

Issues: Group II (failure to follow policy), Group II (abuse of State time), Group II (late arrivals without permission) Group II (leaving worksite without permission), Group I (excessive tardiness), and Termination due to accumulation; Hearing Date: 05/02/17; Decision Issued: 07/07/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10982; Outcome: Group II for failure to follow policy – No Relief; Group II for abuse of State time – Partial Relief; Group II for Late arrivals without permission – Partial Relief; Group II for leaving worksite without permission – No Relief; Group I for excessive tardiness – Full Relief; and Termination due to accumulation – No Relief; **Administrative Review: Ruling Request received 08/07/17; Outcome: Request denied – untimely (08/11/17 [2018-4598].**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10982

Hearing Date: May 2, 2017

Decision Issued: July 7, 2017

PROCEDURAL HISTORY

On February 16, 2017, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to submit P8 forms. On February 16, 2017, Grievant was issued a Group II Written Notice of disciplinary action with removal for taking lunch breaks in excess of 30 minutes. On February 16, 2017, Grievant was issued a Group II Written Notice of disciplinary action with removal for arriving to work late without permission. On February 16, 2017, Grievant was issued a Group II Written Notice of disciplinary action with removal for leaving the work site during working hours without permission. On February 16, 2017, Grievant was issued a Group I Written Notice of disciplinary action with removal for unsatisfactory attendance or excessive tardiness.

On February 28, 2017, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On March 15, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 2, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency 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. 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 Department of Corrections employed Grievant as a Cognitive Counselor at one of its facilities. He had been employed by the Agency for approximately 23 years.

Grievant was an Exempt employee under the Fair Labor Standards Act. His work hours were from 7:30 a.m. until 4 p.m. with a 30 minute lunch break.¹ Grievant was expected to be at the front gate by 7:30 a.m. The Agency gave Grievant a five minute grace period to account for time needed to walk through the Facility.

An employee who took leave was required to submit a P8 form to a supervisor to account for the leave taken and to allow for a reduction in the employee's leave balances. If an employee failed to submit a P8 form, his or her leave balances were overstated.

¹ His work scheduled was changed on February 8, 2017 to begin at 8 a.m. and end at 4:30 p.m.

On October 31, 2016, Grievant reported to work at 7:46 a.m. He left the Facility at 8:22 a.m. without permission. He missed 7.3 hours of work but did not submit a P8 form.

On November 1, 2016, Grievant did not report to work as scheduled. He did not notify the Agency in advance of his shift that he would not be working. He did not submit a P8 form.

On November 2, 2016, Grievant reported to work at 7:46 a.m. He left for lunch at 10:45 a.m. He returned from lunch at 12:40 p.m. He left work at 4:01 p.m.

On November 4, 2016, Grievant reported to work at 7:51 a.m. He left for lunch at 11:15 a.m. He returned from lunch at 12:46 a.m. He left work at 3:50 p.m.

On November 7, 2016, Grievant reported to work at 7:57 a.m. He left for lunch at 11:01 a.m. He returned from lunch at 12:56 p.m. He left the Facility at 4:04 p.m.

On November 8, 2016, Grievant did not report to work as scheduled. He did not call the facility in advance to report that he would not be coming to the Facility that day. He did not submit a P8 form.

On November 9, 2016, Grievant reported to work at 7:38 a.m. He left for lunch at 11:01 a.m. He returned from lunch at 12:48 p.m. He left the Facility at 3:58 p.m.

On November 17, 2016, Grievant reported to work at 12:31 p.m. He left work at 4 p.m. He did not notify the Facility that he would be arriving late. He did not submit a P8 form.

On November 21, 2016, Grievant reported to work at 7:52 a.m. He left for lunch at 11:03 a.m. He returned from lunch at 12:26 p.m. He left the Facility at 4 p.m.

On December 7, 2016, Grievant reported to work at 12:40 p.m. He departed the Facility at 4:02 p.m. He did not submit a P8 form.

On December 13, 2016, Grievant reported to work at 8:15 a.m. He left for lunch at 10:58 a.m. He returned from lunch at 12:33 p.m. He left the facility at 3:57 p.m.

On January 5, 2017, Grievant reported to work at 9:17 a.m. He left for lunch at 11:11 a.m. He returned from lunch at 12:15 p.m. He left the Facility at 4:02 p.m. He did not submit a P8 form.

On January 17, 2017, Grievant reported to work at 7:30 a.m. He left the Facility at 11:03 a.m. and did not return. He did not submit a P8 form.

On January 20, 2017, Grievant reported to work at 12:39 p.m. He left the Facility at 4:07 p.m. His late arrival was not pre-approved. He did not submit a P8 form.

On January 23, 2017, Grievant reported to work at 12:29 p.m. He left the Facility at 3:59 p.m. He did not obtain prior approval to be late. He did not submit a P8 form.

On February 1, 2017, Grievant reported to work at 11:45 a.m. He left the Facility at 4:05 p.m. He did not obtain prior approval to be late. He did not submit a P8 form.

On February 3, 2017, Grievant arrived to work at 12:50 p.m. He left the Facility at 4:06 p.m. He did not obtain prior approval to be late.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Group II – Failed to Submit P8 Forms

Under the Agency’s policies, employees are required to submit P8 forms to account for their paid absences.⁵ Failure to submit P8 forms means the employee received paid time off from work but his or her leave balances are not reduced. The effect of this practice is a theft of leave. Grievant repeatedly failed to submit P8 forms. The Hearing Officer does not believe Grievant simply forgot to submit the forms, his pattern of behavior shows an intentional practice. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Group II Written Notice – Excessive Lunch Breaks

Group I offenses include, “[a]buse of state time, including for example unauthorized time away from the work area” Grievant took many lunch breaks exceeding his allotted 30 minute lunch period. The Agency has established that Grievant abused State time thereby justifying the issuance of a Group I Written Notice.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ The Agency failed to submit a copy of its leave policy. This would usually result in the reduction of the disciplinary action to a Group I from a Group II because the Agency failed to establish a violation of policy. In this case, however, Grievant’s behavior amounted to theft of paid leave. Theft is a Group III offense.

The Agency argued that Grievant should receive a Group II Written Notice but did not present the policy Grievant violated.

Group II Written Notice – Late Arrivals Without Permission

Arriving late without permission is the same as tardiness.⁶ Tardiness is a Group I offense. The Agency established that Grievant established a pattern of arriving late without permission to be late. Grievant should receive a Group I Written Notice for tardiness.

Group II Written Notice – Leaving Work Early Without Permission

“Leaving the work site during working hours without permission” is a Group II offense. Grievant was authorized to leave the Facility to take a lunch break. He was not authorized to leave the Facility to conclude his shift early on the several days identified by the Agency. The Agency has established that Grievant left the work site during work hours without permission thereby justifying the issuance of a Group II Written Notice.

Group I Written Notice – Tardiness

The Agency established that Grievant had a pattern of reporting to work after the beginning of his shift and after accounting for a five minute grace period. The Agency also issued a Group II discussed above which the Hearing Officer reduced to a Group I Written Notice. It is not appropriate to issue a second Written Notice for tardiness. Accordingly, the Group I Written Notice must be reversed.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices and, thus, his removal must be upheld.

Defenses

Grievant argued that the disciplinary action was too harsh and the Agency could have addressed the matter with lesser disciplinary action. Grievant argued that the Agency did not consider the times when he worked beyond his normal shift.

The Agency has presented sufficient evidence to support Grievant’s removal. Although it could have chosen a letter level of discipline, it was not obligated to do so.

⁶ The Agency did not discipline Grievant for failure to report to work as scheduled. It presented evidence of days Grievant was scheduled to report to work, but did not come to work on those days. Failure to report to work as scheduled is a Group II offense. The Agency’s Written Notice asserts, “a review of your work scheduled revealed that you arrive to work late” (Emphasis added).

In addition, it was not obligated to consider the time Grievant worked beyond his normal shift. Grievant did not establish how much time he worked beyond his normal shifts.

Grievant asserted the Agency discriminated against him. No credible evidence was presented to support this allegation.

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”⁷ 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 II Written Notice of disciplinary action with removal for failure to submit P8 forms is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal for taking lunch breaks in excess of 30 minutes is **reduced** to a Group I Written Notice. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal for arriving to work late without permission is **reduced** to a Group I Written Notice. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal for leaving the work site during working hours without permission is **upheld**. The Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action with removal for unsatisfactory attendance or excessive tardiness is **rescinded**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

⁷ Va. Code § 2.2-3005.

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 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 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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.