

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 07/27/15;  
Decision Issued: 09/23/15; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10630; Outcome: Full Relief.



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 10630**

Hearing Date: July 27, 2015  
Decision Issued: September 23, 2015

#### **PROCEDURAL HISTORY**

On February 13, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

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 July 1, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 27, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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 Department of Alcoholic Beverage Control employs Grievant as a Store Manager of one of its stores. No evidence of prior active disciplinary action was introduced during the hearing. Grievant's Wife also worked as a Store Manager for the Agency.

The Agency had a computer databased referred to as "MyABC". Grievant and his Wife had MyABC accounts. Certain system aspects were limited to Store Managers. In the database was a dialog box entitled "Backup Account". The box listed several lines with menu selections:

Select a Position to Back Up:  
Select a Back Up Name:  
Employee No.:  
Effective Date:  
Termination Date:

Below these lines was another box listing items to check as "Backup Types." The backup types were listed as:

EWP:  
EVAL:  
Training:  
MIPS:

Supervisor:  
Timekeep:  
Assets:<sup>1</sup>

Grievant's Wife was a new manager at another Store. The Wife asked Grievant to help her use time and attendance software and timekeep for her employees. On August 27, 2014, Grievant change his MyABC account to list his Wife as his "Alternate User". He checked the "Timekeep" box granting her authority with respect to reviewing and approving time records of his subordinates. This authorization was to set to end on August 31, 2015.

During a staff meeting on September 16, 2014, the Supervisor instructed staff that they "could not back each other up." Grievant and his Wife were told not to use each other as "backup managers." The Supervisor stated "this would be unethical; because of your personal relationship, and you reside together." She noted, "[t]here are plenty of other Manager's to choose from."<sup>2</sup> The Supervisor said that a backup manager should have a key to the store, a security code to turn off the store alarms and be located close enough to operate the store in inclement weather.

On September 18, 2014, Grievant's Wife sent the Supervisor an email identifying the subject as "Backup Manager" and asking:

I am having trouble finding a place to appoint a backup manager with a Sonitrol code and a key. There is no place that allows that. I can't find a designation for "Backup Manager". The Alternate User has no designation other than Supervisor that's even close. Can you clarify?<sup>3</sup>

On December 19, 2014, the Supervisor sent Store Managers an email regarding employee leave and stated:

Note: All Managers are required to have an Alternate User designated in Myabc in this region as previously discussed. They should have the ability to access at least Time Keep and Mips.<sup>4</sup>

## CONCLUSIONS OF POLICY

Failure to follow a supervisor's instruction is a Group II offense. The Agency must show that the Grievant understood or should have understood the instruction

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<sup>1</sup> Grievant Exhibit 2.

<sup>2</sup> Grievant Exhibit 6.

<sup>3</sup> Grievant Exhibit 4.

<sup>4</sup> Grievant Exhibit 3.

given and then failed to follow that instruction. Grievant did not understand the Supervisor's instruction and the Agency has not established that he should have understood that instruction.

Grievant understood the Supervisor's definition of backup manager to consist of all of the responsibilities performed by a Store Manager. This would include having a key and having access to codes to turn off store alarms. Grievant had not given his Wife all of his responsibilities as a Store Manager. He believed he had not made his Wife his backup manager. The Supervisor intended her definition of backup manager to mean all or some of the responsibilities of a Store Manager. She intended to communicate that giving any of the items listed for an alternate user would be inappropriate. She did not use the term Alternate User.

Grievant's interpretation of the Supervisor's instruction was reasonable for several reasons. First, the Supervisor gave examples of things Grievant and his Wife could not do such as sharing a key and alarm codes. She did not include an example of Grievant having his Wife as an Alternate User in MyABC. Second, one of the MyABC check items was "Supervisor".<sup>5</sup> Grievant had not checked that item. This is consistent with Grievant believing he had not given his Wife supervisory authority that a backup manager would have over his staff in his absence. Third, Grievant's Wife sought clarification from the Supervisor regarding how to designate a "Backup Manager" and indicating the "Alternate User has no designation other than Supervisor that's even close. Can you clarify?" Grievant asserted that the Supervisor did not respond to the Wife's email thereby leaving the definition of "Backup Manager" unclear.

Grievant's misunderstanding of the Supervisor's instruction was reasonable. Because of this misunderstanding there does not exist a basis to conclude that Grievant was at fault for failing to take action to remove his Wife's timekeep responsibilities. The Group II Written Notice must be reversed.

## DECISION

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

## 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>5</sup> The Supervisor testified regarding "Supervisor", "I don't know specifically what the terms means."

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