Agency Exhibit 5.

² Agency Exhibit 1.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

obligation to report to work beginning February 11, 2014. Grievant did not report to work for more than three workdays thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant explained that he did not report to work because the Agency unfairly intended to issue to him a Group III Written Notice without suspension or removal even though he had been complemented by his prior supervisor regarding the quality of his work. He asserted that he should not have been punished given that his department was extremely understaffed and he was responsible for an excessive amount of work. He described the Agency's action as creating an unsafe work environment and a hostile work environment.

Grievant's arguments do not form a basis for removal of the Group III Written Notice with removal. If the Hearing Officer assumes for the sake of argument that the first Group III Written Notice was inappropriate and unsupported by the evidence against Grievant, Grievant's remedy was to file a grievance to reverse the Agency's disciplinary action. Grievant's remedy did not include refusing to report to work as instructed by the Supervisor. There is no basis to reverse the Group III Written Notice with removal based on Grievant's failure to report to work.

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

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

⁵ Va. Code § 2.2-3005.

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