

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 12/20/13; Decision Issued: 12/26/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10220, 10221; **Administrative Review: EDR Ruling Request received 01/16/14; Outcome: Request denied – untimely.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10220 / 10221

Hearing Date: December 20, 2013
Decision Issued: December 26, 2013

PROCEDURAL HISTORY

On May 15, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On June 24, 2013, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions.

Grievant timely filed grievances to challenge the Agency's actions. On November 7, 2013, the Office of Employment Dispute Resolution issued Ruling No. 2014-3660 consolidating the two grievances for a single hearing. On November 19, 2013, EDR assigned this appeal to the Hearing Officer. On December 20, 2013, a hearing was held at the Agency's office. Grievant appeared at the hearing location but left the location without attending the hearing.

APPEARANCES

Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 RNCA at one of its Facilities. She worked as a Charge Nurse for a Unit at the Facility.

On May 7, 2013, the Assistant Chief Nurse Executive instructed Grievant to submit a statement by 8 a.m. on May 8, 2013 to the Patient Abuse and Neglect Investigator for an Abuse/Neglect allegation under investigation. The RNC also instructed Grievant to submit a statement to the Investigator. Grievant failed to submit a statement to the Investigator as instructed.

On June 8, 2013 and June 9, 2013, the Administrator on Duty and Grievant's Supervisor instructed Grievant on multiple occasions to call or email a Staff Psychiatrist if a patient threatened bodily harm to the Staff Psychiatrist. The Patient made a threat of bodily harm against the Staff Psychiatrist. Grievant was aware of the threat but failed to notify the Staff Psychiatrist as instructed.

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 instructions is a Group II offense.²

On May 7, 2013, Grievant was instructed by a supervisor to submit an incident report to an Investigator. Grievant failed to do so thereby justifying the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

On June 8 and June 9, 2013, Grievant was instructed by a supervisor to notify the Staff Psychiatrist if a patient threatened him with bodily harm. A patient threatened the Staff Psychiatrist with bodily harm. Grievant was aware of the threat but failed to notify the Staff Psychiatrist thereby justifying the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove her from employment.

Grievant did not present any testimony or documents to support any of her defenses.

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

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.

³ *Va. Code § 2.2-3005.*

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 on May 15, 2013 to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. The Agency's issuance on June 24, 2013 to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. Grievant's removal is **upheld** based upon 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:

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.