

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 05/08/15;
Decision Issued: 05/11/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10569; 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: 10569

Hearing Date: May 8, 2015
Decision Issued: May 11, 2015

PROCEDURAL HISTORY

On September 3, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On October 3, 2015, 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 March 23, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 8, 2015, 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:

The Department of Corrections employs Grievant as a Sergeant at one of its Facilities. She has been employed by the Agency for approximately 26 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility consists of several locations including the Main Facility and the Work Center. The Work Center is located several miles away from the Main Facility.

A supervisor was scheduled to work at the Work Center on July 26, 2014, July 27, 2014, and July 28, 2014 for the AM shift which began at 6 a.m. and ended at 6 p.m. That supervisor suffered a medical emergency and unexpectedly was unable to work at the Work Center. The Agency needed a supervisor to substitute for that supervisor. The highest ranking Watch Commander at the Facility is responsible for "covering" shifts at the various locations. The Captain was one of Grievant's supervisors and she was obligated to comply with his instructions.

Grievant was scheduled to work at the Main Facility on July 26, 2014, July 27, 2014, and July 28, 2014. She was scheduled to work the PM shift which began at 6 p.m. and ended at 6 a.m.

The Captain wanted to fill the position of the AM supervisor at the Work Center without having to pay overtime wages. Because Grievant was already scheduled to work on July 26, 2014, July 27, 2014 and July 28, 2014, the Captain believed he could change Grievant's shift from PM to AM, cover the Work Center AM supervisor position,

and avoid paying overtime. The Captain decided to have Grievant substitute for the absent AM supervisor at the Work Center.

On July 24, 2014, the Captain called Grievant and told her to report to the Work Center on July 26, 2014 through July 28, 2014 to work the AM 12 hour shift. Grievant told the Captain that she was not going to work there and said he should get an employee that they kept on day shift to work. The Captain again told her to report to the Work Center. Grievant refused and the call ended. Within a few hours, the Captain attempted to call Grievant again but did not receive an answer. Grievant did not report to work at the Work Center on July 26, 2014, July 27, 2014, and July 28, 2014.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”¹ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴ On July 24, 2014, the Captain instructed Grievant to report to work at the Work Center for the AM shift on July 26, 2014, July 27, 2014, and July 28, 2014. Grievant told the Captain she would not report as instructed. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

Grievant argued that she did not refuse to work at the Work Center. The evidence showed that she told the Captain she would not work at the Work Center as he had instructed her to do.

Grievant argued that she was being “drafted” and the Agency failed to comply with the draft policy which obligated the Agency to ask for volunteers and if none volunteered to select the next employee from the waiting list for that shift. The evidence showed that Grievant was not drafted because a draft occurs only when an employee has to work at least one hour beyond his or her normal work shift or on a scheduled day

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

off. Grievant was not being asked to work beyond her normal work shift or on a scheduled day off and, thus, was not being drafted.

Grievant argued that the “day shift covers the day shift” and that the “night shift covers the night shift” meaning that only an employee on the AM shift could have been used to fill the position of the AM supervisor at the Work Center. Grievant presented no policy or evidence to support this assertion. The evidence showed that the Agency has discretion to assign employees based on the Agency’s needs and assigning Grievant to substitute for the AM supervisor was appropriate.

Grievant argued that the Captain was not assigned as Watch Commander on July 24, 2014 but rather the Lieutenant was assigned that responsibility. The evidence showed that the Captain was operating as Watch Commander on July 24, 2014 and that the Lieutenant reported to the Captain that day as did other Facility security employees. The Captain was a superior officer in rank to Grievant and Grievant was obligated to comply with his instructions regardless of whether or not he was also acting as Watch Commander.

Grievant argued that she had not been certified to work as a supervisor at the Work Center and that she had obligations to family members that would have prevented her from working the AM shift on July 26, 2014, July 27, 2014, and July 28, 2014. The evidence showed she formerly worked as a Lieutenant and had received needed training to work as a supervisor at the Work Center. Grievant did not express to the Captain any of her concerns about meeting obligations to her family members. If she had done so, the Captain would have considered them in determining whether to select her to fill the AM supervisor shift. The Hearing Officer will not consider the significance Grievant’s family obligations because she did not first afford the Captain the opportunity to do so.

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.

⁵ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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 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.