

Issues: Group II Written Notice with demotion (failure to follow instructions and/or policy and failure to report to work without authorization); Hearing Date: 08/31/07; Decision Issued: 09/14/07; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 8678; Outcome: No Relief, Agency Upheld in Full

Commonwealth of Virginia
Department of Corrections

DECISION OF HEARING OFFICER
In the matter of: Case No: 8678

Hearing Date: August 31, 2007
Decision Issued: September 14, 2007

PROCEDURAL HISTORY

On February 26, 2007 Grievant was issued a Group II Written Notice for, "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy" and "Failure to report to work as scheduled without proper notice from supervisor".¹ On March 21, 2007, Grievant timely filed a grievance to challenge the disciplinary action. The grievance proceeded through the resolution steps and the parties failed to resolve the grievance. The agency head qualified the grievance for a hearing on July 13, 2007.² On August 13, 2007, the Department of Employment Dispute Resolution assigned this matter to the Hearing Officer.

PROCEDURAL ISSUES

On August 16, 2007, the hearing officer contacted Grievant by telephone to set a pre-hearing conference and grievance hearing. Grievant indicated he was not interested in proceeding forward, in setting a pre-hearing conference, in setting a hearing, or any other matters. A letter providing written Notice of Hearing of the hearing time, date, and location was mailed on August 17, 2007 to Grievant at his correct, last-known address via certified mail return receipt requested. This letter also requested that Grievant provide a written, dated, and signed notice of withdrawal as per Section 5.11 of the EDR "Grievance Procedure Manual" if it was his desire to withdraw the grievance or this matter would be required to proceed forward to hearing. Return receipt indicated the letter was delivered to the address and signed for by an agent of Grievant on 8/18/07. No written, dated, and signed withdrawal was received from Grievant and this matter proceeded to hearing.

Grievant failed to appear on the date, time, and at the location set for the hearing and which was indicated in the Notice of Hearing transmitted to him. After waiting over 20 minutes from the scheduled start time, the Grievance Hearing was conducted and evidence was taken from those who appeared.

APPEARANCES

Agency Party Designee, who was a witness

¹ Written Notice. Group II Offense.

² Grievance Form A.

ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.³

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, the Hearing Officer makes the following findings of fact:

Grievant has approximately 18 years service with the Virginia Department of Corrections ("D.O.C.") and has been employed approximately 14 months of this period at Correctional Center as a Lieutenant.

On February 26, 2007, Grievant was given a Group II Written Notice (with a date of offense of 2/19/07) for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy and for failure to report to work as scheduled without proper notice from a supervisor. Grievant has one active Group III Written Notice and one active Group I Written Notice. The active Group I Written Notice was issued for failure to follow a supervisor's instructions.⁴

Grievant desired to apply for a different employment position within the D.O.C. but not at Correctional Center. One of the qualifications for this position included being "VCIN certified" ("Virginia Criminal Information Network"). At the employment interview held on February 2, 2007, Grievant indicated to the interview panel that he was not VCIN certified but that a class was being offered and he had enrolled in it.⁵

Grievant did not use VCIN training in his job and it was not needed for his duties at Correctional Center. Grievant was required to obtain supervisor's approval for any training not mandated by the Department of Corrections. VCIN training for any Correctional Center employee was required to be approved by the Warden. The Warden did not approve Grievant's receiving VCIN training. Grievant enrolled himself in VCIN training and on 2/19/07 went to the VCIN training class without permission from his supervisor.⁶ Grievant did not work his shift

³ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") §5.8 and §9.

⁴ Testimony.

⁵ Grievance Form A.

⁶ Testimony and First Resolution Step Response, attachment #1 dated March 28, 2007.

scheduled when the training was attended but made arrangements for someone else to work his assigned shift while attending the training.

VCIN training was not open to the general public.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This legislation also provides for a grievance procedure.

Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in part: "It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

The Department of Corrections (D.O.C.), pursuant to Va. Code §53.1-10, has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department of Corrections. Section XI of the D.O.C. Standards of Conduct address Group II offenses which are offenses that 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. Group II offenses include failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy and failure to report to work as scheduled without proper notice to a supervisor.

Section IV. C. of the Standard of Conduct also states:

"The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these Standards of Conduct and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."⁷

Grievant applied for a job opening in which VCIN certification was a qualification. Grievant was not VCIN certified but wanted to be so certified. VCIN training is not open to the general public and Grievant's duties at Correctional Center did not require VCIN certification or access.

