

Issue: Group II Written Notice with Suspension (failure to follow instructions, insubordination, and leaving work without permission); Hearing Date: 12/16/14; Decision Issued: 02/09/15; Agency: VDH; AHO: Jane E. Schroeder, Esq.; Case No. 10489; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In the matter of Case # 10489

Hearing Date: December 16, 2014

Decision Issued: February 9, 2015

PROCEDURAL HISTORY

The Grievant is employed by the agency as an Administrative & Office Specialist III. On July 9, 2014, the agency issued a Group II Written Notice to the Grievant for leaving work without permission, failure to report without notice, failure to follow instructions and/or policy, insubordination, and falsifying records. The Grievant was suspended for ten workdays. The Grievant initiated the Grievance Procedure by submitting Grievance Form on July 7, 2014. After the Grievance was not resolved after the Third Resolution Step, on August 26, 2014, the Grievant requested qualification of this grievance for hearing.

In a memorandum to the Grievant from the State Health Commissioner on September 12, 2014, the Commissioner stated:

“I am qualifying for a hearing your request to grieve the Group II Written Notice issued to you on July 9, 2014; and

I decline to qualify your request for a hearing to grieve the Alexandria Health Department’s decision to 1) move your workspace and 2) deny your request for a new supervisor.”

In a letter to the Grievant from Agency on September 15, 2014, Grievant was instructed to respond on Grievance Form A to the denial of the Grievant’s request for qualification of the two issues. The Grievant responded in a handwritten memo dated September 22, 2014, “I waive any further right of appeal on any unqualified issues and ask the agency to request appointment of a hearing officer.”

On November 6, 2014, the hearing officer was assigned to hear the case.

A pre-hearing conference was held on November 10, 2014. The hearing date was set for December 2, 2014. The date was later changed to December 16, 2014 at the request of the Grievant’s attorney. The hearing was held on that date. Nine witnesses testified. The agency’s exhibits (Agency Exhibits 1-22) were entered into evidence without objection. The Grievant’s exhibits (Grievant Exhibits A-G) were entered into evidence without objection.

At the conclusion of the hearing, the Agency requested and was granted permission to submit an affidavit from an agency Department of Human Resources employee as a rebuttal witness. The affidavit, when submitted, was objected to by the attorney for the Grievant. The affidavit was not admitted into evidence. Closing arguments in written form were submitted to the hearing officer by counsel on January 13, 2015.

APPEARANCES

Grievant
Grievant's Attorney
Agency Business Manager
Agency's Attorney

Witnesses for Agency:

#1 Business Manager
#2 Fiscal Officer
#3 Administrative Assistant
#4 Fiscal Analyst
#5 Storekeeper
#6 Executive Secretary
#7 HR Manager
#8 Health Department Director

Witness for Grievant: Grievant

ISSUE

Whether the Group II Written Notice given to the Grievant on July 9, 2014 for should be upheld, reduced, or rescinded. On the Written Notice, the Agency alleges that the nature of the offense is as follows:

“Offense code #74 – purposefully attempted to falsify leave record on 6/24/2014; codes #13 & #56 – failure to follow supervisor’s instruction and insubordination on 6/26/2014 by refusing to discuss and complete new work assignment and refusing to move to the new work space; code #02 – left work without permission; code #03 – failure to report to work on 6/27/2014 without proper notice as required and stated in Employee Work Profile.”

The Grievant was suspended for ten days without pay. At the hearing, the Grievant, by counsel, related that the relief sought by the Grievant was removal of the Group II Written Notice from the Grievant’s personnel file and back pay for the ten day suspension.

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. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not (Grievance Procedure Manual). In this case, the Agency must prove that it is more likely than not that the Grievant purposefully attempted to falsify leave record on 6/24/14, that the Grievant failed to follow supervisor’s instruction and was insubordinate on 6/26/14 by refusing to discuss and complete a new work assignment and refusing to move to the new work space, that the Grievant left work without permission, and/or the Grievant failed to

report to work on 6/27/14 without proper notice as required and stated in his Employee Work Profile.

