

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (falsifying leave records), and Termination; Hearing Date: 02/12/18; Decision Issued: 05/01/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11146; Outcome: Partial Relief; **Administrative Review: Ruling Request received 05/08/17; EEDR Ruling No. 2018-4719 issued on 06/01/18; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

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

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

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

In re:

**Case Number: 11146**

Hearing Date: February 12, 2018

Decision Issued: May 1, 2018

#### **PROCEDURAL HISTORY**

On December 1, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to comply with policy. On December 1, 2017, Grievant received a Group III Written Notice for false reporting of leave records. Grievant was removed from employment.

On December 6, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 27, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 12, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representatives  
Agency Party Designee  
Agency's Representative  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 an Offender Workforce Development Specialist at Facility 1. He began working for the Agency on August 10, 2015. Grievant received an overall rating of Exceeds Contributor on his most recent annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Supervisor. The Supervisor's office was located approximately 300 miles from Facility 1. The Supervisor reported to the Manager. The Manager worked at Headquarters. The Superintendent worked at Facility 1.

The Agency used the Time Attendance Leave (TAL) system for employees to report and account for leave requests and approvals. TAL showed employees the amount of accrued leave they had in many categories such as annual leave, personal leave, etc. It did not show any accrued balance for the category of civil work-related leave.

Grievant advised the Supervisor that he wanted to obtain employment at another location. The Supervisor told Grievant that the Agency would "cover" his time devoted

to interviews. Grievant understood this comment to mean he did not have to report as leave his time taken to interview at Agency facilities.

Grievant properly notified the Supervisor in advance of the days he would not be at work.

Grievant lived in City 1 which was approximately 64 miles north of Facility 1 where he worked. His wife got a new job in another part of the State so Grievant and his wife wanted to move to City 2. City 2 was approximately 180 miles south of Facility 1 and 216 miles south of City 1.

Grievant moved to City 2 on September 1, 2017.

Grievant began interviewing at other DOC facilities in July 2017. Because of the length of his drive, he was away from Facility 1 for approximately 8 hours each time he had an interview at another DOC facility near City 2.

Grievant spoke with the Supervisor and told the Supervisor Grievant intended to begin interviewing at other DOC facilities. Grievant told the Supervisor that Grievant would have to use a lot of leave because of the lengthy drives to the interviews. The Supervisor told Grievant not to worry about using personal time and that the Agency would get back with him. The Supervisor told Grievant the Agency would "cover" his leave.

Grievant interviewed at DOC Facility H on July 21, 2017.

On July 31, 2017, Grievant spoke with the Superintendent. Grievant told the Superintendent that Grievant was going on his second interview at Facility H and had applied for jobs at several other facilities. The Superintendent expressed concern that Grievant was spending a lot of time away from Facility 1 and said that Grievant, the Supervisor, and the Superintendent should discuss the matter. The Superintendent went on leave for several weeks without first talking to Grievant about being away from Facility 1.

Grievant interviewed at DOC Facility H on July 31, 2017.

Grievant did not report to work as follows:

On July 21, 2017, Grievant drove to Facility H and was interviewed for a position with the DOC. He did not make an entry into TAL to take leave for his absence.

On July 31, 2017, Grievant drove to Facility H and was interviewed for a position with the DOC. He used TAL on July 20, 2017 to request eight hours of annual leave to be absent on July 31, 2017.

On August 2, 2017, Grievant was absent from work. He did not interview for a position with the Agency. He did not request leave in TAL.

On August 8, 2017, Grievant drove to Facility D and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

On August 9, 2017, Grievant drove to Facility D and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

On August 25, 2017, Grievant drove to Facility G and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

On August 28, 2017, Grievant drove to Facility D and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

On August 29, 2017, Grievant drove to Facility De and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

The Superintendent went on sick leave. He returned on September 4, 2017. On September 5, 2017, Grievant told the Superintendent that he would be away from the Facility for additional interviews. Grievant had interviews on September 12, 2017 and September 14, 2017. The Superintendent told Grievant he could take civil and work-related leave for four hours two times per year. Grievant replied that he did not know about that limitation. Grievant believed the Agency would “cover” his leave because that is what the Supervisor told him.

On September 6, 2017, Grievant was absent from work due to illness. He did not record his sick leave in TAL.

On September 12, 2017, Grievant drove to Facility G and was interviewed for a position with the DOC. Grievant did not initially request leave in TAL. On September 20, 2017, Grievant requested five hours of annual leave for September 12, 2017. Grievant’s Supervisor approved the request on September 21, 2017.

On September 13, 2017, Grievant sent the Supervisor an email stating, “I was appraised by the Superintendent that I am “technically” only allowed 4-hrs agency time for interview-related events.”<sup>1</sup>

On September 14, 2017, Grievant drove to Facility L and was interviewed for a position with the DOC. Grievant did not initially request leave in TAL. On September 20, 2017, Grievant requested five hours of annual leave for September 14, 2017. Grievant’s Supervisor approved the request on September 21, 2017.

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<sup>1</sup> Grievant Exhibit p. 94.

On September 21, 2017, Grievant drove to Facility L and was interviewed for a position with the DOC. Grievant did not initially request leave in TAL. On September 20, 2017, Grievant requested four hours of annual leave and one hour of Family/Personal leave for September 21, 2017. Grievant's Supervisor approved the request on September 21, 2017.

