

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 02/15/07; Decision Issued: 02/16/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8510; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8510

Hearing Date: February 15, 2007
Decision Issued: February 16, 2007

PROCEDURAL HISTORY

On September 25, 2006, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance. On October 19, 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 she requested a hearing. On January 16, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 15, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witness

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. She has been employed by the Agency since 2004. No evidence of prior active disciplinary action against Grievant was presented during the hearing.

One of the conditions of her employment at the Facility is that she, "[m]ust provide a current telephone number and address where [she] can be reached."¹ On November 7, 2005, Grievant completed a Personal Data Sheet listing a telephone number where she could be reached as "a means of contact in the event of an emergency."²

On August 29, 2006, Grievant met with the Assistant Attorney General regarding testifying in a case involving another employee. The Assistant Attorney General asked Grievant what she knew about the case. After hearing her answers, the Assistant Attorney General told Grievant that he needed her to appear at the Circuit Court on September 8, 2006 for a hearing at 11 a.m. and that she should arrive approximately a

¹ Agency Exhibit 2.

² Agency Exhibit 4.

half hour early to prepare. Grievant did not appear at the hearing on September 8, 2006.

The Warden asked an employee working at the Master Control post to call Grievant's telephone number and remind Grievant to appear in Court on September 8, 2006 and to contact the Warden. Calls were made to Grievant on September 7, 2006 at 10:15 a.m. and 3:32 p.m. and on September 8, 2006 at 7:35 a.m., 8 a.m., and 9:18 a.m. The telephone number called was the number Grievant provided to the Facility as her emergency contact number. Several messages were left on the voice mail for the telephone number. Grievant did not return the calls left for her.

The Assistant Attorney General also spoke with two other Facility employees and asked them to appear at the Circuit Court on September 8, 2006. Both of those employees appeared in court.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁶ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant's position required her to testify in Court from time to time. She had received training at the Academy on testifying in Court and how to dress appropriately to appear in Court. Grievant was instructed by the Assistant Attorney General to appear in the local Circuit Court and she should have complied with that instruction. The Facility staff called Grievant five times and left messages on her telephone voice mail

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ DOCPM § 5-10.15(B)(4).

reminding her of the court date and her obligation to appear.⁷ Grievant did not appear in Court thereby justifying the Agency's issuance to her of a Group I Written Notice for inadequate or unsatisfactory job performance.

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...."⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action against her should be mitigated because she had a medical appointment on September 8, 2006 and had to attend that appointment. Grievant testified she received a call from the doctor's office at approximately 7:30 a.m. advising her that she could be seen that morning for an appointment. She drove to the appointment and returned home by 10:30 a.m. Grievant's evidence is not sufficient to establish a mitigating circumstance because the doctor's appointment ended prior to the hearing time and she had returned home by 10:30 a.m. Grievant could have appeared in Circuit Court on September 8, 2006 at 11 a.m. or shortly thereafter.

Grievant contends the disciplinary action against her should be mitigated because her telephone number was a cell phone and it was not working and had to be replaced. Grievant was obligated to keep the Facility informed of her current emergency contact information. If the doctor's office staff were able to contact Grievant on September 8, 2006, the Facility staff should also have been able to contact her. Grievant either chose not answer her cell phone or she failed to provide the Facility with the necessary contact information that she provided to her doctor's office. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

⁷ It was not necessary for Grievant to have received a witness subpoena in order for the Assistant Attorney General's instruction to become effective. A witness subpoena is an instruction from a Court and is independent of the Assistant Attorney General's instruction to appear.

⁸ *Va. Code § 2.2-3005.*

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
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.⁹

⁹ 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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer