

Issue: Group I Written Notice (failure to work mandatory overtime); Hearing Date: 08/13/15; Decision Issued: 08/18/15; Agency: VMI; AHO: Carl Wilson Schmidt, Esq.; Case No. 10644; 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: 10644

Hearing Date: August 13, 2015
Decision Issued: August 18, 2015

PROCEDURAL HISTORY

On April 7, 2015, Grievant was issued a Group I Written Notice of disciplinary action for failure to work mandatory overtime.¹

On May 5, 2015, 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 15, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 13, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

¹ Grievant objected to the length of time the Agency took to issue the Written Notice following the date of the offense. The length of time taken by the Agency to issue the disciplinary action is not so egregious as to affect the outcome of this case.

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:

Virginia Military Institute employs Grievant as a Housekeeper. On January 6, 2015, Grievant was notified that the Agency deemed her position essential and she would have report work to respond to emergencies or/or natural disasters. She has been employed by the Agency for approximately 17 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant presented the Agency with a note from her medical provider setting forth certain work restrictions. Grievant would not lift more than 20lbs. She could not squat, crawl, or climb as part of her job duties. She could bend occasionally.

On February 19, 2015, Grievant and other housekeeping staff were informed they would be obligated to work mandatory overtime on February 21, 2015 and February 22, 2015 because of pending inclement weather. On February 20, 2015, Grievant told the Supervisor that she would not report to work the mandatory overtime because she had work restrictions. The Supervisor obtained a copy of Grievant's restrictions from the Human Resource office. The Supervisor told Grievant that her work restrictions would not affect her work duties and that she was expected to report for work as directed. The Supervisor intended to have Grievant work inside a building using a mop to remove water and snow tracked inside the building when people entered

the building. Grievant re-stated that she would not be reporting to work on the weekend. On February 21, 2015 prior to her the beginning of her shift, Grievant called the Supervisor and told him she would not be reporting to work mandatory overtime. The Supervisor told her he could not make her come to work but if she did not report to work, she would face disciplinary action. Grievant did not report to work on February 21, 2015 or February 22, 2015.

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.”² 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.”

“[R]efusal to work overtime” is a Group II offense.³ Grievant was instructed to work overtime on the weekend beginning February 21, 2015. She refused to do so and failed to report to work as scheduled. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice which must be upheld.

Grievant argued that her restrictions prevented her from working mandatory overtime. The evidence showed that the Supervisor was aware of her physical restrictions and intended to have Grievant work a job that did not require her to perform duties contrary to her restrictions. If Grievant had reported to work as scheduled, the Agency would have accommodated her restrictions.

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”⁴ 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

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

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency inconsistently disciplined its employees and singled her out for disciplinary action. The evidence showed that all employees who failed to appear to work the mandatory overtime were given Group I Written Notices unless the employees provided credible excuses for failing to appear. None of the other employees who failed to report to work and did not receive written notices notified the Agency in advance that they did not intend to report to work. The Agency did not inconsistently discipline its employees or single out Grievant for disciplinary action. 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 I 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.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.