

Issues: Group II Written Notice (abuse of State time), and Termination (due to accumulation); Hearing Date: 12/07/15; Decision Issued: 12/22/15; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10701; 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: 10701

Hearing Date: December 7, 2015
Decision Issued: December 22, 2015

PROCEDURAL HISTORY

On August 26, 2015, Grievant was issued a Group II Written Notice of disciplinary action for abuse of State time. He was removed from employment based on the accumulation of disciplinary action.

On September 25, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 12, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 an HVAC Mechanic. He had been working for the Agency for approximately five years prior to his removal effective August 26, 2015. Grievant had prior active disciplinary action. On November 5, 2013, Grievant received a Group I Written Notice for failure to follow policy and/or abuse of State time. On March 31, 2015, Grievant received a Group II Written Notice with a three workday suspension for failure to report to work without notice and failure to follow policy.

Grievant's work hours were from 7 a.m. to 3:30 p.m. with a lunch break beginning at approximately noon. He was allowed a 15 minute morning break at approximately 9 a.m.

On June 24, 2015, the Manager and Supervisor met with Grievant and told him of their expectations regarding his work performance.

On July 28, 2015, the Lead Worker gave Grievant assignments for the remaining days of the week because the Lead Worker expected to be away from work and on leave. The assignments involved removing debris from roofs and replacing filters.

On July 29, 2015 at approximately 2:10 p.m., the Supervisor entered the shop area and observed Grievant at a desk, wearing headphones, and watching videos from a website on his computer. The videos were not work related. The Supervisor questioned Grievant about the status of his work assignments that had been assigned

the prior day by the Lead Worker. Grievant said he was planning his work and would begin work on his assignments.

On August 4, 2015 at approximately 2:10 p.m., the Supervisor entered the shop where he observed Grievant sitting at a desk and wearing headphones. Videos were playing on the computer screen. The Supervisor suspected Grievant was asleep. The Supervisor observed Grievant for approximately 20 to 30 seconds. He did not confront Grievant because he was focused on another task.

On August 5, 2015 at approximately 1:50 p.m., the Supervisor entered the shop and observed Grievant sitting at a desk, wearing headphones and scrolling through videos from a website on his computer. The videos were not work related. The Supervisor observed Grievant for several seconds before Grievant realized the Supervisor was watching him. Grievant then closed the website videos and removed his headphones. The Supervisor asked Grievant if he had completed his assignments. Grievant replied that he still had work to do.

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.”

“[A]buse of State time” is a Group I offense.² Grievant was assigned work to perform during his work hours. He displayed a pattern of ignoring his work duties and watching non-work related videos. The Agency has established that Grievant engaged in a Group I offense by abusing State time. Because Grievant already had a Group I Written Notice for abuse of State time, the Agency was authorized to elevate the disciplinary action to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated a second Group II Written Notice. 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 See, Attachment A, DHRM Policy 1.60.

Management”³ 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.

Grievant argued that the disciplinary action should be reduced because he was experiencing hardship with the passing of his grandfather and the symptoms of Lyme disease, and he received a diagnosis of audible processing disorder. These burdens are unfortunate but Grievant did not establish a connection between them and his behavior. Grievant did not testify or call any witnesses to testify on his behalf. 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 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.

³ Va. Code § 2.2-3005.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.