

Issue: Group II Written Notice with Suspension (leaving work without permission);  
Hearing Date: 02/06/15; Decision Issued: 02/24/15; Agency: UVA; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 10511; Outcome: No Relief – Agency Upheld;  
**Administrative Review: EDR Ruling Request received 03/05/15; EDR Ruling No.  
2015-4112 issued 03/13/15; Outcome: AHO's decision affirmed; Judicial  
Appeal: Appealed to Charlottesville Circuit Court (04/06/15); Outcome: AHO's  
decision affirmed (07/08/15).**



# **COMMONWEALTH of VIRGINIA**

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

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

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

In re:

**Case Number: 10511**

Hearing Date: February 6, 2015  
Decision Issued: February 24, 2015

#### **PROCEDURAL HISTORY**

On September 23, 2014, Grievant was issued a Group II Written Notice of disciplinary action with a three work day suspension for leaving work without permission and disruptive behavior.

On October 2, 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 he requested a hearing. On December 8, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 6, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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 University of Virginia employs Grievant as a Housekeeping employee.

Grievant began his shift at approximately 6:00 a.m. on September 2, 2014. At approximately 6:15 a.m., Grievant was assigned to work in Building R. He was not as familiar with that building compared to other buildings he had worked. He believed he would have to carry three sets of keys while working in the building in order to access all of the doors. Grievant spoke with a co-worker, Ms. C, and asked her if she could open the doors for him as had been done on a prior day so that he would not have to carry a third set of keys. Ms. C said it was not her job to open doors for him and gave him the third set of keys. Ms. C spoke in an argumentative manner that upset Grievant. Grievant decided to leave his duty post and go to the human resource department to discuss his concerns. He did not approach his supervisor and ask for permission to leave Building R, he simply left.

Grievant arrived at the human resource department before any human resource employees began working. He waited outside of the human resource department's building until he was able to speak with an employee. They discussed the incident and several other matters Grievant raised as concerns.

At approximately 8:40 a.m., Grievant called the Housekeeping Manager and told her about his interaction with Ms. C. Grievant said he was upset because Ms. C would not unlock doors for him and he had to carry a third set of keys. Grievant did not ask the Housekeeping Manager for permission to remain away from his duty post. The Housekeeping Manager believed Grievant would be returning to work. Grievant did not perform any work duties prior to his shift ending at 2:45 p.m.

## 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.”

University Policy HRM-031 governs Paid Leave for University Staff Employees. Under this policy, employees are “responsible for: seeking approval for leave from the supervisor with reasonable advance notice.”<sup>2</sup>

Group II offenses include, “leaving work without permission.”<sup>3</sup> On September 2, 2014, Grievant left his duty post without asking permission from his Supervisor or any other person in his chain of command. He went to the Human Resources building and waited for human resource staff to arrive to work. After speaking with a human resource employee, Grievant did not return to his duty post or otherwise seek and obtain approval to remain away from his duty post. The Agency has presented sufficient evidence to show that Grievant left work without permission, a Group II offense. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s three work day suspension is upheld.

Grievant argued that it was appropriate for him to leave his duty post in response to the conflict with Ms. C. When Grievant became upset at Ms. C’s comments to him, it is understandable that he might seek assistance from human resource staff. There was nothing about the incident that would have prevented Grievant from speaking with his supervisor or manager to obtain permission to go to the human resource department. Once he spoke with a human resource employee, Grievant should have returned to Building R. Grievant has not established a basis to walk away from his job without first obtaining a supervisor’s permission.

Speaking with Human Resource staff to resolve concerns would be protective activity by Grievant. Although Grievant desired to engage in protective activity, this objective did not mean Grievant could disregard his work assignments without permission and leave his duty post.

*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

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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> Agency Exhibit 4.

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

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.

He argued the Agency inconsistently disciplined its employees because a few months earlier Ms. C had been observed cursing loudly yet the Agency did not take disciplinary action against her. Grievant and Ms. C are not similarly situated employees. Grievant was not disciplined for cussing. Although Ms. C may have expressed displeasure and not performed her duties immediately, she performed her duties at her assigned duty post. Grievant walked away from his duty post.

Grievant argued that the discipline was too harsh. Once the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice, the Hearing Officer may reduce that discipline only if it exceeds the limits of reasonableness. Leaving work without permission is a Group II offense. The Agency’s discipline is consistent with the Standards of Conduct and does not exceed 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 with a three work day suspension 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 14<sup>th</sup> St., 12<sup>th</sup> Floor

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<sup>4</sup> Va. Code § 2.2-3005.

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.