

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow instructions); Hearing Date: 11/20/07; Decision Issued: 11/21/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8740; Outcome: No Relief, Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8740

Hearing Date: November 20, 2007
Decision Issued: November 21, 2007

PROCEDURAL HISTORY

On August 22, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. Grievant was removed from employment effective August 22, 2007 based on the accumulation of disciplinary action.

On August 22, 2007, 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 October 25, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 20, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

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 had prior active disciplinary action. On June 28, 2005, Grievant received a Group II Written Notice for leaving a security post without permission. On February 22, 2006, Grievant received a Group II Written Notice for failure to report to work as scheduled without proper notice to a supervisor.¹

Grievant was scheduled to work on July 29, 2007. At approximately 12:05 a.m., Grievant called Captain K, the Shift Watch Commander, and told him that she would not be reporting for duty because of personal family business. At approximately 4:30 a.m., Captain A called Grievant regarding why she would be absent from work. Grievant told Captain A that she had a program to attend that day and that she would not be reporting to work. Captain A told Grievant that she needed to report to work as scheduled and that her absence was not excused. Grievant did not report to work as scheduled on July 29, 2007. Captain A referred Grievant's absence to the Assistant Warden for disciplinary action.

¹ Agency Exhibit 4.

As part of the Assistant Warden's investigation, he met with Grievant on August 17, 2007 and asked her about her absence. Grievant said that she was leading a church group on July 29, 2007 and thus did not report for duty. She told the Assistant Warden that she led this group every fifth Sunday of the month and was well aware of the upcoming event in advance. He asked Grievant why she did not request the day off previously, given that she was aware of the scheduled church event. Grievant said she believed her request would not have been approved in advance and then said that she "did what I had to do".

On August 22, 2007, Grievant appeared before the Assistant Warden for a pre-disciplinary hearing. She was given notice of the hearing and an opportunity to respond. Following the hearing, she was given a Group II Written Notice. She was removed from employment based on the accumulation of active 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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

"[F]ailure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁵ "Employees should report to work as scheduled." "Planned absences including reporting to work late or leaving work early, should be arranged in advanced with supervisors."⁶ "An employee who fails to notify the supervisor will be considered absent without leave." "Notification does not mean leave will be approved."⁷

Grievant was scheduled to work on July 29, 2007. Although she knew of the church event well in advance, she did not seek approval for her absence in advance. Captain A instructed Grievant to report to work as scheduled. Grievant did not report to

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁶ Virginia Department of Corrections Operating Procedure 135.1(IV)(D).

⁷ Virginia Department of Corrections Procedure Number 5-12.10.

work. Grievant's actions were contrary to Agency policy and contrary to a supervisor's instruction. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

Grievant contends that the Agency took too much time to issue the disciplinary action against her. The Assistant Warden testified that he could not meet with Grievant until August 17, 2007 because he was busy obtaining information from other employees including Captain A and reviewing the Agency's logbooks. This length of time is not unreasonable. Grievant argues that the Agency should have provided her some form of written notice prior to the August 17, 2007 meeting with the Assistant Warden. This argument fails. The Assistant Warden was merely obtaining information at that point and was not obligated to provide Grievant with notice of the reason for the meeting. Prior to the August 22, 2007 pre-disciplinary hearing, the Agency provided Grievant with notice of the pre-disciplinary hearing.

"[A]ccumulation of two Group II offenses normally should warrant removal."⁸ With the Written Notice giving rise to this grievance hearing, Grievant has accumulated three active Group II Written Notices. The Agency's decision to remove Grievant from employment must be upheld.

Grievant argues that the Agency improperly concluded that she should receive a Group II because the Agency incorrectly considered her prior active disciplinary action. She argues that the prior active disciplinary action is not as severe as the Agency asserted. This argument fails. The Agency did not consider Grievant's prior active disciplinary action when deciding whether to issue Grievant a Group II Written Notice for her absence on July 29, 2007. The Agency only considered Grievant's prior active disciplinary action as part of its decision to remove Grievant from employment. A Group II Written Notice standing by itself is not sufficient to support removal. Under the Standards of Conduct, however, the Agency may consider prior active disciplinary action in order to reach the conclusion that an employee should be removed from employment. The Agency's decision to remove Grievant from employment was in accordance with the Agency's Standards of Conduct.

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...."⁹ 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-

⁸ Virginia Department of Corrections Operating Procedure 135.1(XI)(C)(2).

⁹ *Va. Code § 2.2-3005.*

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. 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 with removal 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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.