

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions); Hearing Date: 12/14/05; Decision Issued: 12/15/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8212; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8212

Hearing Date: December 14, 2005
Decision Issued: December 15, 2005

PROCEDURAL HISTORY

On September 13, 2005, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. She was removed from employment based on the accumulation of disciplinary action. On September 19, 2005, 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 November 10, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 14, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

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. 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 at one of its Facilities. She had been working for the Agency for approximately nine years until her removal effective September 13, 2005. On July 20, 2004, Grievant received a Group I Written Notice for inadequate or unsatisfactory job performance. On January 28, 2005, Grievant received a Group III Written Notice with suspension for acts of physical violence or fighting.¹

On August 10, 2005, Grievant met with Lieutenant J for a counseling session regarding placing her on leave restriction. Following their meeting, Lieutenant J provided Grievant with a memorandum outlining the restriction. Grievant signed the memorandum. The memorandum stated, in part:

I advised you during the session based on your call-ins to work thus far for Year 2005, and no sick leave has accrued, I am placing you on 'Leave Restriction Status' in accordance with IOP #209 – Reporting Leave. You will be on 'Leave Restriction Status' from August 10, 2005 until January 9, 2006.

¹ Agency Exhibit 3.

I explained to you that being on 'Leave Restriction Status' requires you to bring in doctor's verification if you call-in. You were also advised it will be your responsibility to forward the doctor's verifications (the first days you return to work), to the Shift Commander. It is also noted that you will be required to bring in verification for any unscheduled leave that you take without prior approval.²

Grievant testified during the hearing that when she met with Lieutenant J, he stated she was required to produce an excuse for any absence regardless of the reason for absence.

On August 30, 2005 at 3:30 a.m., Grievant called the Facility and informed Lieutenant H that she would not be coming to the Facility to work as scheduled. Lieutenant H heard Grievant say that she was not coming to work because she was taking her son to the doctor. He wrote in the log book "Taking son to Dr." as the reason Grievant would not be coming to work. Lieutenant H told Grievant that he would tell the next shift commander that Grievant would not be at work. He later informed Lieutenant C of Grievant's telephone call.

Grievant did not bring in any doctor's excuse. When asked for an excuse, Grievant told Agency employees that the doctor would not provide her with an excuse since she was not the patient treated by the doctor.

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). Grievant was instructed to provide the Agency with a written excuse on those occasions she was absent from work. Grievant was absent from work on August 30, 2005 but she failed to provide an acceptable and timely excuse for her absence. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.³

² Agency Exhibit 2.

³ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

Grievant had an active Group III Written Notice and a Group I Written Notice. With the addition of a Group II Written Notice, the Agency has presented evidence of a sufficient number of active disciplinary actions to support its removal of Grievant based on the accumulation of disciplinary action.⁴

Grievant testified that when she called Lieutenant H she told him she had car problems and that she was going to the doctor with her child. Lieutenant H testified that Grievant only mentioned that she was taking her child to the doctor. Assuming for the sake of argument that Grievant's testimony is correct, that fact does not affect the outcome of this appeal. Grievant understood that she needed to bring an excuse "the first days you return to work" for any reason she was absent. Grievant presented the Hearing Officer with a note from an individual indicating that on August 30, 2005 he replaced a windshield for a vehicle belonging to Grievant. Grievant did not promptly present the Agency with the document. Even if the document had been presented timely, it is inadequate. Grievant worked a 12 hour shift. There is no evidence to suggest that the windshield installation required 12 hours. Grievant should have been able to work at least a portion of the day.

Grievant argued that the Agency has inconsistently disciplined its employees. She presented evidence of Corrections Officer S who was also placed on leave restriction and received the same leave restriction counseling memorandum Grievant received. Corrections Officer S was 30 minutes late for work because of car trouble. She called her supervisor in advance of her shift. When she arrived at work she was not asked to provide documentation of her car problem. The factual circumstances of Corrections Officer S and Grievant are materially different. Grievant was absent from work for her entire 12 hour shift. Corrections Officer S was late to work by 30 minutes. Her tardiness was approved by her supervisor prior to being late. Grievant's absence was not approved in advance. The evidence is insufficient for the Hearing Officer to conclude that the Agency singled out Grievant for disciplinary action.

Grievant presented documents establishing the Agency's obligation to provide equal employment opportunity. No evidence was presented showing the Agency acted contrary to these documents.

Grievant argues she had leave available to cover her time away from work. This argument is irrelevant. The Agency's leave restriction required documentation regardless of the availability of leave.

DECISION

⁴ DOCPM § 5-10.16(C)(2).

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

APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.⁵

⁵ 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