

Issues: Group I (excessive tardiness), Group II (failure to follow instructions), Group II (leaving work without permission); Group III with Termination (workplace violence);  
Hearing Date: 07/26/12; Decision Issued: 07/31/12; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9854; Outcome: Partial Relief.



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 9854**

Hearing Date: July 26, 2012

Decision Issued: July 31, 2012

#### **PROCEDURAL HISTORY**

On April 12, 2012, Grievant was issued a Group I Written Notice of disciplinary action for tardiness. On April 12, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On April 12, 2012, Grievant was issued a Group II Written Notice of disciplinary action for leaving the worksite without permission. On April 12, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On May 10, 2012, 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 he requested a hearing. On June 25, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 26, 2012, 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:

Christopher Newport University employed Grievant as a Cook II. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant's shift was scheduled to begin at noon. On the morning of March 19, 2012, Grievant called the Manager and indicated that he would be a little late to work. The Manager said that was okay. Grievant did not report to work at noon. At about 2 p.m., the Manager called Grievant and asked when he would be coming to work. She told him he needed to come to work. Grievant said that he was on his way and should be there in approximately 20 minutes. Grievant arrived at the facility at approximately 2:20 p.m. or 2:30 p.m.

Grievant began working with Ms. T. She asked Grievant if he had "tempted the chicken". She did so in a manner that that Grievant found annoying. Grievant located the Supervisor and told the Supervisor that he was leaving because he did not feel well and because Ms. T was "p—sing him off". Grievant told the Supervisor that Ms. T was questioning him like he did not know his job. Grievant then stated that if he was to stay he would end up smacking her in her face. The Supervisor told Grievant to calm down and that the Supervisor would go talk to Ms. T. The Supervisor testified that he told

Grievant to remain where he was.<sup>1</sup> The Supervisor walked away from Grievant and spoke with Ms. T. Grievant left the Facility while the Supervisor was speaking with Ms. T. Grievant had not obtained permission to leave Facility.

## **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>2</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 I Written Notice – Tardiness

The Agency contends that Grievant should receive a Group I Written Notice for tardiness. There is no basis to take disciplinary action against Grievant in this case even though he was tardy on March 19, 2012. The Agency did not establish that Grievant displayed a pattern of “excessive tardiness”<sup>3</sup> or that his tardiness had a material impact on the Agency such as causing other employees to work overtime or preventing the Agency from delivering services on a timely basis. Although Grievant had been counseled regarding tardiness, it appears that counseling took place in 2006 and 2008 instead of within a few months of March 19, 2012.<sup>4</sup> The Group I Written Notice must be reversed.

### Group II Written Notice – Leaving Work Without permission.

“Leaving work without permission” is a Group II Written Notice. On March 19, 2012, Grievant left the worksite prior to the end of his shift and without permission from the Supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that he left the worksite but should not be disciplined because he was ill and angry. This argument fails. There is no reason to believe the Grievant could not have waited a few minutes and continued his conversation with the Supervisor in order to obtain the Supervisor’s permission prior to leaving the Facility.

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<sup>1</sup> The Supervisor’s written statement does not mention this instruction.

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Written Notice Offense Codes.

<sup>4</sup> See Agency Exhibit 5.

### Group II Written Notice – Failure to follow a Supervisor’s Instructions.

The Agency contends that Grievant should receive a Group II Written Notice for failure to follow a supervisor’s instructions. There is no basis to support this disciplinary action. The disciplinary action for failure to follow a supervisor’s instructions and the disciplinary action for leaving work without permission are not materially different. They arose out of the same set of facts and essentially address the same behavior, namely, that Grievant left the worksite without permission. The Supervisor’s instruction was implicit in the policy requiring an employee to remain at a Facility unless given permission to leave. The Group II Written Notice for failure to follow a supervisor’s instructions must be reversed.

### Group III Written Notice – Workplace Violence.

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual’s position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

“[T]hreatening others” is a Group III offense. Grievant engaged in workplace violence by stating to the Supervisor that if he were to stay, he would end up smacking Ms. T in her face. Grievant had not been released by the Supervisor to leave the work site at the time he made the statement. Grievant was angry when he made the statement. The Supervisor was concerned about Grievant’s comment because he believed it was a threat directed at Ms. T. The Supervisor was especially concerned because of the prior conflict between Grievant and Ms. T. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action for threatening others. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.<sup>5</sup>

Grievant argued that he did not actually intend to hit Ms. T. He argued that he was not threatening Ms. T because he was not speaking directly to her but rather was speaking to his supervisor. Grievant’s arguments fail. The Agency does not need to show that Grievant actually intended to carry out his threat: it only needs to show that a threat was made. The Agency does not need to show that Grievant made the threat directly to Ms. T or that she was aware of the threat.

### 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 Employment Dispute Resolution....”<sup>6</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 further the disciplinary action.

## DECISION

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<sup>5</sup> Although Grievant’s comments to his supervisor may constitute protected speech, the level of production does not prohibit an agency from taking disciplinary action with respect to threats.

<sup>6</sup> *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for tardiness is **rescinded**. The Group II Written Notice of disciplinary action for leaving work without permission is **upheld**. The Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **rescinded**. The Group III Written Notice of disciplinary action with removal for workplace violence 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 email.

3. 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 the Office of Employment Dispute Resolution to 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 email 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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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>7</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>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.