

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 10/29/13; Decision Issued: 11/01/13; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10176; 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: 10176

Hearing Date: October 29, 2013
Decision Issued: November 1, 2013

PROCEDURAL HISTORY

On August 13, 2013, Grievant was issued a Group II Written Notice of disciplinary action for violating the Agency's workplace expectations policy. On August 13, 2013, Grievant was issued a second Group II Written Notice of disciplinary action for violating the Agency's timekeeping policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On August 17, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 10, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuance a decision in this case. On October 29, 2013, 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 Alcoholic Beverage Control employed Grievant as an ABC Store Manager at one of its stores. He began working for the Agency in July 1998. The purpose of his position was:

Manages and operates an ABC store in compliance with the requirements of the policies and operational Procedures of the Department of Alcoholic Beverage Control. Plans, organizes, and directs a store's operation and participates in all activities that are essential to the operation of an ABC Store.¹

On May 16, 2013, May 23, 2013, May 30, 2013, June 6, 2013, and June 7, 2013, Grievant was shown on the store's video wearing clothing that was not in accordance with the Agency's dress code policy. For example, he was wearing denim, boots, and/or assorted collarless shirts and jerseys. In an email dated August 7, 2013, Grievant wrote, "I will admit that I'm guilty of violating this procedure on several occasions."²

¹ Agency Exhibit 4.

² Agency Exhibit 7.

On April 10, 2013, April 18, 2013, May 1, 2013, May 17, 2013, May 18, 2013, May 21, 2013, June 7, 2013, June 11, 2013, and June 19, 2013, Grievant made changes to his schedule involving time increments exceeding 30 minutes. Grievant did not report these changes to his Supervisor, the Regional Manager.

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.”³ 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 policy is a Group II offense.⁴

Group II Written Notice – Dress Code

The Agency has a dress code for its employees requiring them to wear “appropriate business casual attire.” Examples of acceptable attire include, “[c]ollared sport shirts or golf shirts, button-down shirts, blouses, sweaters, turtlenecks, sports coats.”⁵ The Agency’s SOP 403-1032 address dress guidelines for store employees and provides:

Trousers/slacks will be of a dress/dress casual variety (e.g. Khaki style). Trousers/slacks legs must be worn on the outside of boots/shoes. Blue jeans, dress jeans, any color denim material, cotton jersey garment, fleece pants, sports pants, warm ups, tight stirrup pants, leggings, stretch pants, Lycra, athletic apparel or shorts will not be permitted. Belts must be buckled and worn with Trousers/slacks designed for them. Capri’s must be a minimum of 6 inches below the knee. Skirts or dresses should be no shorter than 1 inch above the knee.

All shirts must be of the dress or business casual variety and must be tucked into pants or skirt unless the shirts are designed for wear on the outside of the slacks (e.g. the front and rear hem of the shirts are the same length). Dress or business shirts must be buttoned from the top to the bottom. Shirts that are designed to be worn outside of the slacks may

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ Agency Exhibit 8.

not extend more than four (4) inches below the belt line. Polo shirts may be worn if they do not contain any written advertisement. No T-shirts, tank tops or spaghetti strapped shirts may be worn. ***⁶

On May 16, 2013, May 23, 2013, May 30, 2013, June 6, 2013, and June 7, 2013, Grievant was shown on the store's video wearing clothing that was not in accordance with the Agency's dress code policy. Grievant admitted failing to comply with the Agency's dress code. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with written policy.

Group II Written Notice – Schedule Changes

The Agency has a Time, Attendance & Leave Policy to provide a "method of scheduling, tracking, reporting, and maintaining of all employee time worked and leave activities." Under this policy, "[a]ny changes to the Manager's daily schedule involving 30 minutes or more must be reported to the Regional Manager by e-mail."⁷

On April 10, 2013, April 18, 2013, May 1, 2013, May 17, 2013, May 18, 2013, May 21, 2013, June 7, 2013, June 11, 2013, and June 19, 2013, Grievant made changes to his schedule involving time increments equaling or exceeding 30 minutes. Grievant did not report these changes to his Supervisor, the Regional Manager. Grievant was aware of the policy because he had complied with it on several prior occasions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with written policy.

Upon the issuance of two Group II Written Notices an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that the Agency failed to provide him with progressive discipline. He was not given an opportunity to improve his performance. Grievant did not have prior active disciplinary action. The Agency issued two Group II Written Notices on the same day. Under the Standards of Conduct, agencies are encouraged to take progressive disciplinary action but they are not required to do so. Grievant's objection is not a basis to reverse the Written Notices.

Grievant argued that other employees committed more serious offenses but they were not removed from employment. Grievant presented no evidence to support this allegation.

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

⁶ Agency Exhibit 9.

⁷ Agency Exhibit 12.

Management”⁸ 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 for failure to follow the dress code policy is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow the time keeping policy is **upheld**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

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:

⁸ Va. Code § 2.2-3005.

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.