

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 08/31/15; Decision Issued: 09/01/15; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10656; 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: 10656

Hearing Date: August 31, 2015
Decision Issued: September 1, 2015

PROCEDURAL HISTORY

On June 24, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. He was removed from employment based on the accumulation of disciplinary action.

On July 7, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 4, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 31, 2015, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency 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 employed Grievant as a Security Officer. Grievant had prior active disciplinary action. He received a Group II Written Notice issued June 15, 2015.

Grievant began his shift at approximately 4 p.m. on May 13, 2015. He was in uniform. At approximately 9 p.m., Grievant was assigned to perform a task in the Emergency Room. He was relieved from his post in the Emergency Room and told to take care of a report and assist with a safe keeping. A safe keeping is when a security officer retrieves patient property held in a safe by the Agency and returns the property to the patient. Instead of performing these tasks, Grievant met his wife at a coffee kiosk inside a building also containing a cafeteria.

After 9 p.m. on May 13, 2015, the Supervisor walked to the cafeteria to eat. After he finished at approximately 9:22 p.m., the Supervisor observed Grievant and his wife standing in front of a coffee kiosk. The Supervisor was standing approximately 45 feet away from Grievant and looking at Grievant's back. The Supervisor realized that Grievant was away from his post. The Supervisor radioed Grievant but Grievant did not answer. The Supervisor waited approximately 20 seconds and radioed Grievant again. Grievant answered and said "go ahead." The Supervisor asked, "What's your location?" Grievant did not answer. Approximately 30 seconds later, the Supervisor asked "What's your location?" Approximately a minute later, Grievant replied, "I'm in the bathroom." Grievant's statement was untrue because he was still in front of the coffee kiosk. The Supervisor instructed Grievant to report to the Sergeant's Office.

Grievant met the Supervisor at the Sergeant's Office. The Supervisor asked Grievant which bathroom he was in when the Supervisor called. Grievant responded, "the one near the cafeteria." Grievant's statement was untrue.

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."¹ 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."

Policy A-3.0 governs Code of Conduct and Ethics. Section (B)18 provides:

Truthfulness

Upon the order of the Chief of Police, the Chief's designee or a superior officer, employees will truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the department which may be asked of them. Employees will be honest and will not practice deceitfulness. Any attempt to hide or evade the truth or fact, no matter how slight, will be grounded for discipline up to and including dismissal. This is not meant to invoke Garriety Protection.²

Failure to follow policy is a Group II offense.³ Under the Agency's policy, Grievant was required to be truthful at all times. On May 13, 2015, Grievant was not truthful when he answered questions of his Supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice "normally should result in termination."⁴ Grievant has accumulated two Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

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

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² Agency Exhibit 5.

³ See, Attachment A, DHRM Policy 1.60.

⁴ DHRM Policy 1.60(B)(2)(b).

Management”⁵ 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 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 removal 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

⁵ Va. Code § 2.2-3005.

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.⁶

[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

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