

Issues: Group II Written Notice (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 07/02/14; Decision Issued: 07/22/14; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 10377; 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: 10377**

Hearing Date: July 2, 2014  
Decision Issued: July 22, 2014

#### **PROCEDURAL HISTORY**

On April 7, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed from employment based on the accumulation of disciplinary action.

On May 4, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 28, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 2, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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 Virginia Department of State Police employed Grievant as a State Police Trooper II at one of its locations. He began working for the Agency on February 25, 2007.

Grievant had prior active disciplinary action. He received a Group II Written Notice on May 24, 2011 for not responding to a dispatch in a timely manner. Grievant received a Group II Written Notice with a five work day suspension on May 23, 2012 for failure to arrive on time for a special assignment.

In March 2013, Sergeant F verbally counseled Grievant regarding the requirement to obtain supervisory approval to take leave instead of "marking off duty" before the end of a scheduled shift.

On July 31, 2013, the First Sergeant met with Grievant and discussed her memorandum addressed to all sworn employees in the area. The memorandum stated, "You need Area [number] supervisor approval prior to using leave."<sup>1</sup> Grievant signed and dated the memorandum.

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<sup>1</sup> Agency Exhibit 4(l).

The Agency has a master schedule to account for its employee's absences from work including when they are on leave. The master schedule is in the main common area at the Facility where Grievant worked.

On January 4, 2014, Grievant wrote "CT" on the master schedule. "CT" refers to compensatory time. Grievant intended to indicate that he would be taking compensatory time leave when his shift started on January 7, 2014. Troopers were not supposed to make entries on the master schedule. The Secretary Senior followed her customary practice and entered information from the master schedule into the computer aided dispatch. She did not know that Grievant had written "CT" on the master schedule without the approval of a supervisor.

Grievant worked his shift on January 5, 2014, January 6, 2014 and January 7, 2014.

Grievant was scheduled to work the midnight shift on January 8, 2014. This shift was scheduled to begin at 9 p.m. on Tuesday January 7, 2014 and end on Wednesday January 8, 2014 at 7 a.m. Grievant did not work his shift as scheduled.

The Sergeant later approved Grievant's leave slip containing leave for January 8, 2014 but he did so without knowledge that the leave had not been first approved by a supervisor.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order 12.02(11)(a). Group II offenses "include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal." General Order 12.02(12)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order 12.02(13)(a).

Group II offenses include "failure to follow a supervisor's instructions ...."<sup>2</sup> On July 31, 2014, Grievant was instructed by a supervisor to obtain approval to take leave. On January 8, 2014, Grievant took leave without having first obtained approval from a supervisor thereby acting contrary to the July 31, 2013 instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant had prior active disciplinary action including a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

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<sup>2</sup> General Order ADM 12.02 (12)(b)(1).

Grievant argued that he wrote CT on the master schedule on January 4, 2014 because he was not feeling well and did not want to use his sick leave. He assumed that his leave had been approved. He argued that because there was a “shift overlap” and another trooper was working the January 8, 2014 midnight shift that the Agency had adequate coverage for his shift. He argued that Agency employees adopted an informal practice that when a shift overlapped one of the employees was free to take leave.

Grievant’s arguments are not persuasive. If Grievant was aware on January 4, 2014 that he might be sick on January 8, 2014, he had sufficient time to notify a supervisor and obtain permission to take leave. The evidence showed that employees with the Agency had adopted an informal practice enabling an employee to take approximately an hour of leave at the end of his or her shift when another employee was also working during a shift overlap. Grievant took more than an hour of leave and, thus, exceeded the Agency’s informal practice.

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 ....”<sup>3</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.

Grievant presented evidence regarding medical conditions including stress that he was experiencing in March 2014. These medical problems are not mitigating circumstances because they occurred after Grievant’s behavior in January 2014 and do not appear to have cause him to disregard his supervisor’s instructions. In light of the standard set forth in the Rules, 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 is **upheld**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

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<sup>3</sup> Va. Code § 2.2-3005.

## 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  
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>4</sup>

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

[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