

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 03/09/15;  
Decision Issued: 03/25/15; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10540; 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: 10540**

Hearing Date: March 9, 2015  
Decision Issued: March 25, 2015

#### **PROCEDURAL HISTORY**

On October 27, 2014, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy.

On November 25, 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 she requested a hearing. On February 2, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 9, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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:

Old Dominion University employs Grievant as an Administrative and Office Specialist II. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's work area was near the entrance lobby to the Police Department. On August 12, 2014, the Supervisor instructed Grievant to unlock the lobby entrance door in the morning when she arrived and to lock it in the afternoon when she left work. The key to the lobby entrance door was located in the dispatch office.

On October 1, 2014, the Supervisor observed Grievant taking a key from the dispatch office without signing for the key. The Supervisor told Grievant that she was obligated to sign a log every time she took possession of the key. Grievant said she was unaware of the policy change. The policy had been changed effective July 24, 2014 but Grievant had not been informed of that change. The Supervisor indicated to Grievant that he would send her a copy of the email implementing the policy change. On October 1, 2014, the Supervisor sent Grievant an email stating:

A key audit was completed on July 17, 2014. This audit showed a large number of keys missing and otherwise unaccounted for. The Chief has been advised of the situation and a policy/practice review will be taking place. Effective immediately, ALL KEYS will be signed out prior to leaving dispatch with NO EXCEPTIONS. Use the usual sign in sheet for this

purpose. A clipboard has been provided and will be maintained next to the door for this log.<sup>1</sup>

On October 14, 2014, Grievant entered the Communications Room, walked past the Supervisor, to the key locker. She asked for key 17 from the Dispatcher. The Dispatcher provided Grievant with the key. The Supervisor presented Grievant with the key sign out log. Grievant walked around the Supervisor and refused to accept and sign the key sign out log. The Supervisor turned and offered the sign out log to Grievant a second time. Grievant began exiting the Communications Room and the Supervisor told her she was required to sign out the key as required by policy. Grievant said she would not sign out the key and would not abide by the policy requiring all personnel to sign out keys. She said that if she was required to sign out the key, she would also refuse to secure and unsecure the lobby door to police headquarters as previously directed.

### **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.”<sup>2</sup> 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.”

Failure to follow a supervisor’s instruction or written policy is a Group II offense.<sup>3</sup> Grievant knew that every time she removed the key from the dispatch office, she was obligated to sign the log sheet. On October 14, 2014, Grievant removed the key from the dispatch office and refused to sign the key log when it was presented to her by the Supervisor. The Agency has presented sufficient evidence to show the Grievant disregarded the Agency’s policy and the Supervisor’s instruction thereby justifying the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice. The Group I Written Notice must be upheld.

Grievant argued that the policy change should have been presented to her prior to October 1, 2014. She argued that other employees were not following the policy. She argued that she was a “team player” yet she was disciplined by the Agency. Grievant’s arguments are not persuasive. Grievant had notice of the policy prior to the Agency’s decision to hold her accountable for compliance with that policy. Grievant did not establish that other employees were disregarding the policy. Grievant’s work

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<sup>1</sup> Agency Exhibit 1.

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

performance was well-respected by Agency supervisors. Because of her satisfactory work performance, the disciplinary action was mitigated to a Group I Written Notice.

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 ....”<sup>4</sup> 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 I Written Notice of disciplinary action 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 14<sup>th</sup> St., 12<sup>th</sup> 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

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<sup>4</sup> Va. Code § 2.2-3005.

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>5</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.