

Issue: Group II Written Notice with Suspension (failure to report without notice, failure to follow instructions, unsatisfactory performance); Hearing Date: 06/30/16; Decision Issued: 07/01/16; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10818; 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: 10818

Hearing Date: June 30, 2016

Decision Issued: July 1, 2016

PROCEDURAL HISTORY

On March 3, 2016, Grievant was issued a Group II Written Notice of disciplinary action with a ten workday suspension for failure to report to work without notice, unsatisfactory work performance, and failure to follow policy or instructions.

On March 22, 2016, 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 he requested a hearing. On May 24, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 30, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Community College System employs Grievant as a Housekeeping Supervisor at one of its campuses. He has been employed by the Agency for over six years. Grievant had prior active disciplinary action. On March 9, 2015, Grievant received a Group I Written Notice for failure to follow instruction and/or policy, insubordination, and refusal to work overtime as required.

Grievant was informed that he held a position designated as essential personnel. On December 8, 2015, Grievant received a memorandum regarding Essential Staff and providing, in part:

When an event is foreseen, such as a known inclement weather event, all employees will be notified of their on-call status ahead of the event. During this set time, the employees notified will be required [to] be readily available to be contacted by phone and report to work in a timely manner. For unforeseen events, employees will be contacted by their direct Supervisor. Given that all Facility employees are considered essential, each facilities employee must also take responsibility and is required to contact their direct Supervisor in a timely manner.¹

In February 2016, a snow storm adversely affected the College's operations. College administrators concluded classes should be cancelled but were unsure when

¹ Agency Exhibit 7.

classes could resume. Before classes could resume, employees including Grievant would have to clear snow from the campus walk ways. Agency managers informed staff that even though the campus may be closed for classes, essential personnel might have to report to work.

On Sunday February 14, 2016 at 9:13 p.m., the Supervisor sent a text to his subordinates including Grievant stating:

The College is closed tomorrow Monday February 15, 2016. Please respond to this text when you receive it.

Grievant replied, "Ok".

Mr. M sent a text to Grievant asking, "What [time] we come in[?]" Grievant did not respond.

At approximately 5 a.m. on Monday February 15, 2016, Mr. W spoke with the Supervisor. The Supervisor told Mr. W that employees did not need to report that morning. A short time later, Mr. W told Grievant what the Supervisor told him. Grievant spoke with Mr. M and told him that Mr. W said the Supervisor told Mr. W employees did not need to report to work that morning.

At approximately 8:30 a.m. on Monday February 15, 2016, the Manager spoke with the Supervisor and said that College managers were determining when they planned to have employees come to the College to remove snow. At 10:04 a.m., the Manager called the Supervisor and told him to have employees come to the College to remove snow. At 10:08 a.m., the Supervisor began calling his employees to inform them of their obligation to report to work. At 10:09 a.m., the Supervisor called Grievant but Grievant did not answer. The Supervisor could not leave a voice message with Grievant because Grievant's voice mailbox was full of messages. At 10:17 a.m., the Supervisor called Mr. M and left a message for him to report to work.

At 10:21 a.m., the Supervisor sent all employees, including Grievant, a text entitled "Snow" and stating:

This is a change in the schedule. You are to report to work at 12 noon today Monday February 15, 2016 to clean snow from sidewalks.

The Supervisor did not ask the employees to reply to his text.

Grievant did not report to work on February 15, 2016. He did not contact the Supervisor prior to or after noon on February 15, 2016.

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.”² 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.”

Failure to report to work without notice and failure to follow a supervisor’s instructions are Group II offenses.³ On Monday February 15, 2016, Grievant was instructed by the Supervisor to report to work at noon. The Supervisor called Grievant but Grievant did not answer. The Supervisor could not leave a message because Grievant’s voicemail was full. The Supervisor sent Grievant a text message instructing Grievant to report to work at noon that day. An approximately two hour advanced notice was sufficient to allow Grievant time to learn of the change in plan. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant’s ten work day suspension must be upheld.

Grievant told the Manager that he did not respond because he did not receive the 10:21 a.m. text from the Supervisor. Grievant did not present any evidence to the Hearing Officer to support this assertion. Based on the evidence presented, it appears that if Grievant had looked at his telephone shortly after 10:21 a.m. on February 15, 2016, he would have seen the Supervisor’s text.

Grievant argued that he had to ensure that his family was safe before ensuring that the Agency’s students, staff, and faculty were safe. This argument fails. When asked by the Agency regarding why Grievant did not report to work, Grievant did not claim he failed to report to work because of inclement weather. He indicated he did not receive the Supervisor’s text. Grievant did not claim to have avoided reporting to work because of safety concern.

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”⁴ 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

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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 a ten work day suspension 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
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.⁵

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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