

Issue: Group II Written Notice (failure to report to work as scheduled); Hearing Date: 10/30/06; Decision Issued: 10/31/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8445; Outcome: Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8445**

Hearing Date: October 30, 2006  
Decision Issued: October 31, 2006

**PROCEDURAL HISTORY**

On June 27, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to report to work as instructed. On July 3, 2006, 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 October 3, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 30, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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. Grievant received favorable evaluations of his work performance.<sup>1</sup> No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant worked as scheduled on June 20, 2006. Because of staffing needs, Grievant was "drafted" to work on June 21, 2006 although he was not previously scheduled to work that day. Grievant's Supervisor told Grievant that Grievant needed to work on June 21, 2006. Grievant told the Supervisor he could not work on June 21, 2006 because "he was going to help his buddy." The Supervisor told Grievant that his reason for not wanting to work was not a valid reason to release him from his obligation to work. Grievant responded to the Supervisor that he couldn't afford to work at the Facility on his days off. The Supervisor said that also was not an excuse and that Grievant signed a conditions of employment document stating that Grievant would work overtime when required. Grievant replied that he did not recall signing a conditions of employment document. The Supervisor attempted to show Grievant a copy of the conditions of employment located on the Agency's intranet. Grievant had to leave the Supervisor's office in order to make required security round and did not read the conditions of employment.

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<sup>1</sup> Grievant Exhibit 1.

On June 21, 2006, Grievant did not call the Facility prior to the beginning of his shift. Grievant did not arrive to work his shift.

The Supervisor sent the Captain an email outlining his interaction with Grievant. The Captain referred the matter to the Warden for disciplinary action.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”<sup>2</sup> Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

Institutional Operating Procedure 206 governs Overtime and Schedule Adjustments at the Facility. Section 206-4.0 states:

Although emergency situations or Officer shortages may disrupt institutional operations, manning all necessary posts remains essential to the function of [the Facility].

Section 206-6.0 states, in part:

Mandatory overtime is required based on ... staff shortages, or other exceptional circumstances. Mandatory overtime worked over two (2) hours shall be considered a draft.

Section 206-7.0(B) provides:

In the event of ... staff shortages when regularly scheduled employees or volunteers are insufficient, mandatory overtime drafting will take place. Refusal to work mandatory overtime may result in action under the Standards of Conduct.

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>5</sup> “[F]ailure to

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

report to work as scheduled without proper notice to supervisor” is a Group II offense.<sup>6</sup> On June 20, 2006, the Supervisor instructed Grievant to work on June 21, 2006 because of a staffing shortage at the Facility. Institutional Operating Procedure 206 authorized the Agency to require Grievant to work on an unscheduled day and notified him that he could be subject to disciplinary action if he failed to work. The Supervisor rejected Grievant’s reason for not wishing to work on June 21, 2006. Grievant was well-aware that he was obligated to work on June 21, 2006. On June 21, 2006, Grievant did not call into the Facility at least two hours prior to his shift to notify the Agency staff on duty that he would not be coming to work on June 21, 2006 as required. He did not appear to work on June 21, 2006. Grievant failed to comply with written policy because he did not report to work as scheduled without proper notice to an Agency supervisor. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

Grievant argues the Agency should have engaged in progressive disciplinary action by first issuing him a counseling memorandum or a Group I Written Notice instead of issuing him a Group II Written Notice. He feels the disciplinary action is too harsh. Grievant’s argument is untenable because nothing in the Agency’s Standards of Conduct requires the Agency to take progressive disciplinary action. The Agency may take progressive disciplinary action but it is not required to do so.<sup>7</sup> In this case, the Agency chose to issue a Group II Written Notice and that decision is authorized by the Standards of Conduct.

Grievant argues several of the Agency’s documents contain typographical errors. Although Grievant’s assertion is correct, none of those errors affect the Agency’s assessment of his failure to report to work as scheduled.

Grievant contends he should not have been disciplined because his excuse was appropriate. Grievant made a commitment to assist another person and he felt morally obligated to comply with that commitment. Although Grievant’s respect to honor promises made is commendable, he is in control of the terms of any promise he makes. Grievant knew or should have known that he could be expected to alter his work schedule with little notice based on the Agency’s needs. To the extent Grievant made a promise that might conflict with that obligation to the Agency, he did so at his own risk.

Grievant contends the disciplinary action should be mitigated. *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...”<sup>8</sup> Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may

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<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(4).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B) provides, “counseling is not a prerequisite to taking formal disciplinary action.”

<sup>8</sup> *Va. Code § 2.2-3005.*

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 II 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  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>9</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.