Issues: Group III Written Notice (failure to follow instructions/policy), and Termination (due to accumulation); Hearing Date: 10/09/15; Decision Issued: 10/15/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10683; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10683

Hearing Date: October 9, 2015
Decision Issued: October 15, 2015

PROCEDURAL HISTORY

On July 29, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy.

On August 20, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 9, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 9, 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 Behavioral Health and Developmental Services employed Grievant as a Forensic Mental Health Tech at one of its facilities. Grievant had prior active disciplinary action. On October 10, 2013, Grievant received a Group II Written Notice for violating the Agency's "Call-in" policy.

Grievant was scheduled to work on June 26, 2015. Her shift began at 11 p.m. She called at 10:45 p.m. and spoke with the Facility's Scheduler. She told the Scheduler that she could not report to work because she was sick. Grievant did not report to work as scheduled.

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."

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

Facility Policy Q-2 governs "Call-ins". Section III(C) provides:

> In the event an employee must call-in to request leave because of an inability to report to work as scheduled, whether it be a few minutes or an entire shift, the employee must personally transact the call-in telephone procedure (unless totally incapacitated) in the following manner:
>
> 1. Provide as much advance notice to supervision as possible, but at least: 2 hours before the start of Day, Evening, and Night Shift. (Emphasis original.)[2]

"Failure to … comply with written policy" is a Group II offense.[3] On June 26, 2015, Grievant was scheduled to report to work at 11 p.m. She called the Scheduler at 10:45 p.m. and said she could not report to work. She did not call-in at least two hours before her shift thereby violating the Agency's policy and justifying the issuance of a Group II Written Notice. Grievant had prior active disciplinary action consisting of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

The Agency argued that Grievant should receive a Group III Written Notice instead of a Group II Written Notice because Grievant had a prior Written Notice for the same offense. Nothing in the Standards of Conduct authorizes an agency to elevate a Group II offense to a Group III offense simply because the employee repeated the behavior.[4]

Grievant did not testify at the hearing. She asserted that when she called the Scheduler she was in the parking lot of a building owned by the Agency and adjoining her work location. The evidence showed that to be at work, Grievant had to be at her duty station inside the Building where she was assigned to work. Grievant was not at work at 10:45 p.m. even though she may have been near her work location assuming Grievant's assertion is true.[5]

Grievant argued that she was under a doctor's care on June 26, 2015. She presented a doctor's note saying, "This is to certify that [Grievant] has been under my

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[2] Agency Exhibit 4.

[3] See, Attachment A, DHRM Policy 1.60.

[4] The Standards of conduct permits agencies to elevate a Group I offense to a Group II offense when the employee has a prior Group I Written Notice for the same offense.

[5] If Grievant had reported to work at 11 p.m. and then left work because of illness she would not have violated the Agency's reporting policy but she may have violated the Agency's attendance policy. The Agency had a "no fault" attendance policy assigning "occurrences" each time an employee failed to work as scheduled regardless of the reason. An employee may be disciplined if he or she exceeds the number of allowed occurrences in a 12 months period.

professional care and was totally incapacitated from 6-26-15 to 7-2-15. As of 7-3-15 she is sufficiently recovered to return to work with the following limitations: work limited to eight hours at a time."[6] This argument fails for two reasons. First, Grievant was scheduled to work on June 26, 2015 and did not notify the Agency of any medical condition affecting her ability to work on June 26, 2015. She did not present the doctor's note to the Agency until July 8, 2015. Second, the Hearing Officer does not believe Grievant was totally incapacitated on June 26, 2015. By her own assertion, she was able to reach a parking lot near her work location and call the Scheduler. If she had been totally incapacitated, it is unlikely she would have been able to accomplish these tasks. It is unclear what medical condition Grievant may have had.

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 …."[7] 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 III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal is upheld based on the accumulation of disciplinary action.

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

[6] Agency Exhibit 2.

[7] Va. Code § 2.2-3005.

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.[8]

[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

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