

Issue: Group II Written Notice (failure to report to work without proper notice to Supervisor); Hearing Date: 08/06/03; Decision Issued: 08/06/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5766



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5766

Hearing Date: August 6, 2003
Decision Issued: August 6, 2003

PROCEDURAL HISTORY

On April 21, 2003, Grievant was issued a Group II Written Notice of disciplinary action for:

Did not report to work as scheduled on 4/16/03, nor notify supervisor for failure to report.

On May 20, 2003, 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 he requested a hearing. On July 7, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 6, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Lieutenant

ISSUE

Whether Grievant should receive a Group II 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:

The Department of Corrections employed Grievant as a Corrections Officer for approximately 16 years. His work performance was satisfactory to the Agency. No evidence of prior disciplinary action against Grievant was introduced.

On April 16 and 17, 2003, Grievant was scheduled to work at the Agency's Facility. He did not report to work and did not notify his supervisor that he would be absent from work.

CONCLUSIONS OF POLICY

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.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. DOCPM § 5-10.16(B)(1). As a condition of employment,¹ Facility employees are expected to comply with a Facility policy stating:

¹ Agency Exhibit 5.

Security personnel are required to call in at least one (1) hour in advance for emergency absences and speak with the shift commander. An employee [who] must be absent because of illness or other unanticipated reasons shall notify their supervisor no later than one-half hour after the beginning of normal work hour. An employee who fails to so notify the supervisor may be considered absent without leave.

Grievant's behavior was contrary to established written policy because he failed to notify his supervisor that he would be absent on April 16 and 17 2003. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.

Grievant argues that his failure to comply with established written policy resulted from his "going through some emotional times." Grievance seeks "mercy" because his failure to comply with policy was an aberration resulting from an unusual circumstance in his life. The Hearing Officer has only the power authorized by the *Grievance Procedure* and the *Rules for Conducting Grievance Hearings*. The authority to make decisions based on equity considerations has not been granted to the Hearing Officer. Thus, the Hearing Officer cannot reverse the Agency's disciplinary action.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.²

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.