

Issue: Group III Written Notice with termination (absence in excess of 3 days without proper notice to supervisor or satisfactory reason); Hearing Date: 08/06/03; Decision Issued: 08/06/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5767



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5767

Hearing Date: August 6, 2003

Decision Issued: August 6, 2003

PROCEDURAL HISTORY

On May 16, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Absence in excess of three days without proper authorization or a satisfactory reason. Did not report to work during the period of April 30, 2003 through May 4, 2003 nor contact supervisor for authorization to be absent from work.

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

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for being absent in excess of three days without proper authorization or a satisfactory reason.

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. Grievant received a Group II Written Notice on April 21, 2003 for failure to report to work as scheduled on April 16, 2003 on April 17, 2003.¹

Grievant was scheduled to work on April 30, 2003 and May 1, 2003 through May 4, 2003. On April 30, 2003, Grievant called his supervisor and said he would be reporting to work. Instead, Grievant did not report to work on April 30, 2003. He also did not report to work on May 1, 2003 through May 4, 2003. He did not notify the Agency that he would not be reporting to work. Because Grievant failed to report to work, the Agency had to adjust the work schedules of other employees.

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.

¹ Agency Exhibit 1.

"[A]bsence in excess of three days without proper authorization or a satisfactory reason" is a Group III offense. Grievant was absent from work for more than three days without proper authorization. He presented no evidence suggesting he was unable to contact supervisor. He presented insufficient evidence to establish that he was emotionally incapacitated and unable to notify the Agency that he would be absent due to mental or physical illness. Accordingly, the Agency has established sufficient facts to support its issuance to Grievant of a Group III Written Notice.

Grievant argues that his failure to report to work resulted from his "going through some emotional times." On April 21, 2003, Grievant met with the Superintendent to discuss his failure to report to work on April 16 and 17, 2003. During that meeting Grievant was made aware of the importance of either reporting to work or timely notifying the Agency that he would be unable to report to work. In light of this evidence, there is no basis to excuse Grievant's failure to contact the Agency prior to his absence.

Grievance seeks "mercy" because his failure to report 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 III Written Notice of disciplinary action with removal 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.