

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 12/28/07;
Decision Issued: 01/02/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8755; 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: 8755

Hearing Date: December 28, 2007
Decision Issued: January 2, 2008

PROCEDURAL HISTORY

On August 16, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. 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 November 19, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 28, 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 employs Grievant as a Probation and Parole Officer at one of its Facilities. Grievant's work schedule required her to work Mondays through Fridays from 7:15 a.m. to 4 p.m. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

With the Agency's knowledge, Grievant had been working for an Outside Employer on Saturdays.¹ Grievant wanted to begin working for the Outside Employer on Mondays as well as Saturdays. On August 1, 2007, Grievant submitted to the Supervisor a Request for Permission to Secure Employment Outside Regular Working Hours. She sought permission to work on Mondays and Saturdays with her date of employment beginning July 16, 2007. The Supervisor recommended disapproval of Grievant's request on August 1, 2007. The Supervisor wrote, "Initially this employment was for Saturday. Since Monday is now added, this request is disapproved." The Supervisor submitted Grievant's request to the Unit Head who disapproved the request on August 1, 2007. Grievant was immediately informed of the Agency's decision to deny her request for outside employment.²

Grievant was scheduled to work for the Agency on Monday, August 13, 2007. She did not report to work as scheduled. Grievant did not call the Supervisor to inform

¹ Grievant testified she had been working for the Outside Employer since June 11, 2007.

² Grievant testified she reviewed the Agency's response on August 1, 2007.

him that she would be absent from work on August 13, 2007. The Agency later determined that Grievant was absent to work on August 13, 2007 because she was working for the Outside Employer from approximately 7 a.m. to 5 p.m.

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

Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(4) provides, "failure to report to work as scheduled without proper notice to supervisor" is a Group II offense. Grievant failed to report to work on August 13, 2007 as scheduled. She did not give proper notice of her planned absence to a supervisor.

Virginia Department of Corrections Operating Procedure 135.1(V)(E) provides:

1. Employees may not engage in any other employment in another agency, outside of state service, in any private business, or in the conduct of professions:

- a. during the hours for which they are employed to work; or
- b. outside the work hours if such employment is deemed by employing agencies to affect employees' work performance or to be a violation of the Virginia Conflict of Interests Act.

3. Employees are required to obtain approval from their Unit Head or designee prior to obtaining outside employment according to department procedures. The Unit Head or designee may deny employee requests for engaging in outside employment based on Section E.1. and E.2. above.

"[F]ailure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁶ Grievant failed to comply with established written policy because she engaged in

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

outside employment on August 13, 2007 without approval from the Agency. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

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....”⁷ 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 should be mitigated because the Agency was aware that she was engaged in outside employment well before August 13, 2007. Although Grievant is correct that the Agency managers knew that Grievant was engaged in outside of employment prior to August 13, 2007, the evidence showed that Agency managers believed Grievant was working only on Saturdays. Agency managers did not object to Grievant working on Saturdays. On August 1, 2007, Agency managers learned for the first time that Grievant also intended to work on Mondays. The Agency did not authorize or sanction Grievant working on Mondays. Grievant was notified that she was not authorized to work on Mondays prior to Monday, August 13, 2007. There is no basis to mitigate the disciplinary action based on Grievant's assertion that the Agency was aware of the scope of her outside employment. In light of the standard set forth in the *Rules*, 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:

⁷ *Va. Code § 2.2-3005.*

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.