

Issue: Group I Written Notice (inadequate or unsatisfactory job performance); Hearing
Date: 10/15/03; Decision Issued: 10/21/03; Agency: DOC; AHO: Carl Wilson
Schmidt, Esq.; Case No. 5816



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5816

Hearing Date: October 15, 2003
Decision Issued: October 21, 2003

PROCEDURAL HISTORY

On May 22, 2003, Grievant was issued a Group I Written Notice of disciplinary action for:

Inadequate or Unsatisfactory Job Performance; failure to call in to work without proper notice to supervisor. On May 16, 2003, you failed to use proper call in procedure when you failed to call your supervisor and inform him that you would not be reporting to work. According to your testimony and verified by your supervisor, this is not a first occurrence of this type of incident. This was a violation of policy.

On June 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 September 16, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Grievant's Representative
Agency Representative
Three additional witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

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 employs Grievant as a Building and Grounds Superintendent. Grievant reported directly to the Assistant Warden of Operations (AWO) until July 2003. Grievant has been employed by the Agency for approximately 18 years and received favorable work evaluations.

On December 16, 1998, the Warden issued a memorandum to all employees including Grievant stating:

Non-security personnel who must be absent because of illness shall notify their supervisor no later than one-half hour after the beginning of the normal work shift. An employee who fails to notify the supervisor may be charged with unauthorized leave and may be subject to disciplinary action in accordance with the employee Standards of Conduct.

On several occasions, the AWO reminded Grievant of his obligation to notify the AWO directly when Grievant would not be coming to work as scheduled.

On May 16, 2003, Grievant was scheduled to work but could not come to work due to personal illness. He notified his secretary that he would be out of the office. If Grievant's secretary needed to reach Grievant, she had his pager and cell phone numbers. Grievant did not notify the AWO that he would be absent or ask his secretary

to notify the AWO of his absence. The AWO wished to speak to Grievant and asked Grievant's secretary if Grievant was at work. She inform the AWO the Grievant was out sick for the day.

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.

"Inadequate or unsatisfactory work performance" is a Group I offense.¹ The Agency's policy required Grievant to notify his supervisor when Grievant would not be at work due to illness. On May 16, 2003, Grievant notified his secretary but not his supervisor that he would be absent. Grievant did not ask his secretary to inform the AWO that he would be absent. When Grievant failed to follow the Agency's policy, his behavior was inadequate or unsatisfactory work performance. Accordingly, the Agency's issuance of a Group I Written Notice must be upheld.

Grievant argues that he was easily accessible² by cell phone or pager. If his supervisor wished to reach him, the supervisor could have done so. Moreover, Grievant informed his secretary that he would be absent and the reason for his absence. In essence, Grievant's position is that the Agency should not expect him to follow the written procedure because following the procedure would not have made him any more accessible to his supervisor. The problem with Grievant's argument is that it is the decision of Agency managers as to how and when an employee must notify the Agency that the employee would be away from work due to illness. Grievant is not free to disregard Agency procedure even in those circumstances where he believes following the procedure is unnecessary.

Grievant contends that the AWO singled him out for disciplinary action because of his dislike of Grievant. Although evidence was presented suggesting that Grievant and the AWO sometimes have conflict, no credible evidence was presented³ showing

¹ DOCPM § 5-10.15(B)(4).

² Even though Grievant was away from work due to illness, he called the Facility at least three times to address Agency business.

³ A Captain was having difficulty reporting to work as scheduled. Under normal circumstances, the Captain would report to the Major regarding work absences. In January 2003, the AWO sent the Captain a memorandum requiring the Captain to speak directly with the AWO anytime the Captain called in because of an expected absence. Grievant alleges the Captain was absent on July 7, 2003 and called

that the AWO targeted Grievant for disciplinary action or treated Grievant differently from other employees who were absent without notifying their supervisors.

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

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.⁴

someone other than the AWO, yet the Captain did not receive a Group I Written Notice. The Captain's testimony during the hearing was not developed well-enough for the Hearing Officer to determine whether Grievant's allegation is supported. It is unclear whether the Captain failed to contact the AWO as alleged, or when any such absence may have occurred. Accordingly, the evidence is insufficient to show Grievant and the Captain were treated differently by the AWO.

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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