Issue: Group III Written Notice with Termination (absent 3 days without authorization); Hearing Date: 12/11/14; Decision Issued: 01/05/15; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10478; Outcome: Partial Relief; **Attorney's Fee Addendum issued 01/21/15 awarding $917.00.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10478

Hearing Date: December 11, 2014
Decision Issued: January 5, 2015

PROCEDURAL HISTORY

On August 22, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report to work without notice and being absent from work in excess of three days without authorization.

On August 21, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 13, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 11, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Department of Social Services employed Grievant as a Support Enforcement Specialist, Sr. at one of its locations. He began working for the Agency on December 1, 1992. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Supervisor who reported to the Manager. Grievant's regular work schedule was every Monday through Friday.

Grievant reported to work on August 7, 2014. After work, he was arrested and placed in jail. Grievant was scheduled to report to work on Friday August 8, 2014 but he was unable to report to work because he was in jail. He met with his attorney in the morning at the jail. Grievant did not have cash for a bond to obtain his release from jail. The attorney needed a copy of the deed to Grievant's house to provide to the court to assist in Grievant's release from jail.

When the Manager learned Grievant had not reported to work on August 8, 2014, she called his telephone number but only connected to Grievant's voice mail. She left a message that she had not heard from him and was concerned about him and wanted him to contact the Agency. At approximately 10:00 a.m., the Manager accessed a website with court information and determined that Grievant was in custody. She read that Grievant's "Hearing Date" was August 22, 2014 and "Hearing Time" was 8:30 a.m. The hearing date was for an arraignment but the Manager did not know the nature of

the pending hearing when she read the website. At approximately 11 a.m., Grievant's attorney called the Agency's office to speak with the Supervisor. He needed someone to go to Grievant's house to obtain a copy of the deed to his home. The attorney did not tell anyone that Grievant would not be reporting to work or needed leave to be absent from work.

On August 8, 2014, the Manager sent Grievant a letter by U.S. Mail and hand delivery stating, in part:

> You failed to report to work as scheduled and you failed to contact or notify your supervisor of your absence on Friday August 8, 2014. While trying to determine your whereabouts, we became aware that you were arrested and charged with four serious criminal offenses on August 7, 2014.
>
> The Standards of Conduct states that any employee who is formally charged with a criminal offense, such as by arrest or indictment, by outside authorities shall immediately be suspended without pay for a period not to exceed ninety (90) calendar days. You have the option to use your accrued annual, compensatory, or family personal leave to cover this period of suspension provided you have sufficient leave balances. You will need to notify your District Manager [Manager] if you want to use your leave balances. ***
>
> At this time, you are being placed on leave without pay until close of business August 22, 2014, your next court date. You are required to contact your District Manager [Manager] at [telephone number] no later than 4:00 PM on August 22, 2014 to advise her of the outcome of your court appearance and your status. The agency will re-evaluate your situation at that time.
>
> Under the circumstances, the agency has elected to limit your access to agency property. You may only return to facilities housing Virginia Department of Social Services staff for official business and only with an appointment. This includes visits to participate in administrative processes or to deliver documents.[1]

Grievant was release from jail later in the day on August 8, 2014. Grievant received the Manager's August 8, 2014 letter and understood he was being suspended by the Agency.

On August 13, 2014 at approximately 10:30 p.m., Grievant called the Manager. He intended to leave a message for the Manager but she answered the telephone. Grievant told the Manager that he had received the Manager's August 8, 2014 letter and

[1] Agency Exhibit 2.

that he wanted to use leave to cover the period of suspension. Grievant said he would call the Manager on August 15, 2014. Grievant did not call the Manager on August 15, 2014.

On August 14, 2014, the Manager sent Grievant a letter by certified mail and first class mail reiterating Grievant's obligation to contact her no later than 4 p.m. on August 22, 2014. Grievant did not receive the letter and was not aware of its terms.

The Agency removed Grievant from employment effective August 22, 2014.

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."

"[F]ailure to report to work without proper notice" is a Group II offense.[3] Grievant was obligated to report to work on August 8, 2014. He did not report to work and did not notify anyone at the Agency that he would not be reporting to work and obtain permission to be absent. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, it is appropriate for Grievant to receive a ten workday suspension.

Grievant argued that the call from his attorney served as notice to the Agency that he would not be reporting to work. This argument is not persuasive. Grievant was supposed to report to work by 7:30 a.m. on August 8, 2014. Neither Grievant nor his attorney called the Agency by 7:30 a.m. or within a reasonable time thereafter to inform the Agency Grievant would not be at work and to obtain permission to be absent from work.

The Agency argued that Grievant should receive a Group III Written Notice for being absent in excess of three workdays without authorization. The Agency erred in its interpretation and application of the Standards of Conduct. In order to sustain an allegation that an employee is absent from work in excess of three work days without authorization, an agency must first show that the employee was obligated to report on the days supporting the basis for disciplinary action. In this case, Grievant was able to

[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.

report to work beginning Monday August 11, 2014. He did not report to work because of the Agency's decision to suspend him from employment and limit his access to Agency property. Grievant's absence from work was not merely authorized by the Agency, it was mandated by the Agency. The Agency cannot take disciplinary action against Grievant for failing to report to work on Monday August 11, 2014 and thereafter when it was the Agency who prohibited him from reporting to work. Once Grievant was removed from employment, he had no obligation to report or to notify the Agency of his status. There is no basis to support the Agency's assertion the Grievant should receive a Group III Written Notice with removal.[4]

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 further the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action removal is **reduced** to a Group II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to

[4] The Agency presented evidence that Grievant failed to notify the Manager of his status before August 22, 2014. This behavior would support only a Group II Written Notice for failure to follow a supervisor's instructions.

[5] Va. Code § 2.2-3005.

Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency may reduce back pay to account for the ten workday suspension.

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]

[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

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10478-A

Addendum Issued: January 21, 2015

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[7] For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[8]

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's counsel submitted a statement showing 7 hours of work. The hourly rate for attorney reimbursement is $131. This request is reasonable.

AWARD

Grievant is awarded attorneys' fees in the amount of $917.00.

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[7] Va. Code § 2.2-3005.1(A).

[8] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer