

Issue: Group III Written Notice with Termination (unsatisfactory job performance and failure to follow instructions); Hearing Date: 08/05/14; Decision Issued: 08/18/14; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No.10399; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 09/02/14; EDR Ruling No. 2015-3992 issued 09/17/14; Outcome: AHO's decision affirmed;** **Administrative Review: DHRM Ruling Request received 09/02/14; DHRM Ruling issued 09/10/14; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10399**

Hearing Date: August 5, 2014  
Decision Issued: August 18, 2014

#### **PROCEDURAL HISTORY**

On May 16, 2014, Grievant was issued a Group III Written Notice of disciplinary action for unsatisfactory performance and failure to follow instruction. Grievant was removed from employment based on the accumulation of disciplinary action

On May 22, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 2, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 5, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant's Representative  
Agency Party Designee  
Agency's Counsel  
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 Health employed Grievant as a Nutritionist Assistant at one of its offices. She was employed by the Agency for approximately ten years prior to her removal effective May 16, 2014.

Grievant had prior active disciplinary action. Grievant was issued a Group II Written Notice on April 16, 2013 for unsatisfactory performance and failure to follow instructions or policy. Grievant received a Group I Written Notice on January 7, 2014 for unsatisfactory work performance and failure to follow instructions.

Grievant made errors in completing an "encounter" form. While Grievant and the Supervisor were seated at a table, the Supervisor provided Grievant with a guideline document regarding how to complete encounters and asked Grievant to begin using the document. Grievant pushed the document back to the Supervisor and told her she did not need and would not use the document.

On March 13, 2014, Grievant was attending a training program with other employees. She was observed by the Manager who was in her chain of command leaving the training at lunchtime. The Manager asked Grievant if she wanted to go to lunch with his group of employees. Grievant indicated she had a toothache and was going to seek treatment from a dentist. The Manager instructed Grievant to notify the Supervisor that she was leaving. Grievant did not contact the Supervisor. She left the training site without notifying the Supervisor or obtaining permission from the Supervisor.

to leave the training. It is unclear whether Grievant actually had a toothache and went to the dentist.

## **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.”

The Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice. Agencies may not combine separate factual situations giving rise to disciplinary action and elevate them into a higher group offense. Each factual scenario must be considered separately and evaluated for the appropriate level of disciplinary action.

The Agency presented evidence of poor customer service, poor interactions with her co-workers, and taking frequent unnecessary breaks. This evidence need not be addressed in detail because it would not support the issuance of more than a Group I Written Notice.

Group II offenses include failure to follow a supervisor’s instructions.<sup>2</sup> The Supervisor instructed Grievant to consider and use a guideline when completing encounters. She refused to accept the document from the Supervisor. Grievant was instructed by the Manager to contact the Supervisor before leaving the training. Grievant did not contact the Supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. With the disciplinary action issued on May 16, 2014, Grievant has accumulated two Group II Written Notices. The Agency’s decision to remove Grievant must be upheld.

Grievant’s Representative asked that Grievant be given another chance because she has become better able to control her behavior. Once an agency has met its burden of proof to support its disciplinary action, there is no policy that would authorize the Hearing Officer to reverse or modify the disciplinary action.

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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.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued in her grievance documents that she suffered from bipolar disorder and had notified the Agency of her disability. Following the issuance of the Group I Written Notice in January 2014, the Agency informed Grievant that, “Your physician will need to complete a Fit for Duty form. If it is determined that you require an accommodation under the Americans with Disabilities Act (ADA), we can explore what options are available.”<sup>4</sup> Grievant took no action to contact her physician and obtain needed documents to request an accommodation. Grievant never specified what accommodation, if any, she was seeking. No credible evidence was presented to suggest that Grievant’s disability caused her inappropriate behavior. Grievant’s assertions regarding her disability do not affect the outcome of this case.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. 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

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<sup>3</sup> Va. Code § 2.2-3005.

<sup>4</sup> Agency Exhibit 16.

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>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.