

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 07/09/13; Decision Issued: 07/15/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10110; 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: 10110**

Hearing Date: July 9, 2013  
Decision Issued: July 15, 2013

#### **PROCEDURAL HISTORY**

On April 30, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and comply with established written policy. Grievant was removed from employment effective April 30, 2013 based on the accumulation of disciplinary action.

On May 7, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 4, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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 Safety and Security Technician at one of its facilities. The purpose of her position was:

To maintain security, custody, and control over a patient population ranging from 18-64 at the Forensic Unit. Responsible to maintain controlled access both inside and outside the Forensic Unit.<sup>1</sup>

Grievant had prior active disciplinary action. On July 14, 2011, she received a Group III Written Notice for being less than alert. On November 15, 2012, Grievant received a Group I Written Notice for unsatisfactory work performance.

On April 7, 2013, Grievant was working with SST O in the control room. Grievant was responsible for controlling the log and keys. SST O was responsible for opening and closing doors to the secured patient visitation area. SST O left his post to enter the secured area. When he did so, he left unlocked two of the doors to the secured area. This action amounted to a breach of security because patients could walk out of the secured area. Grievant recognized that SST O created a security breach. She did not report the information immediately to her supervisor. She wanted to see if SST O would report himself. The Lieutenant entered the control room and Grievant could have

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<sup>1</sup> Agency Exhibit 3.

reported that information to the Lieutenant. After approximately five hours, Grievant concluded that SST O would not report the security breach so she reported it to the Lieutenant.

### 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.”

Security Post Order 39 governed Grievant on April 17, 2013 and provided,

Report all breaches of Security to the Security Shift Supervisor or Forensic Unit Security director in his/her absence and follow his/her instruction regarding the handling of the situation.<sup>3</sup>

Failure to follow policy is a Group II offense.<sup>4</sup> Post Order 39 represents the Facility’s policy governing that post. On April 7, 2013, Grievant observed a breach of security when SST O left the doors to the visitation area unsecured. She failed to report the breach to the Lieutenant when the Lieutenant entered the control room on several occasions. She only reported the breach after approximately five hours had passed. By that time, Facility managers no longer had an opportunity to address the breach. The Agency has presented sufficient evidence to support the issuance of a Group II offense. Grievant had prior disciplinary action consisting of a Group I Written Notice and a Group III Written Notice. With the addition of a Group II Written Notice the Agency has presented sufficient evidence to justify its removal of Grievant.

Grievant argued that she reported the breach to the Lieutenant and thus complied with the post order. Although Grievant reported the breach, she did so several hours later even though she had at least two opportunities to report the breach to the Lieutenant when the Lieutenant entered the control room. When first given the opportunity to report the breach, Grievant failed to do so thereby acting contrary to her post orders.

*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

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<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> Agency Exhibit 2.

<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

“in accordance with rules established by the Department of Human Resource Management ....”<sup>5</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 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  
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 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

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<sup>5</sup> Va. Code § 2.2-3005.

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>6</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>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.