

Issue: Group I Written Notice (excessive absences); Hearing Date: January 14, 2002;
Decision Date: January 18, 2002; Agency: Department of Corrections; AHO: Carl
Wilson Schmidt, Esquire; Case Number: 5356; **Administrative Review: EDR
Ruling requested 01/28/02; EDR Ruling Date: 04/04/02; Outcome: Hearing
Officer's decision upheld (Ruling #2002-024)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5356

Hearing Date: January 14, 2002
Decision Issued: January 18, 2002

PROCEDURAL HISTORY

On September 5, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

You have called in nine (9) times for a total of twenty (20) days or one hundred seventy six (176) hours. Six (6) of the nine (9) times have been in conjunction with your rest days (day before or day after). On February 9, 2001, you were placed on leave restriction in an effort to address your call-in problems, yet have continued to call-in and established a pattern of "abuse of sick leave."

On October 4, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 18, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 14, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Agency Representative
Regional Employee Ombudsman
Unit Manager
Major
Associate Warden
Assistant Warden Operations
Major
Lieutenant
Captain
Assistant Warden Programs

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action.

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:

At the time of the disciplinary action, the Department of Corrections employed Grievant as a Corrections Sergeant. The Agency has employed Grievant for approximately 21 years. Although Grievant had received prior disciplinary action, he had no active discipline.

Grievant and other corrections staff follow a set work schedule which is designed to minimize overtime and account for days worked and leave taken. The schedule establishes set rest days during which Grievant does not work. From January 2, 2001 to August 9, 2001, Grievant was absent from work on nine separate occasions for a total of twenty days. Six of the nine times coincided with his rest days.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

Group I offenses include “[u]nsatisfactory attendance.” DOCPM § 5-10.15(B)(1). Policy 5-10 does not provide a minimum number of days of absences that must be met before a Group I is justified. Each case must be evaluated on an individual basis. After considering the number of separate incidences of leave taken and the total number of days of leave taken, the Hearing Officer concludes that the Agency has met its burden of proof that Grievant’s attendance has been unsatisfactory.

Most disciplinary action is directed at correcting employee behavior that, in itself, is wrong or improper. The objective of correcting unsatisfactory attendance, however, is not necessarily to correct a malicious or improper action by an employee, but is to prevent harm to the Agency’s operations that may result from being unable to properly staff its operations. Understaffed correctional facilities may jeopardize employee and inmate safety. The Agency must be able to properly plan for its manpower needs and be able to rely on the ability of its staff to work as scheduled. In this case, Grievant used his accrued leave balances when he was sick. He did not go on leave without pay status. Although he could not control when and if he was sick, his absences disrupted Agency operations. Thus, the Agency appropriately issued Grievant a Group I Written Notice for unsatisfactory attendance.

Although the Written Notice suggests the Agency is disciplining Grievant for the Group I offense of “abuse of sick leave”, he did not abuse his leave. His leave use was merely excessive. Grievant has construed the Agency’s choice of words to suggest it is disciplining him for “Abuse of state time”¹ a separate Group I offense. The Hearing Officer recommends the Agency re-issue the Group I Written Notice to state Grievant is being disciplined for “Unsatisfactory attendance” with an issue date of September 5, 2001 and an inactive date of September 6, 2003.²

Grievant contends he cannot be disciplined for excessive leave because he was not first placed on leave restriction.³ It is not necessary for the Agency to place

¹ See Grievant’s step response.

² Grievant correctly pointed out that the original written notice issued by the Agency was in error because it showed the inactive date of the discipline as being in 2004. The Agency corrected its mistake during the grievance step process. Group I offenses are active for only two years and, thus, the inactive date should be September 6, 2003.

³ Placing an employee on leave restriction enables the Agency to closely monitor sick leave taken and notifies the employee that the Agency considers the employee’s leave use problematic.

Grievant on leave restriction before it can discipline him for unsatisfactory attendance. Grievant was not placed on leave restriction. Although the Captain attempted to place Grievant on leave restriction⁴, the Unit Manger informed Grievant he was not on leave restriction.⁵

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

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific

⁴ See Agency Exhibit 6.

⁵ Grievant has two separate supervisors and it is unclear how their duties overlap regarding leave reporting.

error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer