

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 12/18/15; Decision Issued: 12/30/15; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10711; 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: 10711**

Hearing Date: December 18, 2015  
Decision Issued: December 30, 2015

#### **PROCEDURAL HISTORY**

On September 29, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for being absent in excess of three days without authorization. On September 29, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On October 16, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 3, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 4, 2015 a prehearing telephone conference was held with Grievant and the Agency. A hearing date of December 18, 2015 was selected. The parties were advised by the Hearing Office that the hearing would begin at 9:00 a.m. The Hearing Officer sent the parties a letter confirming the hearing date and start time of 9:00 a.m. On December 18, 2015, a hearing was held at the Agency's office. The hearing was scheduled to begin at 9:00 a.m. and the Agency staff appeared. The Hearing Officer waited until 9:15 a.m. before beginning the hearing to give Grievant an opportunity to arrive. Grievant did not appear at the hearing. After the hearing had concluded, Grievant left a voice message with the EDR office indicating he thought the hearing began at 10:30 a.m. There is no basis to reopen the hearing because Grievant was informed of the hearing time and there is no reason he should have believed the hearing would start at any time other than 9:00 a.m.

#### **APPEARANCES**

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 Virginia Department of Transportation employed Grievant as a Program Admin I at one of its locations. No evidence of prior active disciplinary action was introduced during the hearing.

On July 30, 2015, Grievant received a written counseling from the Supervisor regarding not coming to work, work schedules, and teleworking. He was instructed to swipe his badge each time he entered VDOT buildings to record his entry times. His teleworking privileges were suspended for 90 days. He was instructed to adhere to his work shift which began at 8 a.m. and ended at 5 p.m., Monday through Friday. He was instructed to contact the Supervisor if he was going to be more than 15 minutes late or needed to depart early.

Staff at the Agency's Office use an "in/out board" to identify whether they were "in" or "out" of the Office and where they were located during work hours. Grievant typically reported to work at the Office.

On September 18, 2015, Grievant reported to work at the Office but then indicated he would be "out" of the Office and at the B Center. He did not report to the B Center. He did not notify the Supervisor he intended to work at the B Center that day.

On September 21, 2015, Grievant was given the opportunity to work at the Office or the B Center because of a public event near the center of the city. At 9:02 a.m., Grievant emailed the Supervisor and indicated he was unable to reach the B Center due to road conditions. At 9:33 a.m., the Supervisor emailed Grievant that there was no traffic congestion to reach the Office and that he could either report to the Office or the B Center. Grievant did not report to either location or respond to the Supervisor. He did not report to work at either location from September 21, 2015 through September 24, 2015. He did not have leave scheduled for those dates.

### **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."<sup>1</sup> 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."

"Absence in excess of three days without authorization" is a Group III offense.<sup>2</sup> Grievant was scheduled to report to work on September 21, 2015, September 22, 2015, September 23, 2015, and September 24, 2015. He did not report to work or obtain permission to be absent. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

"[L]eaving work without permission" and "[f]ailure to follow [a] supervisor's instructions" is a Group II offense.<sup>3</sup> On July 30, 2015, the Supervisor instructed Grievant to notify her if he intended to leave work early. On September 18, 2015, Grievant reported to work but left work without permission and without notifying the Supervisor he intended to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

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

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

During the Step Process, Grievant asserted that he suffered from a disability that caused depression, anxiety, high blood pressure, shaking, anger, and sleep disorder. He claimed he was being discriminated against based on his disability. Grievant did not present sufficient evidence to show that his disability caused him to be absent from work or caused him to disregard his Supervisor's instructions.

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 ...."<sup>4</sup> 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 with removal is **upheld**. The Agency's issuance to the Grievant of a Group II 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>4</sup> Va. Code § 2.2-3005.

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