

Issue: Misapplication of policy; Hearing Date: 10/25/06; Decision Issued: 11/08/06;
Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8441; Outcome:
Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8441

Hearing Date: October 25, 2006
Decision Issued: November 8, 2006

PROCEDURAL HISTORY

On April 17, 2006, the Agency reduced Grievant's pay by eight hours because he failed to report for duty on a day he was scheduled to work. On May 8, 2006, Grievant 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 20, 2006, the EDR Director issued Ruling 2007-1403 qualifying the grievance for hearing. On October 2, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 25, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether the Agency failed to comply with policy?

BURDEN OF PROOF

Grievant will have the burden of proving that the agency's action was adverse and disciplinary. If the Hearing Officer finds that the grievant has not met this burden, then he or she must determine if the grievant has presented evidence to show that the agency's action was nevertheless a misapplication or unfair application of policy. If, however, the hearing officer finds that the agency's action was adverse and disciplinary, the agency will then have the burden of proving that the action was warranted and appropriate. Should the hearing officer find that the denial was adverse, disciplinary and unwarranted, he or she may rescind the agency's action, just as he or she may rescind any formal disciplinary action.

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 Sergeant at one of its Facilities. Grievant was scheduled to work on April 17, 2006. He failed to report to work because he was tired and slept through the day.¹ He had worked several hours earlier. Grievant did not call the Facility prior to his shift to notify Agency staff that he would not be coming to work as scheduled. The Lieutenant did not authorize Grievant to take leave in advance of the scheduled work day or after it.

On April 18, 2006, the Lieutenant sent a memorandum to the Facility Human Resource Officer saying:

Please be advised that [Grievant] is being x'd on 4-17-2006 for 8 hours due to ... [f]ailure to report for duty or call-in.

The Lieutenant also wrote, "I met with [Grievant] about failing to report for work or call-in. His reply was that he was tired." A Leave Activity Reporting Form was prepared for Grievant which showed him receiving "Leave Without Pay" for April 17, 2006. The form was signed by the Lieutenant and Grievant.

When employees failed to report to work as scheduled, the Agency's practice was to dock the pay of the absent employees.

¹ Grievant wrote, "I slept the whole day."

CONCLUSIONS OF POLICY

Virginia Department of Corrections Operating Procedure 135.1(IV)(D)(1) states, [e]mployees should report to work as scheduled. Agency Procedure 5-12.10(D) states:

In the event of illness, injury or other emergency, the employee shall be required to provide notice to the supervisor and request approval for leave. *** Shift workers shall notify the officer in charge, or the shift commander, at least two hours before the beginning of their shift, if they will be absent. *** An employee who fails to notify the supervisor may be considered absent without leave. *** Notification does not mean the leave will be approved.

Grievant failed to report to work as scheduled. He did not have prior approval for leave and leave was not granted after the day he was absent from work. Under the Agency's policy and practice, it could have (1) docked Grievant's pay for the day he missed from work and (2) issued Grievant a Written Notice for misconduct under the Standards of Conduct. Instead of taking both actions, the Agency only docked Grievant's pay for the day he was absent. Although docking Grievant's pay served to "penalize" Grievant because he suffered a loss in pay, the penalty was authorized by Agency Procedure 5-12 independently of the Agency's Standards of Conduct.² The Agency did not intend to further "penalize" Grievant by issuing him formal disciplinary action.

Grievant has not presented any evidence showing the Agency acted contrary to written policy by refusing to pay him for a day he was absent from work.³

Grievant contends the Agency did not call him at his home to remind him to come to work. In some (not all) cases, Agency supervisors contact absent employees and ask them why they have not arrived to work.⁴ This practice is a courtesy and not required by any policy. The Lieutenant explained that he did not call Grievant because he was the only supervisor working at the time and he was busy locking up an inmate and handling other pressing work duties.⁵ The Lieutenant's failure to extend a courtesy to Grievant did not relieve Grievant of his obligation to come to work and the consequences under policy for his failure to come to work. There is no reason to

² Simply because an employee may feel penalized by the application of a leave policy, this does not convert the application of a leave policy into the application of discipline under the Standards of Conduct. No credible evidence was presented to show that the Agency intended to discipline Grievant beyond the consequences naturally flowing from the application of the Agency's policy 5-12.

³ Grievant also has not shown that the Agency's action was adverse and disciplinary in nature.

⁴ No evidence was presented to identify what actions the Agency takes against tardy employees.

⁵ Since the Agency did not issue to Grievant a Written Notice and did not intend to do so, mitigation of disciplinary action is not an issue before the Hearing Officer.

believe the Agency singled out Grievant for special treatment because of some improper motive (e.g. age, gender, race etc. discrimination).

Grievant contends the Agency's treatment of him was "inhumane and injurious treatment." Grievant's comment reflects his personal opinion and does not form a basis for relief under policy.

DECISION

For the reasons stated herein, the Grievant's request for relief is **denied**. The Agency's 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
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 all of your appeals to the other party and to the

EDR Director. 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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.