

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 08/04/16; Decision Issued: 08/15/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10844; 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: 10844

Hearing Date: August 4, 2016

Decision Issued: August 5, 2016

PROCEDURAL HISTORY

On May 23, 2016, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instruction.

On June 22, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 11, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 4, 2016, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Representative
Witness

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 Department of Behavioral Health and Developmental Services employed Grievant as a Nursing Services Assistant at one of its facilities. He began working for the Agency in May 25, 2009.

Grievant had prior active disciplinary action. Grievant received a Group I Written Notice on July 23, 2015 for unsatisfactory performance. Grievant received a Group I Written Notice on July 23, 2015 for unsatisfactory attendance/excessive tardiness. Grievant received a Group II Written Notice on March 29, 2016 for failure to follow policy. Grievant received a Group II Written Notice on March 29, 2016 for leaving work without permission.

Grievant was informed by his Supervisor that he was to speak with a person anytime he had unscheduled leave. This instruction was consistent with the Agency’s policy requiring:

When reporting an absence, an employee must contact the supervisor or designee in person unless other forms of communication are approved by the department head. Each employee should know his/her department’s expectations with regard to such contacts.¹

On April 5, 2016, Grievant was scheduled to work but wanted to take unscheduled leave. He called the Facility but did not speak with a Charge Nurse or other person. Instead he left a voice message.

¹ Agency Exhibit 4.

Grievant showed a pattern of reporting to work early and leaving work early. On March 29, 2016, Grievant was told that his work hours would be from 3 p.m. to 11:30 p.m. He was instructed to report at 3 p.m. and not earlier and to leave at 11:30 p.m. and not earlier. On the following day, Grievant “clocked in” at 2:32 p.m. and “clocked out” at 11:14 p.m. He continued to disregard the Supervisor’s instructions on other days.

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 follow a supervisor’s instructions and policy is Group II Written Notice.³ Grievant was instructed to speak with a supervisor in the event he had to take unscheduled leave. He was instructed that leaving a voice mail was not acceptable. On April 5, 2016, Grievant left a voice mail regarding unscheduled leave. He did not speak directly with a supervisor. On March 29, 2016, Grievant was instructed to report to work at 3 p.m. and leave at 11:30 p.m. On the following day, he reported to work early and left work early. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.

An agency may remove an employee who has accumulated two active Group II Written Notices. Grievant has accumulated three active Group II Written Notices thereby justifying the Agency’s decision to remove him from employment.

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 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

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.

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 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.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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