

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 02/20/15;
Decision Issued: 03/04/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 10537; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10537

Hearing Date: February 20, 2015

Decision Issued: March 4, 2015

PROCEDURAL HISTORY

On October 30, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On November 26, 2014, 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 January 20, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 20, 2015, 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 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 Behavioral Health and Developmental Services employs Grievant as an Safety and Security Technician at one of its facilities. The purpose of his position was to "maintain security, custody, and control over a patient population ranging from ages 18-64 at the Forensic Unit."¹ Grievant had prior active disciplinary action. He received a Group I Written Notice on June 7, 2013 for unsatisfactory attendance/excessive tardiness.

The Agency has a walk-through metal detector at an entrance to the Building. Inside the Building is a secured area where patients are admitted to the Facility. Inside the door to the secured area is a time clock employees must access to show that they began their shifts on time. Before Grievant could access the time clock, he was supposed to remove the items from his pockets, pass through the metal detector and be searched by a SST who was responsible for ensuring that Grievant did not bring contraband into the secured area.

On October 7, 2014, Grievant entered the Building and emptied items from his pockets onto a small table. He walked to the left of the metal detector instead of through it. A SST was on the other side of the metal detector attending to another employee. When the other employee opened the door to the secured area, Grievant walked past the SST and into the secured area. Grievant clocked-in at the time clock. Approximately twenty seconds later, Grievant walked out of the secured area and

¹ Agency Exhibit 4.

returned to the entrance area. He walked through the metal detector and was searched by the SST. He then entered the secured area and assumed his post.

Grievant had received training informing him that he was not permitted into the secured area unless he had been searched for contraband by a SST. In response to the Agency's notice of intent to take disciplinary action, Grievant admitted making a mistake and added, "my actions were done to prevent from being late into the facility and occurring any disciplinary action for my tardys."

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."

"[U]nsatisfactory work performance" is a Group I offense.³ On October 7, 2014, Grievant entered the Building and placed items from his pockets on a small table near the metal detector. He walked past the metal detector and ignored the SST working the security post in order to enter the secured area of the Building. Approximately 20 seconds later he returned to the security entrance and followed the proper protocol to enter the secured area. Grievant knew that he was expected to be searched before entering the secured part of the Building. He acted contrary to that training when he entered the secured area without being searched. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

The Agency argued that Grievant should receive a Group II Written Notice for failure to follow policy. The policies presented by the Agency governed the behavior of an employee holding a security post and responsible for enforcing security rules with respect to other people. On October 7, 2014, Grievant had not assumed a post and was not responsible for enforcing any security rules. The policies did not apply to him. In addition, the Agency alleged Grievant violated the security post order for the Building.⁴ That post order, however, applied to the Entrance Safety and Security Technician but Grievant was not the Entrance Safety and Security Technician on October 7, 2014 at the time he entered the secured area without being searched.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ Attachment A, DHRM Policy 1.60.

⁴ See, Agency Exhibit 5.

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.

Grievant argued that the Agency inconsistently disciplined its employees, the punishment was excessive, and the Agency failed to follow progressive discipline. Although Grievant established that other employees routinely bypassed the security check in order to access the time clock, he did not show that Agency managers had singled him out for disciplinary action. Now that the discipline is reduced to a Group I Written Notice, it is not severe. Although agencies are encouraged to take progressive disciplinary action, they are not required to do so. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

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

⁵ Va. Code § 2.2-3005.

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.