

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 02/14/06;
Decision Issued: 02/15/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8270; Outcome: Agency upheld in full; **Administrative Review: HO**
Reconsideration Request received 03/02/06; Reconsideration Decision issued
04/04/06; Outcome: Original decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8270

Hearing Date: February 14, 2006
Decision Issued: February 15, 2006

PROCEDURAL HISTORY

On August 31, 2005, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. 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 January 23, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 14, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 employs Grievant as a Corrections Officer at one of its Facilities. Grievant worked the day shift beginning at 5:45 a.m. and ending at 6:15 p.m. She worked on the "A" break. She received a Group I Written Notice on November 2, 2004 for unsatisfactory attendance or excessive tardiness.

Employees who know they will not be coming to work are expected to call the Facility at least two hours prior to their shifts to inform Agency staff of their status. Employees working on the day shift would call the night shift watch commander. If Agency managers know at least two hours in advance that an employee will not appear for his or her scheduled shift, the Agency managers can determine whether to "draft" someone from the shift at the Facility and make that person work into the following shift while the Agency attempts to obtain a replacement for the absent employee.

After their scheduled shift begins, absent employees are expected to call the supervisor on their shift to obtain approval for the leave requested.

Employees are informed of the leave reporting process during new employee orientation, shift briefings, and memorandums sent to employees. For example, on

August 30, 2004, the Agency distributed a memorandum to all employees including Grievant regarding leave approval.¹ The memo stated:

According to Department of Corrections Procedure 5-12, Hours of Work and Leaves of Absences, employees shall provide notice to their supervisor and request approval for all leave.

An employee who must be absent because of illness or other unanticipated reasons shall follow established call-in procedures. Employees shall keep their supervisors updated of any changes in status as they occur and as directed by supervisor.

Failure to provide proper notification of an absence may result in disciplinary action taken in accordance with the Employee Standards of Conduct.²

Grievant experienced medical problems preventing her from working full time without restriction. On July 7, 2005, Grievant called Lieutenant J and said she would be out of work for several days and returning on July 25, 2005. Lieutenant J wrote this information on the call-in log and passed that on to the oncoming shift. Lieutenant J had the authority to approve leave for employees working on his shift, but did not have the authority to approve Grievant's leave request since she did not work on his shift.

Captain P was the shift commander of the day shift. He was responsible for approving Grievant's leave requests. Grievant did not contact him directly to inform him of how long she would be absent from work and to seek approval for any of her medical leave. Grievant returned to work on August 9, 2005.

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.

DOCPM § 5-12.10(D) governs the procedure employees must follow if they know they will be absent due to illness. Under this policy, an employee working on the day

¹ On September 1, 2004, Grievant signed a document acknowledging her receipt of the memorandum.

² Agency Exhibit 3.

shift must take two separate actions. First, the employee must “notify the officer in charge, or the shift commander, at least two hours before the beginning of [her] shift.” The officer in charge of the shift commander would be supervisor of the night shift. Second, the employee must “notify the supervisor not later than one-half hour after the beginning of the normal work house.” This supervisor would be employee’s immediate supervisor on the day shift or the shift commander on the day shift.

For the time periods at issue, July 25, 2005 to July 29, 2005 and August 4, 2005 to August 9, 2005, Grievant attempted to complete the first step, but she did not make any attempt to complete the second step. On July 11, 2005, Grievant notified the shift commander of the **night** shift that she would be absent from work due to illness. Grievant submitted to the Agency Human Resource office a note from her doctor dated July 7, 2005 for the period until July 14, 2005, and a note dated July 14, 2005 with return to work on July 15, 2005 for light duty work for two weeks.³ Grievant did not contact her direct supervisor on the **day** shift or the shift commander on the **day** shift. By failing to contact a supervisor on the shift she worked, she did not provide her supervisor with information about how long she would be out from work. Grievant’s supervisor could not adequately plan shift assignments without knowing how long Grievant would be absent from work.

“Failure to ... comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant failed to comply with DOCPM § 5-12 thereby justifying the issuance of a Group II Written Notice. The Agency reduced the Group II to a Group I Written Notice. The Agency’s issuance of a Group I Written Notice must be upheld.

Grievant argues she contacted shift commanders other than Captain P and told them to inform Captain P that she was under doctor’s care and would be out of work for specific dates. She argues she also informed the Agency’s human resource office of this information. Although Grievant did not testify, if the Hearing Officer assumes for the sake of argument that her assertions are true, Grievant’s actions were in furtherance of the first step required under the policy. Grievant did not complete the second step, namely speaking with day shift supervisor and obtaining approval for leave requests.

Grievant argues that the policy was not followed regularly at the Facility. No evidence was presented to support this contention. Testimony from the Agency’s witnesses indicated that they believe the policy was routinely applied and strictly enforced.

Grievant argues that the Shift Commander of the day shift did not enforce the policy requiring Grievant to notify the day shift supervisor. Captain P was the shift

³ On August 8, 2005, Grievant’s doctor faxed a note to the Agency Human Resource Office for the period August 4, 2005 to August 9, 2005 with a return to light duty on August 9, 2005. On August 12, 2005, Grievant presented a note indicating she should be on light duty until she sees an orthopedic. See, Agency Exhibit 2.

commander of the day shift. He testified that although DOCPM § 5-12 required employees to call him within 30 minutes after the beginning of the day shift, he did not take disciplinary action against employees so long as they called him at some point during the day shift – even if the call took place more than 30 minutes after the start of the shift. Grievant was not disciplined for calling the day shift commander more than 30 minutes after the beginning of the shift. She was disciplined for not calling him at all. Thus, Captain P’s testimony does not justify reversal of the Agency’s action.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”⁴ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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 **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

⁴ *Va. Code § 2.2-3005.*

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

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8270-R

Reconsideration Decision Issued: April 4, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant makes the same or similar arguments to those she made during the hearing. She incorrectly recounts the testimony of witnesses. She offers to present telephone records. There is no reason to believe she could not have presented those telephone logs during the hearing, and, thus, the logs are not new evidence. She argues Post Order #3 does not require a call back policy. There is no reason to believe Post Order #3 supersedes DOCPM § 5-12.10 which she violated.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant’s request for reconsideration is **denied**.

APPEAL RIGHTS

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

1. The 15 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 DHRM, 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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer