

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 06/28/16;  
Decision Issued: 07/01/16; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10819; Outcome: Full Relief.



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 10819**

Hearing Date: June 28, 2016

Decision Issued: July 1, 2016

#### **PROCEDURAL HISTORY**

On February 29, 2016, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow instructions.

On March 15, 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 28, 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 Housekeeper at one of its campuses. He began working for the Agency in September 2006. The purpose of his position was to, "provide and maintain a safe, comfortable and attractive campus environment that is conducive to teaching and learning."<sup>1</sup> No evidence of prior active disciplinary action was introduced during the hearing.

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.<sup>2</sup>

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<sup>1</sup> Agency Exhibit 6.

<sup>2</sup> Agency Exhibit 7.

In February 2016, a snow storm adversely affected the College's operations. College administrators concluded classes should be cancelled but were unsure when 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 Unit 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 received the Unit Supervisor's text but replied by sending a text to the Immediate Supervisor asking, "What [time] we come in[?]" The Immediate Supervisor did not respond by text.

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

Grievant had an ongoing problem with one of his teeth causing him pain. He had prescription pain medication pills left over from a back injury he suffered on a prior occasion. Grievant took one of the pain medication pills. Sleepiness was a side effect of the pain medication.

At approximately 8:30 a.m. on Monday February 15, 2016, the Manager spoke with the Unit 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 Unit Supervisor and told him to have employees come to the College at noon to remove snow. At 10:08 a.m., the Unit Supervisor began calling his employees to inform them of their obligation to report to work. At 10:17 a.m., the Unit Supervisor called Grievant but Grievant did not answer. The Unit Supervisor left a voice message.

At 10:21 a.m., the Unit 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 Unit 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 Unit Supervisor prior to or after noon on February 15, 2016. On the following day when the Unit Supervisor asked Grievant why he did not report to work, Grievant said because he had taken pain medicine and was asleep when the texts were sent and the phone call was made. He did not wake up until the afternoon of February 15, 2016.

Grievant presented a note dated February 16, 2016 from his Dentist stating, “[patient] was seen today for fillings.”<sup>3</sup>

## 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>4</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.”

Failure to report to work without proper notice is a Group II offense. Grievant did not report to work but mitigating circumstances exist to reduce the 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>5</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.

There are several factors making disciplinary action in this case inappropriate. First, on February 14, 2016, Grievant demonstrated an intent to report to work on February 15, 2016. He asked the Immediate Supervisor at what time he should report for work. Second, the Immediate Supervisor told Grievant early in the morning of

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<sup>3</sup> Agency Exhibit 3.

<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>5</sup> *Va. Code § 2.2-3005.*

February 15, 2016 not to report to work. Third, Grievant was not told by either the Unit Supervisor or the Immediate Supervisor to “stand by” in case the Agency’s plan changed. Grievant relied on the Immediate Supervisor’s statement made on February 15, 2016 that he would not have to report to work on February 15, 2016. Fourth, Grievant suffered from a tooth ache. He took medication with a side effect of sleepiness to reduce the pain he was experiencing. He went to sleep with the understanding that he did not have to report to work on February 15, 2016. Only after he awoke did he realize he was expected to report to work by noon February 15, 2016. Grievant’s degree of fault is not sufficient to support disciplinary action. Mitigating circumstances exists to reverse the disciplinary action.

### **DECISION**

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

### **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

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>6</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>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.