



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11413**

Hearing Date: November 13, 2019

Decision Issued: December 10, 2019

#### **PROCEDURAL HISTORY**

On April 6, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On April 12, 2019, 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 September 3, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 13, 2019, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections employs Grievant as a Grievant Coordinator at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On July 12, 2018, Grievant received a Notice of Improvement Needed/Substandard Performance. The Notice stated, in part, "We also reminded you that your work hours would change to 8 a.m. to 4:30 p.m." She was placed on an Improvement Plan requiring: "you are to report to work as scheduled."

Grievant was expected to report to work at 8 a.m. prior to March 19, 2019. After March 19, 2019, Grievant's work time began at 8:15 a.m. and ended at 4:45 p.m. To be on time, she had to have passed the security check point and reached her office. Grievant signed a "FLSA Work Period Time Sheet".

On February 22, 2019, Grievant arrived at her desk at 8:08 a.m.

On February 28, 2019, Grievant arrived at her desk at 8:08 a.m.

On March 1, 2019, Grievant arrived at her desk at 8:06 a.m.

On March 4, 2019, Grievant arrived at her desk at 8:06 a.m.

On March 7, 2019, Grievant arrived at the Facility at 8:11 a.m.

On March 13, 2019, Grievant arrived at the Facility at 8:14 a.m.

On April 3, 2019, Grievant arrived at the Facility at 8:28 a.m.

On April 9, 2019, Grievant left work early at 4:30 p.m.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”<sup>1</sup> Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

Operating Procedure 110.1 governs Hours of Work and Leaves of Absence. Section (G)(2)(a) provides:

For the purposes of determining work hours, work begins when the employee arrives at the actual workstation (place of performance of essential job functions).

Grievant was instructed on July 12, 2018 to report to work as scheduled. Grievant’s scheduled work hours were 8 a.m. to 4:30 p.m. until March 19, 2019 when her work scheduled was changed to 8:15 a.m. to 4:45 p.m. Grievant was late at least seven times and left work early at least one time from February 22, 2019 to April 9, 2019. Grievant established a pattern of failure to report to work as scheduled. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.

Grievant argued that the Notice of Improvement Needed/Substandard Performance was “bogus and made up.” She claimed she had permission from her supervisor to be tardy or leave early. Grievant argued she was “written up” for timesheets she was directed to change by her supervisor. Grievant did not testify or present testimony from other witnesses. Grievant presented documents. Grievant has not presented sufficient evidence to substantiate her defenses. There is no basis to reverse the Agency’s disciplinary action.

*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

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>4</sup> Va. Code § 2.2-3005.

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 is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</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>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.