In Grievant's response to the Agency's notice of its intention to take disciplinary action, Grievant discussed two days in which he was absent from work due to illness. Grievant wrote, "I previously did not account for and, honestly, simply and mistakenly overlooked." Regarding the September 6<sup>th</sup> absence, Grievant wrote, "I mistakenly forgot to record my absence in TAL when returning to the facility on Thursday, September 7<sup>th</sup>."<sup>2</sup>

### **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."<sup>3</sup> 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."<sup>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>5</sup>

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.<sup>6</sup>

#### Group II Written Notice

DOC Operating Procedure 110.1 governs Hours of Work and Leaves of Absence. Section U(3)(a) addresses False Reporting of Leave-Time and provides:

Inaccurate reporting of time/leave, failure to properly record time/leave, falsification of time sheets, leave balances, or leave records will be subject to disciplinary action under Operating Procedure 135.1, Standards of Conduct.

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<sup>2</sup> Grievant Exhibit pp. 13 and 14.

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

On August 2, 2017 and September 6, 2017, Grievant was absent from work for reasons unrelated to interviewing at an Agency facility. He was obligated to request leave through TAL so that his leave balances could be reduced. He failed to properly record in TAL his leave taken thereby failing to comply with policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Grievant described his actions as simply a mistake. It is a mistake he repeated and supports the Agency's decision to issue disciplinary action.

### Group III Written Notice

DOC Operating Procedure 110.1 (L) addresses Civil and Work-Related Leave:

1. Civil and Work Related Leave is paid and/or unpaid leave time for employees who are ... interviewing for state positions .... \*\*\*
3. Employees shall be allowed time off from work to participate in interviews for state employment opportunities (including reasonable travel time). Each such absence may require a Leave Activity Reporting Form (P-8) 110 F\_F2 to be submitted or leave to be reported in TAL. Use of this time must be scheduled in advance with the approval of the supervisor and may require verification from interviewing agency (statement, signed by interviewer, indicating agency and time.)
  - a. For lateral transfer or demotion opportunity interviews within the DOC a maximum of eight hours can be used annually.
  - b. Promotional interviews that exceed eight hours annually may be approved at the discretion of the Organizational Unit Head.<sup>7</sup> \*\*\*
  - e. Time exceeding these limits can be approved as for annual, family/personal, or compensatory leave time at the discretion of the Organizational Unit Head.

Grievant was entitled to take eight hours of work-related leave under the Agency's policy. He could exceed that amount by obtaining approval from the Organizational Unit Head. Instead, he took substantially more than eight hours of leave. He did not seek permission from the Organizational Unit Head. His Supervisor was not an Organizational Unit Head. Grievant knew the Agency had a policy governing work-related leave. He knew how to access the policy if he wanted to do so rather than relying on others to interpret the policy for him. Grievant failed to comply with the Agency's policy thereby justifying the issuance of a Group II Written Notice.

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<sup>7</sup> The Organizational Unit Head is the person occupying the highest position in a DOC operating unit.

The Agency alleged Grievant should receive a Group III Written Notice because “[y]our failure to accurately report your time in TAL constitutes false reporting of your leave record.” Grievant argued that the Supervisor told him he would be “covered” because he was interviewing at Agency facilities. It is clear that the Supervisor had only a limited understanding of the Agency’s leave policy and his comments served to mislead Grievant. However, the Agency’s policy was readily available and Grievant should have reviewed the policy himself rather than relying on his misinformed Supervisor. Nevertheless, the Agency has not established that Grievant falsified records because at the time he took work-related leave and failed to report that leave, Grievant (mistakenly) believed his action was allowed by his Supervisor.

The Agency alleged that Grievant did not give the Agency adequate notice of his scheduled interviews. The Agency did not establish this allegation. The evidence showed that Grievant notified the Supervisor by email or verbally each time Grievant expected to be absent from work and did so within a reasonable time period.

Grievant argued that he had worked additional hours and obtained agreement from the Superintendent to offset his absences with the accumulated additional work hours. The evidence showed that the number of hours Grievant supposedly accumulated was not precise, his agreement to utilize the hours was unclear, and the number of hours accumulated would not likely equal the balance of Grievant’s interview hours.

### Mitigation

*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>8</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 further the disciplinary action.

### Recommendation

The Hearing Officer does not agree with the Agency’s decision to make Grievant ineligible for rehire for several reasons. First, Grievant’s actions were primarily devoted

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<sup>8</sup> *Va. Code § 2.2-3005.*



to furtherance of the Agency's mission to provide assistance to inmates. Second, Grievant possessed unique skills and his work performance was satisfactory to the Agency except for the facts giving rise to the disciplinary action. Third, Grievant's Supervisor had no greater knowledge of the Agency's Civil and Work-Related Leave policy than did Grievant. A competent supervisor would have reviewed the policy and immediately informed Grievant of the restrictions. Instead, the Supervisor indicated that Grievant's leave would be "covered." The Supervisor lacked the authority to make such a statement and that statement misled Grievant. If the standard for mitigation were lower, the Supervisor's comment would have been sufficient to mitigate the disciplinary action. Fourth, the Superintendent had a conversation with Grievant regarding his work-related leave but then the Superintendent was away from Facility 1 for several weeks while on medical leave. If the Superintendent had promptly informed Grievant of the Agency's policy, he would have been able to correct his behavior sooner. Grievant had no control over the Superintendent's absence. Accordingly, the Hearing Officer recommends that the Agency change Grievant's status to eligible for rehire.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR 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 EEDR before filing a notice of appeal.