

Issues: Group II Written Notice (failure to follow instructions), and Termination due to accumulation; Hearing Date: 06/04/15; Decision Issued: 06/05/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No.10601; 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: 10601

Hearing Date: June 4, 2015

Decision Issued: June 5, 2015

PROCEDURAL HISTORY

On March 31, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. She was removed from employment based on the accumulation of disciplinary action.

On March 31, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 6, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 4, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 employed Grievant as a DSA II at one of its facilities. Grievant was responsible for providing services to individuals residing at the Facility. Grievant had prior active disciplinary action consisting of a Group III Written Notice with a fifteen day suspension for violation of DHRM Policy 1.05.

Grievant reported to the Supervisor. The Supervisor began working in the Building in November or December 2014. Several individuals residing in the Building were assigned special wheelchairs to assist with their unique needs. The Supervisor was not familiar with which wheelchairs belonged to each individual.

On February 10, 2015, the Supervisor wanted to take the Individual to class in another location. She approached Grievant who was in the day hall. Grievant was not performing any specific tasks but was overseeing four individuals. The Supervisor asked Grievant to get the wheelchair for the Individual and bring it to the Supervisor. Grievant said "no." The Supervisor asked Grievant if she was refusing to comply with the instruction and Grievant said "yes." Grievant said she did not see any reason why she would get up and get a wheelchair and walk it back to the day hall. The Supervisor walked to the location of the wheelchairs, obtained a wheelchair, returned to the day hall, placed the Individual in the wheelchair, and escorted her to class.

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.”¹ 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 is a Group II offense.² Employees are obligated to comply with the legal and ethical instructions of their supervisors. On February 10, 2015, Grievant was instructed by the Supervisor to get the wheelchair for the Individual. The Supervisor had the authority to give the instruction and it was appropriate to carry out operations at the Facility. Grievant refused to comply with the instruction. The Supervisor confirmed that Grievant was refusing to comply with the instruction. Grievant did not obtain the wheelchair for the Individual. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. An employee who has an existing active Group III Written Notice may be removed from employment upon the accumulation of additional disciplinary action. Grievant had a prior active Group III Written Notice. With the accumulation of the Group II Written Notice in this case, the Agency has presented sufficient evidence to support its decision to remove Grievant.

Grievant argued that the disciplinary action should be reduced or removed because it was based on a subjective perception of her interaction with the Supervisor. The evidence showed, however, that Grievant refused to comply with the Supervisor’s instruction thereby justifying the issuance of disciplinary action.

Grievant argued that if she had complied with the instruction and left the day hall, the four individuals for whom she was responsible would have been left unattended. This argument is not supported by the evidence. If Grievant had left the day hall to locate the Individual’s wheel chair, the Supervisor would have remained in the day hall to observe the four individuals.

Grievant argued that the Individual did not have a specific wheelchair assigned but rather used a general purpose wheelchair for transportation. This argument fails because the Supervisor was not familiar with the Individual and did not know whether the Individual had an assigned wheelchair which is why the Supervisor asked Grievant for assistance. Even if the Supervisor knew that the Individual had not been assigned a specific wheelchair, Grievant would have been obligated to comply with the Supervisor’s instruction.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

Grievant argued that she had been complying with the terms of the Group III and, thus, removal would not be appropriate. Whether Grievant complied with the terms of the Group III Written Notice would not form a basis to reduce the applicability of the Group III Written Notice. The existence of an active Group III Written Notice supports the Agency's decision to remove Grievant in this case.

Grievant asked that she be permitted to resign in lieu of removal. The Hearing Officer does not have the authority to order the Agency to permit her to resign in lieu of removal.

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"³ 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 II Written Notice of disciplinary action with removal 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

³ *Va. Code § 2.2-3005.*

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.