FINDINGS OF FACT

1. The Grievant work as health counselor for seventeen years at the agency. In October 7, 2012, the Grievant was terminated. Upon a hearing in 2012, he was reinstated. After the Agency appealed his reinstatement and did not prevail, the Grievant was reinstated in March, 2013. The Grievant requested to be placed under a different supervisor.¹
2. The Grievant was placed in a new position of Administrative & Office Specialist III under a new supervisor, the Business Manager. The Business Manager created a new Employee Work Profile (“EWP”) for the Grievant’s new position. The core responsibilities for the position included data analysis, medical records management and administrative support. On his first day in his new position, Health Department Director and the Business Manager met with the Grievant to explain his new position and the EWP. The Grievant refused to sign the EWP.²
3. On the same day, the Business Manager held a meeting with the Grievant and five other employees with whom the Grievant would be working. The Grievant complained about the new position. He said he could not do the job, that it was overwhelming. The Business Manager testified that he was dumbfounded that the Grievant was so negative in the meeting. The Grievant testified that he later called the five people to apologize for his attitude in the meeting.³
4. On June 19, 2014, the Grievant completed a Leave Reporting Form, requesting 8 hours of leave on June 18th, four hours of leave on June 20th, and four hours of leave on June 23rd. Since the Business Manager, who would usually approve the leave, was off work from June 16th through June 23rd, the leave was approved by the Fiscal Officer.⁴
5. On Monday, June 23rd, the Fiscal Officer was working from home. He received two emails from the HR Manager. In the first email, at 10:43 a.m., the HR Manager said that the Grievant was not at work. In the second email, at 11:56 a.m., the HR Manager said that the Grievant just arrived at work. Since the Fiscal Officer had approved the half-day leave, he was not concerned about the late arrival.⁵
6. On Tuesday, June 24th, the Grievant told the Fiscal Officer that he had not taken leave for the previous morning after all, and asked the Fiscal Officer to change the Grievant’s leave form to reflect the fact that the Grievant had worked all day on June 23rd. The Fiscal Officer told the Grievant that the HR Manager had said that the Grievant did not arrive until noon. The Grievant insisted that he was at work all day. The Fiscal Officer

¹ Agency Exhibit 10; Testimony of Grievant

² Testimony of Business Manager; Agency Exhibit 7

³ Testimony of Business Manager and Grievant; Agency Exhibit 9, pp. 1-3

⁴ Agency Exhibit 15, p. 3

⁵ Agency Exhibit 15, p. 1; Testimony of Fiscal Officer

asked who could verify that he was there the morning of June 23rd. The Grievant provided the names of three employees.⁶

7. The Fiscal Officer went immediately to the three offices to talk to each of the three employees. None of the three employees recalled seeing the Grievant the previous morning, although one of the three employees testified that she was not sure of the date. One testified that she noticed that the Grievant had not moved his attendance dot on the attendance board from “out” to “in.” While the Fiscal Officer was speaking to two of the three employees, he could see on their phones that the Grievant was calling those employees.⁷ The HR Manager testified that she went from her office (three doors down from the Grievant’s office) to the office next to the Grievant’s office on the morning of June 23rd. The Grievant’s office door was closed, and there was no light coming from under the door. She later heard the Grievant come in and talk to other employees around noon that day.⁸
8. The Fiscal Officer then told the Grievant that no one could verify that he was there on the morning of June 23rd. The Grievant told the Fiscal Officer that he was there that morning but “I don’t want to get you involved. Don’t worry about it. Leave it as it is.” The Fiscal Officer did not change the leave form as originally requested by the Grievant. The Fiscal Officer related the incident to the Business Manager the next day.⁹
9. The Business Manager further investigated whether the Grievant was at work on the morning of June 23rd. When he checked the internet user history, he discovered that the Grievant, who normally logs onto his work computer when he arrives at work, did not log on until the afternoon of June 23rd.¹⁰
10. The Business Manager and Health Department Director testified that this leave form incident was the basis for the offense code #74 violation, purposefully attempted to falsify leave record on 06/24/2014. Although the Grievant did not personally falsify the leave record, he asked the Fiscal Officer to change the record to show that he had worked on the morning of June 23rd when he, in fact, was not at work. Of further concern to the Health Department Director was the fact that the Grievant involved other employees in substantiating his claim of working the morning of June 23.¹¹
11. When the Grievant first returned to work in March, 2013, he was placed in a large office with two other employees. In June, 2014, due to business needs to use that office for other equipment and employees, the employees in that office were moved to other offices on the same floor. On June 25, 2014, the Business Manager told the Grievant he would be moving to a small office next to the Executive Secretary’s office so that he could easily cover the reception desk when she was not there.¹²

