



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11591

Hearing Date: December 18, 2020

Decision Issued: December 21, 2020

PROCEDURAL HISTORY

On May 11, 2020, Grievant was issued a Group I Written Notice of disciplinary action for leaving the worksite without permission.

On May 22, 2020, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 21, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 18, 2020, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 employs Grievant as a Lieutenant at one of its facilities. She has been employed by the Agency for approximately 24 years. No evidence of prior active disciplinary action was introduced during the hearing.

On March 12, 2020, the governor declared a State of Emergency in response to the spread of the coronavirus.

Grievant had been absent from work while on short-term disability. Her first day to return to work was March 12, 2020. Grievant was sick when she reported to work at approximately 5:00 a.m. or 5:30 a.m. She was coughing excessively. Her throat hurt, breathing became difficult, and she was losing her voice. Her demeanor reflected someone who was sick.

Grievant went to the master control office. Captain W and Captain H were working in the office as well. Captain W was the outgoing Watch Commander and Captain H was the oncoming Watch Commander. On March 12, 2020, Captain H supervised Grievant. She was obligated to obtain his permission to leave the Facility.

Grievant spoke to Captain W. Captain W questioned why Grievant was working. Grievant went to the restroom to splash water on her face and regain her composure. Grievant continued to cough. Grievant spoke to Captain H and said she was sick and

needed to leave immediately to go the doctor. Captain H did not respond. Captain W told Captain H that Grievant was sick and needed to go home. Captain H did not respond to Captain W. Grievant asked Captain H for the location of the duty roster. Grievant's objective was to obtain the duty roster and sign out so that she could leave the facility. Captain H said the duty roster was in the basement.

Grievant left the Facility and went home. She left prior to 7:30 a.m. It is not likely that Facility managers who outranked Captain H were present at the Facility when Grievant left.

CONCLUSIONS OF POLICY

Leaving the worksite during work hours without permission is a Group II offense.¹ On March 12, 2020, Grievant asked Captain H for permission to leave the Facility because she was sick. Captain H did not answer Grievant's request and, thus, Grievant did not have permission to leave the Facility. Nevertheless, Grievant left the Facility. Although the Agency has established that Grievant left the facility without permission, there is no basis for disciplinary action in this case.

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"² 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.

On March 12, 2020, Grievant was sick and asked captain H if she could leave the Facility. Captain H heard Grievant's request, but did not reply. Captain H could have told Grievant that she had or did not have permission to leave the facility. Instead, Captain H chose not to respond. His failure to respond to Grievant was unreasonable. He should have instructed Grievant to leave the Facility.

Grievant's actions were reasonable at all times. She informed Captain H she was sick and needed to go home. She asked for permission to leave. After leaving the

¹ See, Operating Procedure 135.1, Standards of Conduct.

² *Va. Code § 2.2-3005.*

Facility, she went home and called her doctor. The doctor told Grievant not to come to the doctor's office because she was displaying signs of COVID19 and to contact the local health department. Grievant contacted the local health department. She did not receive a COVID19 test from the local health department because testing was limited at that time. She was told to self-quarantine and she did so. On March 12, 2020, Grievant did not know whether she had COVID19 and whether she actually had COVID19 is not relevant. What is significant is that she displayed symptoms of COVID19 on the same day that the Governor declared a state of emergency due to COVID19. If she had remained at the facility while knowing she was displaying symptoms of COVID19, her actions would have been improper and present a significant danger to other employees and inmates. Grievant made the right decision to leave and attempted to obtain permission from Captain H who improperly disregarded her request. Grievant acted to protect the employees and inmates at the Facility. Grievant may not be disciplined for doing precisely what she should have done under the circumstances she was facing.

The Agency argued Grievant did not tell Captain H she was sick or ask to leave the Facility. Captain H testified Grievant did not tell him she was sick or ask to go home. Captain H's testimony is not believable. Grievant was within two feet of Captain H as she spoke to him and told him she was sick and needed to go home. Captain W observed Grievant speaking with Captain H and telling Captain H that Grievant was sick and needed to go home. Captain W told Captain H that Grievant was sick and needed to go home. Captain H testified he did not recall hearing Grievant coughing even though Captain W was so concerned about Grievant's coughing that Captain W immediately put on a mask for safety. Captain H knew or should have known Grievant was sick. Captain H failed to respond to Captain W just as he did when he spoke with Grievant. Captain H should have instructed Grievant to leave the Facility. His failure to do so renders the Agency's disciplinary action unreasonable.

In light of the standard set forth in the Rules, the Hearing Officer finds that the Agency's disciplinary action exceeds the limits of reasonableness and must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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.

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 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 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

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