

Issues: Group I Written Notice (disruptive behavior), and Termination (due to accumulation); Hearing Date: 07/07/14; Decision Issued: 07/25/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No.10380; 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: 10380**

Hearing Date: July 7, 2014  
Decision Issued: July 25, 2014

#### **PROCEDURAL HISTORY**

On April 26, 2014, Grievant was issued a Group I Written Notice of disciplinary action for willful disregard and defiance of management's authority. Grievant was removed from employment due to accumulation of disciplinary action.

On April 28, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 2, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 7, 2014, 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 Behavioral Health and Developmental Services employed Grievant as a Forensic Mental Health Technician at one of its Facilities. She had been employed by the Agency for approximately nine years. Grievant had prior active disciplinary action. On November 5, 2012, Grievant received a Group I Written Notice for unsatisfactory attendance. On June 6, 2013, Grievant received a Group II Written Notice with a three workday suspension for unsatisfactory attendance. On July 5, 2013, Grievant received a Group II Written Notice with a five workday suspension for unsatisfactory attendance.

The Administrator on Duty (AOD) was the highest ranking employee at the Facility on March 23, 2014. She was in command of the Facility. The Agency expected nursing staff to comply with the AOD's instructions.

The time period between 11 a.m. and 11:20 a.m. is a busy time for the Staffing Coordinator at the Facility. During that time period the Staffing Coordinator is making telephone calls to inform staff of their assignments and to make sure positions located in various units of the Facility are staffed.

Grievant typically worked in building 39. On March 23, 2014, Grievant learned that she was being "pulled" to work in another position in another building.

On March 23, 2014, Grievant entered the staffing office. The Staffing Coordinator was speaking on the telephone. The AOD asked Grievant "Can I help you?" Grievant replied, "I don't want to talk to you." The AOD continued her work. The AOD received a telephone call informing her that a position at building 94 had not been filled by an employee. The AOD did not know which employee had failed to go to building 94 to begin working. That employee was supposed to be at building 94 by 11:30 a.m. Grievant continued to wait in the staffing office. When the Staffing Coordinator ended his telephone call, Grievant told him that she was to be "pulled" to building 94. The AOD heard Grievant's comment and said, "Instead of wasting your time here, you should go to building 94 ward 4." Grievant said loudly, "You keep quiet; I am not talking to you!" Grievant then walked away while mumbling.

### 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>1</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."

Disruptive behavior is a Group I offense.<sup>2</sup> On March 23, 2014, Grievant was rude and disrespectful to the AOD. The AOD had the authority and right to tell Grievant to go to building 94. Grievant replied rudely by instructing the AOD to "keep quiet." Grievant was not authorized to instruct the AOD and was not justified in doing so. Grievant created unnecessary conflict in the workplace and was disruptive. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Grievant had two prior Group II Written Notices and with the accumulation of this Group I Written Notice, the agency has presented sufficient evidence to support Grievant's removal.

Grievant argued that the AOD was abrasive and "shooed" her away with her hand. The AOD denied this allegation and claimed she was polite in her interaction with Grievant. The AOD's testimony was credible.

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

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> Va. Code § 2.2-3005.

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 I Written Notice of disciplinary action 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 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>

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