⁶ Testimony of Fiscal Officer

⁷ Testimony of Fiscal Officer, Administrative Assistant , Fiscal Analyst, & Storekeeper

⁸⁸ Testimony of HR Manager

⁹ Testimony of Fiscal Officer

¹⁰ Testimony of Business Manager, Agency Exhibit 11, p.7

¹¹ Testimony of Business Manager and Health Department Director

¹² Testimony of Business Manager and Health Department Director

12. The Grievant complained about being moved into a closet. He said he had claustrophobia and he would not move into the office. In fact, the office to which he was being moved had 113 square feet. The room has been used as an office at least since 2008. Prior to room switches in June, 2014, two employees shared the office. Occasionally, three employees had shared the office. The Grievant complained that it had no windows and inadequate ventilation. The Agency had the ventilation checked by a city General Services HVAC Technician and it was found to be adequate.¹³
13. The Grievant provided two doctor's notes regarding the new office space. The first, dated June 24, 2014, stated as follows: "My patient, [Grievant] has asked me to address the issue of his new office space. A small enclosed space is detrimental to his health for multiple reasons, and I have advised him to request a change of office space. He is seen regularly at the [] office."¹⁴
14. The second doctor's note, dated July 15, 2014 (after the issuance of the Written Notice), requested the accommodation of "providing a room with ventilation and preferably window space."¹⁵ Neither doctor's note was adequate to require an accommodation for a disability under the Americans with Disability Act. The Grievant testified that he has been working in the new office space since October. The Business Manager noted that the Grievant generally has the door closed.¹⁶
15. On the morning of Thursday, June 26, 2014, the Business Manager met with the Grievant to give the Grievant keys to his new office and to assign the Grievant a new work project on a different floor. When the Grievant again said he would not work in the new office, the Business Manager instructed the Grievant to follow him downstairs so he could use a downstairs office temporarily to work on a medical records task. As they left the Business Manager's office, the Grievant turned to the Business Manager and said, "We need to finish this." The Grievant became aggressive, sticking his finger in the Business Manager's face and insinuating that he had background information from the Business Manager's previous employer. The Business Manager said, "This is a joke." The Grievant replied, "No, you're the joke." This exchange was witnessed by the Executive Secretary.¹⁷
16. The Business Manager and the Grievant headed toward the elevators. The Business Manager went in the elevator, expecting the Grievant to accompany him to the lower floor to begin the new task as instructed. The Grievant went outside instead. Later the Business Manager went back upstairs and found the Grievant had returned and was sitting in a conference room. The Business Manager said, "I thought I told you to come downstairs." After a further exchange, the Grievant, who was very upset, said that he was leaving and taking the rest of the week off. The Business Manager said that the Grievant did not have permission to take leave. If he left, he would be absent without leave. The

¹³ Agency Exhibit 11, p. 7; Testimony of Grievant and Business Manager

¹⁴ Grievant Exhibit G

¹⁵ Agency Exhibit 1, p.31

¹⁶ Testimony of HR Manager, Business Manager, Grievant; Agency Exhibit 1, p. 46.

¹⁷ Testimony of Executive Secretary, Business Manager, Grievant (although the Grievant denied saying to the Business Manager that he was a joke.)

