



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11824**

Hearing Date: September 12, 2022  
Decision Issued: October 3, 2022

**PROCEDURAL HISTORY**

On March 11, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for poor attendance, failure to report to work without notice, absence in excess of three days, unsatisfactory performance, and failure to follow instructions or policy.

On March 18, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 25, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 12, 2022, a hearing was held by remote conference.

**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 employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately four years. Grievant had prior active disciplinary action. The Agency claimed Grievant received a Group I Written Notice in November 2021 for unsatisfactory attendance and abuse of State time.

Grievant's position was designated as essential by the Agency. He was expected to work during inclement weather. Grievant's shift began at 5:45 a.m. and ended at 6:15 p.m.

Grievant was scheduled to work at the Facility on January 28, 2022, January 29, 2022, and January 30, 2022. Grievant did not report to work as scheduled. Grievant claimed he was sick and sought sick leave for those three days.

January 28, 2022 was Grievant's birthday. January 29, 2022 was a day of inclement weather and the Facility operated under Emergency Conditions.

Grievant was scheduled to work at the Facility on February 11, 2022, February 12, 2022, and February 13, 2022. Grievant did not report to work as scheduled. Grievant claimed he was sick and sought sick leave for those three days.

Grievant was required to submit a doctor's note for his absences due to sickness. Grievant did not submit a note from a medical provider excusing his absence from work on January 28, 2022 through January 30, 2022 and from February 11, 2022 through February 13, 2022. During the Agency's fact-finding, the Warden instructed Grievant to present any medical provider's notes regarding his absences. Grievant did not provide any medical provider's notes to the Agency.

Grievant told the Lieutenant he was not actually sick on January 28, 2022, January 29, 2022, and January 30, 2022. Grievant told the Lieutenant he was taking sick leave and celebrating his birthday.

Grievant asserted that he did not report to work from February 11, 2022 through February 13, 2022 because he was in an automobile accident.

### **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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>1</sup>

Operating Procedure 110.1 governs Hours of Work and Leaves of Absences. Section V(1)(a) provides:

The expectation is that all employees will report to work as scheduled.<sup>2</sup>

Section F provides:

2. Use of sick leave ... is granted at the discretion of management / supervisor.
3. Use of sick leave may require verification, at the discretion of the Organizational Unit Head or designee, by a treating physician.<sup>3</sup>

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>2</sup> Agency Exhibit p. 45.

<sup>3</sup> Agency Exhibit p. 36.

Operating Procedure 135.1 provides:

B. Under certain circumstances, an offense typically associated with one offense category may be elevated to a higher level offense due to aggravating circumstances.

1. Aggravating circumstances include factors related to an offense, such as seriousness of the misconduct or previous record of the same type of offense, which indicate a higher or more severe level of disciplinary action is appropriate.

2. The DOC may consider any unique impact that a particular offense has or could have on the DOC, and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.

Group I offenses include, but are not limited to: \*\*\*

3. Abuse of state time, including for example unauthorized time away from the work area, use of state time for personal business, and abuse of sick leave. \*\*\*

Section XII(C)(2) provides:

Absent mitigating circumstances, a repeat of the same, active Group I offense should result in the issuance of a Group II offense notice.

Group II offenses include, but are not limited to:

1. Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure.

During the hearing the Warden testified that Grievant was disciplined for an "abuse of leave."

The Agency poorly drafted the Written Notice and on its face it does not support removal. Grievant abused State leave because he took sick leave when he was not actually sick. Abuse of State time is a Group I offense. The Agency has presented sufficient evidence to support the elevation of that offense to a Group II Written Notice because he abused State time on a day of inclement weather when the Facility faced staffing shortages and he was required to be present.<sup>4</sup> Failure to follow policy is a Group II offense. The Agency has established a basis to issue Grievant a Group II Written Notice. The issuance of a Group II Written Notice without at least a prior active Group II Written Notice does not support removal. If this case is governed by the specific allegations contained in the Written Notice and the Agency's policies there is no basis for removal.

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<sup>4</sup> Presumably, the Agency could elevate the Group I offense to a Group II offense based on repeated behavior. The Agency did not present a copy of the November 2021 Group I Written Notice.

There are facts supporting Grievant's removal. The Agency could have issued a Group II Written Notice for the absences in January and another for the absences in February and then removed Grievant. The Agency could have issued a Group III Written Notice with removal for falsifying records. Grievant submitted leave records claiming he was sick when he knew he was not actually sick. The Hearing Officer's understanding of the Office of Employment Dispute Resolution's interpretation of policy is to favor agencies by asking whether there are facts that support removal under policy even if the Written Notice is not artfully written. In this case there are facts that support removal, accordingly, the Agency's decision to issue a Group III Written Notice with removal is upheld.

Grievant argued there was an unofficial policy that employees could call out sick on their birthdays. The evidence showed no such unofficial policy existed among staff at the Facility. Grievant argued that he was absent three days and not in excess of three days. Grievant is correct. The Agency's policy requires absences in excess of three days and Grievant's January and February absences were not in excess of three days. There remain, however, facts sufficient to support removal for falsifying records.

*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. 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 III Written Notice of disciplinary action with removal 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.

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<sup>5</sup> Va. Code § 2.2-3005.

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.