

Issues: Two Group II Written Notices (failure to follow policy) and Termination (due to accumulation); Hearing Date: 09/11/14; Decision Issued: 09/19/14; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10433; Outcome: Partial Relief.



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 10433**

Hearing Date: September 11, 2014

Decision Issued: September 19, 2014

#### **PROCEDURAL HISTORY**

On June 20, 2014, Grievant was issued a Group II Written Notice of disciplinary action for violating the Agency's Code of Conduct and Ethics. On June 20, 2014, Grievant was issued a second Group II Written Notice of disciplinary action for violating the Agency's grooming policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On July 5, 2014, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On August 4, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 11, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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 University of Virginia employed Grievant as a Security Officer. He had been employed by the Agency for approximately six years prior to his removal effective June 20, 2014.

Grievant had prior active disciplinary action. On October 11, 2013, Grievant received a Group II Written Notice with a one day suspension

On May 14, 2014, Grievant was schedule to report to work at 4 p.m. He was supposed to be clean shaven. He reported to work approximately five to ten minutes early. Grievant was not clean shaven. He had a beard because he had not shaved for several days. Grievant realized he was not in compliance with the Agency's grooming policy. He told the Supervisor that he was unable to shave because he had a dentist appointment earlier in the day. His dental appointment was at approximately 9 a.m. that morning. Grievant took medications after the appointment that made his drowsy. The Supervisor told Grievant he could not work unless he was clean shaven. The Supervisor told Grievant that he could go to the gift shop down the hallway and buy a razor and shave before his shift began. The Supervisor told Grievant he could go to a nearby store to purchase an electric razor to shave or that Grievant could go home and shave. Grievant left the Facility. He returned at approximately 5 p.m. and told the Supervisor he had gone to a local barber shop to have his beard shaved. Grievant began working.

A Medicaid Office is located in the lower floor of the Hospital. At least two employees work inside the office. They are responsible for assisting Medicaid recipients with their needs for medical services from the Hospital. The Office has a waiting area with three chairs set aside for patients and their families. People who were unfamiliar with the door to the Office sometimes slammed the door closed.

On May 27, 2014 at approximately 4:15 p.m., Grievant walked to the Medicaid Office and opened the door. He went inside and picked up one of three empty chairs. He took the chair out of the Office and carried it several feet down a hallway to a corner where a power outlet was located on the wall. He put the chair down, plugged in his cell phone charger, attached the charger to his cell phone and began reading his cell phone. Grievant did not ask permission to remove the chair. An employee observed Grievant remove the chair and expressed dismay to Mr. E as to why a security officer would remove a chair from the Office. Mr. E worked in the Office. He walked out of the Office door on his way to the restroom. He walked to Grievant's location and said "Hey man, the office will be closing in 30 minutes. It would be nice if you could put the chair back." Grievant replied that he had keys to the Office. Mr. E said that his supervisor was not there and the way Grievant came into the Office and took the chair without asking would have resulted in the supervisor calling Grievant's supervisor. Grievant said he was charging his phone and would put the chair back. Mr. E began walking back towards the Office with the objective of walking to the restroom. When he was away from Grievant, he turned and observed Grievant unplugging his cell phone charger and getting up to put the chair back. When Mr. E was approximately ten to fifteen feet past the Office door, he heard Grievant slam the door closed. Mr. E perceived Grievant's behavior is inappropriate but not as being rude.

## **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."

### Group II Written Notice – Grooming Policy

Policy E-14.0 governs Uniforms, Equipment, and Personal Appearance. This policy provides:

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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.

Male officers will be clean shaven, with the exception of a moustache, unless an emergency situation occurs while on duty. The moustache will not extend below the corners of the mouth.

Failure to follow policy is a Group II offense.<sup>2</sup> On May 14, 2014, Grievant reported to work unshaven. He recognized that his appearance was not in accordance with the Agency's policy. Grievant could have walked a few feet to the gift shop, obtained a razor, shave, and begin his shift on time at 4 p.m. Instead, he left the Facility and returned at 5 p.m. to begin his shift. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a written policy.

Grievant argued that the Agency was being "nit picky" without reason. The evidence showed that Grievant had violated the grooming policy in the past. On June 26, 2013, Grievant had sideburns that were too long. He was told he had violated the policy and was given a copy of the grooming policy. When Grievant arrived at work on May 14, 2014, he recognized that he was not in compliance with the Agency's policy. Grievant had notice of the Agency's policy and knew that it expected employees to comply with the policy.

#### Group II – Chair Removal

Disruptive behavior is a Group I offense.<sup>3</sup> On May 27, 2014, Grievant removed a chair set aside Medicaid recipients in the Medicaid Office. He did not ask for permission to remove the chair. He disrupted the work activities of the employees in the Medicaid Office because they commented as to why Grievant had removed a chair without asking. Mr. E believed it was necessary to speak to Grievant and asked him to return the chair. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency argued that Grievant should receive a Group II Written Notice for violating its Code of Conduct and Ethics. The provisions of this policy are largely aspirational in nature and restate behavior that would already be prohibited in by the Standards of Conduct. For example, the Agency's policy provides that "[d]iscourtesy, rudeness, and insolence to anyone will not be tolerated." This behavior would be prohibited already by the Standards of Conduct as a Group I offense. Restating the behavior as a separate policy should not serve to elevate the level of offense. In addition, the policy provides that, "[n]o employee will loiter, sleep, or loaf on duty or in any manner shirk his or her responsibility in the performance of duty." "Employees may carry personal cellular telephones while on duty; however, calls should not interfere with the employee's ability to perform duties." This behavior would be prohibited already by the Standards of Conduct as an abuse of State time, a Group I offense. When the facts of this incident are considered as a whole, Grievant's behavior best fits a Group I

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

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

offense, not a Group II offense. Neither employee of the Medicaid Office testified that Grievant's behavior was rude. They believed his behavior was inappropriate. Grievant's behavior was disruptive and an abuse of State time which is a Group I offense.

### Mitigation

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>4</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 argued that the Agency discriminated against him based on his race. He argued that the Agency targeted him because of his race and treated him differently from a female security officer of a different race. The evidence shows that the Agency took action against him because of his inappropriate behavior without being influenced by his race. Grievant argued that the percent of employees of his race was dramatically reduced when the Agency reduced the total number of security officers by approximately half. The ratio of employees of a particular race when compared to the total number of employees is meaningless, standing alone, when trying to determine whether an agency acted based on race. There may be many reasons for racial disparity that are happenstance or otherwise beyond the control of an agency. Grievant presented evidence of a female security officer who was involved in a struggle with a patient but refused to perform her duties and disregarded an order from a superior officer to provide assistance. The female security officer was counseled but did not receive disciplinary action. Grievant and the female security officer were not similarly situated. The female security officer did not violate the grooming policy and did not engage in disruptive behavior directed towards other employees. Grievant has not established that the Agency targeted him for disciplinary action based on an improper motive. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

### Accumulation of Discipline

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<sup>4</sup> Va. Code § 2.2-3005.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant had a prior active Group II Written Notice. With the additional disciplinary actions in this grievance, the Agency has presented sufficient evidence to support its decision to removal Grievant from employment.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for violating the grooming policy is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for violating the Agency's Code of Conduct and Ethics is **reduced** to a Group I 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 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.