Grievant said that the Business Manager does not approve his leave, someone in Richmond does. Then the Grievant left for the day.¹⁸

17. On Friday, June 27, 2014, the Grievant left a message on the Business Manager's voice mail that he was not coming in that day. He did not give a reason. On page 5 of the Grievant's EWP, he is instructed, if leaving a voice mail or email regarding leave, to make a follow up call to speak to the supervisor at the beginning of the business day. The Grievant testified that he did make a follow up call, but the Business Manager was not in. He did not speak directly to the Business Manager upon his return as instructed in his EWP.¹⁹

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60 provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Offenses are grouped by levels, from Group I to Group III. Group

¹⁸ Testimony of Business Manager and Grievant

¹⁹ Agency Exhibit 7, p. 5; Testimony of Grievant

II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations.

The Business Manager issued a Group II Written Notice to the Grievant. The Agency alleges that the Grievant attempted to falsify leave record on 6/24/14, that the Grievant failed to follow supervisor's instruction and was insubordinate on 6/26/14 by refusing to discuss and complete a new work assignment and refusing to move to the new work space, that the Grievant left work without permission, and/or the Grievant failed to report to work on 6/27/14 without proper notice as required and stated in his Employee Work Profile.

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo to determine

- (i) whether the employee engaged in the behavior described in the Written Notice;
- (ii) whether the behavior constituted misconduct,
- (iii) whether the agency's discipline was consistent with the law and policy, and finally,
- (iv) 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.¹² Using this outline, I will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

The Grievant asked the Fiscal Officer to change the leave record to reflect that the Grievant was at work when he was not. The Grievant refused to go to the lower floor and begin the new work assignment regarding medical records. The Grievant spoke in an aggressive and inappropriate manner to his supervisor and refused to work in the new office. The Grievant left work without permission on June 26, 2014. The Grievant did not report to work on June 27, 2014. I find that the evidence shows that the Grievant engaged in the behavior described in the Written Notice issued on July 9, 2014.

(ii) Whether the behavior constituted misconduct

Although the Grievant did not himself falsify the leave document, I find that he, by asking the acting supervisor to change the document, he violated Offense Code 74: Falsifying Records. The Grievant's refusal to follow the supervisor's direction to start the new assignment is a violation of Offense Code 13: Failure to follow instructions and/or policy. When the Grievant refused to work in the new office and spoke disparagingly to the supervisor, he violated Offense Code 56: Insubordination. When the Grievant proceeded to leave work on June 26, 2014 after his supervisor explicitly told him that he did not have permission to leave, he violated Code 02: Leaving work without permission. The Written Notice also alleges that the Grievant violated Offense Code 03: Failure to report without notice for his failure to report to work on 6/27/2014 without proper notice as required and stated in Employee Work Profile. When the Grievant did not directly speak to his supervisor upon return as required in his EWP, he violated Offense Code 03. All of these behaviors constitute misconduct.

(iii) Whether the agency's discipline was consistent with the law and policy

The Agency issued a Group II Written Notice and suspended the Grievant for ten days without pay. Under the Standards of Conduct, this level of discipline is appropriate for offenses including insubordination, leaving work without permission, failure to report to work without proper notice and violations of policies and procedures. Falsification of records is listed as a Group III Offense. The Grievant had multiple infractions. The Agency could have issued a Group III Written Notice. The agency's discipline was consistent with law and policy.

(iv) Whether there were mitigating or aggravating circumstances

The Agency considered the mitigating circumstances of the Grievant's nineteen years of employment with Agency in deciding to issue a Group II Written Notice instead of a Group III Written Notice. The Agency also considered the aggravating circumstances that there were numerous violations, that the Grievant did not acknowledge responsibility for his action, that he insisted on remaining insubordinate, and that he refused to take instructions from his supervisor.

According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.²⁰ After review of the agency's consideration and assessment of mitigating circumstances, this Hearing Officer finds that the agency's discipline of imposing a Group II Written Notice and suspension of ten days does not exceed the limits of reasonableness.

DECISION

The Group II Written Notice issued to the Grievant on July 9, 2014 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

²⁰ Rules for Conducting Grievance Hearings, p. 17

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.¹⁴

[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].

February 9, 2015

Date

Jane E. Schroeder

Jane E. Schroeder, Hearing Officer

cc: Agency Representative, Counsel for Agency, Employee, Counsel for Employee, EDR

¹⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.