

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 09/04/14;
Decision Issued: 09/05/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 10408; 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: 10408

Hearing Date: September 4, 2014

Decision Issued: September 5, 2014

PROCEDURAL HISTORY

On March 24, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.¹

On April 18, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 31, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 4, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

¹ The Agency revised its Written Notice upon further investigation and properly notified Grievant of the changes to the Agency's allegations prior to the hearing.

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 employs Grievant as a Registered Nurse at one of its facilities. She has been employed by the Agency for approximately 12 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised Ms. R, a probationary employee, who began working for the Agency in May 2013. Grievant believed Ms. R was a very good worker and wanted to retain Ms. R as an employee with the Agency. Ms. R had a history of tardiness. Grievant had counseled Ms. R about tardiness but never took additional action against her.

The Agency monitors attendance using a KRONOS system where employees "swipe in" to indicate their times of arrival.

For five pay periods from July 25, 2013 through March 9, 2014, Ms. R reported to work late. The Agency evaluated Ms. R's arrival times during that period and concluded Ms. R's tardiness was unacceptable under its tardiness policy. Grievant did not take any corrective action against Ms. R even though Grievant knew Ms. R was often tardy.

During the Step Process, Grievant admitted that “I was wrong.” She justified her failure to act because “I knew that once I pursued a Group I, [Ms. R] would most likely be terminated because of her probationary status.”²

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.”

Human Resource Policy 8-2 governs Tardiness. Section IV(D) provides, “[s]upervisors must initiate appropriate corrective action when the employee meets the criteria of Unacceptable Tardiness.”

Failure to follow policy is a Group II offense.⁴ Ms. R displayed unacceptable tardiness during five pay periods yet Grievant failed to initiate appropriate corrective action against her. Grievant intentionally disregarded the Agency’s policy thereby justifying the issuance of a Group II Written Notice.

Grievant argued that she was responsible for preparing 45 performance evaluations and, thus, was unable to attend to the task of initiating corrective action. The Agency established that Grievant’s decision not to take disciplinary action was intentional and not because of an unreasonable or excessive work burden.

Grievant argued that if she would have taken corrective action if she had been aware that the corrective action for a probationary employee would only be a Notice of Improvement Needed and not a Group I. The Agency’s policy prescribes issuance of a Group I for unacceptable tardiness but does not explain how to treat probationary employees. This confusion created by the policy does not excuse Grievant’s failure to act because Grievant chose not to take corrective action at all. She did not seek the advice of the unit manager or the human resource staff. Had she done so or tried to issue a Group I as stated in the policy, she would have learned of the Agency’s practice of issuing a Notice of Improvement Needed in lieu of a written notice for probationary employees.

² Agency Exhibit 1.

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 1.65.

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”⁵ 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 argued that the level of discipline was too harsh. Once the Agency has met its burden of proof to show a Group II offense, the Hearing Officer may only reduce a Group II upon the showing of mitigating circumstances. Grievant has not presented mitigating circumstances that would show the Agency’s discipline exceeded the limits of reasonableness. 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**.

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.

⁵ Va. Code § 2.2-3005.

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.