On 1/29/07 Grievant had a fax sent to Academy concerning his enrollment in the VCIN class being offered 2/19/07 and 2/20/07. Prior to this date Grievant had contacted staff at the Correctional Center concerning VCIN certification training. Grievant was told that he needed

⁷ Grievance Exhibit A: VDOC Standards of Conduct No. 135.1, effective September 1, 2005, Update 8/29/06.

the Warden's approval to attend VCIN training. Grievant had received training, prior to enrolling in the class, that all non-mandated training required a supervisor's approval. VCIN training is not a training mandated by the DOC for Grievant. Grievant was aware policy required approval of non-mandated training and also that the Warden had to approve VCIN training for any personnel at Correctional Center.

Grievant acknowledged in writing that on February 19th he went to the class without permission from his supervisor, that he was wrong and should have asked first, and that he went outside the guidelines and rules for training.⁸ Grievant indicated in his Response that wrote this because he was instructed to do so. He also contended he made Captain aware of the training, the reason he wanted to take the training, and that at no time was he ever instructed that he needed to seek permission to go to the training.⁹

In the Second Resolution Step Response, Attachment #1 to Grievance Form A dated April 18, 2007, Warden indicated that Grievant had stated, "I was going to do whatever it took to get the training. Assistant Warden testified at hearing that, prior to the date of offense, Major had conducted training with Grievant on the need to get approval for all non-mandated training. Assistant Warden further testified that Grievant was aware he had to receive supervisor's approval to attend non-mandated training and also that it was required that the Warden had to approve all VCIN training. The Agency has established that the Warden did not approve Grievant for VCIN training, Grievant knew he was required to have Warden approval, and Grievant applied for and attended training without the Warden's approval or a supervisor giving an approval.

Grievant was charged also with failure to report to work as scheduled without proper notice to a supervisor. Warden had expressed concerns in writing that Grievant adjusted his own schedule without prior approval of his supervisor or proper approval of the administration.¹⁰ Testimony indicated that Agency was not informed of the reason for his absence and Grievant did not report to work as scheduled. He did make arrangements for his shift to be covered but did not give notice to his supervisor of the facts as to why he was not able to work and as to why he was getting someone to cover his shift.

Upon reviewing the facts de novo (afresh and independently, as if no determinations had yet been made) it is determined that (i) Grievant engaged in the behavior described in the Written Notice; (ii) The behavior constituted misconduct; (iii) the Agency's discipline was consistent with law and policy; and (iv) the agency's discipline did not exceed the limits of reasonableness.

Standards of Conduct (V.D.O.C. Operating Procedure 135.1, updated 8/29/06) provides that 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. The Standards of Conduct further provide that discipline normally takes the form of the notice and up to 10 workdays maximum suspension without pay for a Group II offense and that discipline should

⁸ First Resolution Step Response, attachment #1 dated March 28, 2007.

⁹ Third Step Resolution, Attachment #1 dated April 21, 2007 by Grievant.

¹⁰ Second Resolution Step Response Attachment #1 dated April 18, 2007.

normally result in removal for an additional Group II offense. Mitigating circumstances may result in an employee's demotion and a disciplinary salary action as an alternative to removal.

The Standards of Conduct provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) and employees long service or otherwise satisfactory work performance.

The Agency took into considerations mitigating factors. Grievant has accumulated an active Group III offense and Agency could have terminated Grievant with this Group II Written Notice, there being an active Group III, pursuant to the Standards of Conduct, V.D.O.C. Operating Procedure 135.1 effective date 9/1/05, Update 8/29/06. However, Agency made the determination not to terminate but to reduce the Grievant's discipline from termination of employment to a Group II Written Notice and Role Change to lower pay band with a 10% disciplinary pay reduction (New Role Title: "Correctional Officer").

The Agency's decision was within the limits of reasonableness. Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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.

The Agency has proven by a preponderance of the evidence that the disciplinary action taken was warranted and appropriate under the circumstances.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant on February 26, 2007 of a Group II Written Notice with disciplinary action taken in addition to issuing written notice of Role Change to lower pay band with 10% disciplinary pay reduction (New Role Title: Corrections Officer) is hereby UPHELD.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review:

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

2. A challenge that the hearing decision is inconsistent with State or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to: Director, Department of Employment Dispute Resolution, One Capitol Square, 830 East Main, Suite 400, and Richmond, VA 23219.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo, Hearing Officer