

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 08/29/16;
Decision Issued: 08/30/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 10851; 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: 10851

Hearing Date: August 29, 2016
Decision Issued: August 30, 2016

PROCEDURAL HISTORY

On April 6, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and/or policy.

On May 4, 2016, Grievant timely filed a grievance to challenge the Agency's action. During the Third Resolution Step, the Facility Head reduced the Group II Written Notice to a Group I Written Notice. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 27, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 29, 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 Department of Behavioral Health and Developmental Services employs Grievant as a Trade Tech III at one of its Facilities. He has been employed by the Agency for over 30 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility's practice in its Housekeeping Unit was that if a Housekeeping employee reported to work late, he or she would have to take leave for the missed time. An employee would not be permitted to adjust his or her schedule by working beyond the employee's scheduled end of shift.

Grievant learned that employees working in another unit at the Facility, Buildings and Grounds, were permitted to extend their end of shift by the amount of time they arrived to work late. On March 15, 2016, Grievant approached the Manager and told her that Buildings and Grounds employees could extend their shifts and he wanted to extend his shift when he arrived to work late. He pointed out that he had to rely on public transportation to cross a body of water. He asserted that even if he left his home on time, he could arrive to work late because of delays beyond his control. The Manager told Grievant that he could not extend his shift if he arrived to work late. She told him he had to take leave for the time he was tardy.

The Manager unexpectedly had to be absent from work for approximately a week due to health concerns. She gave the Supervisor many instructions regarding how she

wanted the unit to operate in her absence. She told the Supervisor that if Grievant was late and asked to extend his shift, she would deny Grievant's request.

On March 21, 2016, Grievant was scheduled to report to work at 7:30 a.m. but reported to work at 7:57 a.m. He approached the Supervisor and asked if he could work beyond the scheduled end of his shift. The Supervisor told Grievant "no." Grievant asked if he could address his request with Mr. B, the Unit Head. The Supervisor said he could do so.

In the afternoon of March 21, 2016, Grievant approached Mr. B in a hallway and asked him if he could extend his scheduled shift. Mr. B said Grievant should speak with the Supervisor.

Later in the day, the Supervisor asked Grievant about the matter. Grievant said that Mr. B was going to speak with the Supervisor about Grievant's request. Mr. B did not speak with the Supervisor prior to the end of Grievant's scheduled shift.

Because Grievant was not approached by Mr. B before the end of Grievant's scheduled shift, Grievant assumed it would be permissible for him to extend his shift by approximately a half hour to make up the time missed by his tardy arrival.

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."¹ 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 instructions is a Group II offense.² On March 15, 2016, the Manager instructed Grievant that he could not extend his work shift to make up for a late arrival. On March 21, 2016, the Supervisor instructed Grievant he would not extend his work shift to make up for a late arrival. On March 21, 2016, Grievant worked approximately one half hour beyond the end of his work shift thereby acting contrary to the instructions of two supervisors. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Facility Head reduced the Group II to a Group I. Accordingly, the Group I Written Notice must be upheld.³

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

² See, Attachment A, DHRM Policy 1.60.

³ The Agency should ensure that its records reflect that Grievant received a Group I and not a Group II Written Notice.

Grievant argued that because Mr. B did not speak with him as Mr. B promised⁴ before the end of Grievant's scheduled shift, Grievant was authorized to work an additional half hour. Grievant had been told by two supervisors that he could not extend his scheduled shift to make up for time missed due to tardiness. When Grievant assumed he was permitted to extend his shift, he did so at his own risk. Mr. B's failure to speak with Grievant a second time did not constitute a granting of Grievant's request.

Grievant argued that the Agency failed to comply with policy governing mitigation of tardiness. Grievant was issued a Group I for tardiness but upon further review the Agency elected to retract the Group I for tardiness. Grievant's argument that the Agency failed to comply with policy relates to a written notice that is not before the Hearing Officer. Grievant's argument does not affect the outcome of the written notice before the Hearing Officer relating to his failure to follow 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"⁵ 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.

Grievant argued that he was improperly singled out by the Manager when she told the Supervisor not to grant any request from him to work beyond the end of his scheduled shift. The evidence showed that Grievant was not singled out because on March 15, 2016, he asked the Manager if he could work beyond the end of his shift in order to make up for his tardiness. The Manager did not single out Grievant for any improper purpose such as a protected status such as race, gender, etc.

Grievant argued that the Agency failed to engage in progressive discipline. He argued that the Agency failed to provide him with a verbal and written counseling prior to taking disciplinary action. Although the Agency could have counseled Grievant in lieu of taking disciplinary action, the Agency was not required to do so. An agency is not obligated to counsel an employee as a condition of taking disciplinary action.

⁴ Mr. B testified he made no such promise. The Hearing Officer will assume for the sake of argument that Grievant's assertion is true. Doing so does not affect the outcome of this case.

⁵ *Va. Code § 2.2-3005.*

In light of the standard set forth in the Rules, 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 I 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 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.⁶

[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

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