

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 01/09/08;
Decision Date: 01/15/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8758; 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: 8758

Hearing Date: January 9, 2008
Decision Issued: January 15, 2008

PROCEDURAL HISTORY

On August 2, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to report to work as scheduled without proper notice to supervisor. On August 16, 2007, Grievant timely filed a grievance to challenge the Agency's action. As part of the Second Resolution Step, the Agency reduced the Written Notice from a Group II to a Group I in light of Grievant's military service. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 6, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 9, 2008, 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 Corrections Officer at one of its Facilities. He began working at the Facility on February 10, 2005. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant is in the Army Reserve. He presented the Agency with a copy of his military order showing that he would be on military drill through July 31, 2007. Subsequently, his orders changed. Grievant presented the Agency with a copy of his revised military order showing that he would be on military drill from June 18, 2007 through July 16, 2007. The July 16, 2007 date included time to travel home.

Before Grievant left for military drill, Grievant and the Captain discussed Grievant's absence. Grievant told the Captain that Grievant was unsure of the precise date by which his military drill would end because his military orders could change again. The Captain told Grievant to call the Captain as soon as Grievant returned home so that the Captain could reinstate Grievant to the work schedule. The Captain also suggested that Grievant contact the Facility's Human Resource staff to "save" his annual leave so that it would not be used while he was away on military drill.¹ Grievant

¹ Department of Corrections Procedures Manual, Procedure Number 5-12.20 states, "Military leave is granted with or without pay to employees for active duty in the armed services of the United States or for employees who are former members of the armed services, or current members of the reserve forces of any of the United States' armed services"

told the Captain he would do so.² Grievant failed to contact the Facility's Human Resource staff prior to leaving for military drill.

Grievant returned home on July 17, 2007 at 4:30 a.m. Grievant did not immediately call the Captain as he had been instructed to do so. If Grievant had called the Captain, the Captain would have arranged for Grievant to work on July 17, 2007 beginning at 5:45 p.m. Grievant would also have worked the evening shift on July 18, 2007.

At approximately 8:08 p.m. on July 18, 2007, Grievant called the Facility and spoke with the Sergeant. Grievant asked if he could speak with the Captain. The Captain was unavailable so the Sergeant told Grievant to call back later. At approximately 9:30 p.m. on July 18, 2007, Grievant called the Facility again and spoke with the Captain. The Captain asked Grievant when he returned from drill. Grievant told the Captain that he returned on Tuesday July 17, 2007 at 4:30 a.m. the Captain asked Grievant when Grievant was coming to work. Grievant told the Captain that Grievant was not supposed to come back until July 24, 2007 and that he would be on Day Shift although he acknowledged that he had not been instructed to report to the day shift upon his return to duty prior to beginning his military leave. The Captain advised Grievant that he was scheduled to begin his assignment on day shift on August 6, 2007 and that the Captain expected Grievant come in that evening as soon as Grievant could. Grievant stated that he had been up all day and said that he was to report to Day Shift on July 24, 2007. The Captain told Grievant about a shift change memo that was issued by the Major while Grievant was on military leave that stated Grievant was to report to Day Shift on August 6, 2007. The Captain again told Grievant to report to work.

At approximately 10:30 p.m. on July 18, 2007, Grievant arrived at the Facility to begin working. Grievant spoke with the Captain and told the Captain that he had been up all day. The Captain told Grievant to report to the SH Unit to begin meal breaks. Grievant said, "You know I have been up since 0630, right?" The Captain asked Grievant if he was saying he was in no condition to work. Grievant responded again by saying that he had been up all day. The Captain told Grievant that if Grievant was not in a condition to work, Grievant should leave. Grievant asked the Captain if Grievant would be fired if Grievant left. The Captain told Grievant that Grievant would probably not be fired but Grievant would "get something." Grievant left the Facility.

Because Grievant did not contact the Human Resource staff prior to leaving on military drill, the Agency used Grievant's annual leave balances to cover his time away from work. On July 17 and July 18, 2007, Grievant's available leave balances were zero.

² Grievant argued that the Captain told Grievant that the Captain would take care of preserving his available leave. The Hearing Officer finds that this did not occur. The Captain's testimony was credible. In order to preserve Grievant's available leave balances, Grievant would have had to sign a form entitled "Military Leave Worksheet." Grievant had completed the form in 2006. There is nothing on the form that would suggest the Captain could complete the necessary information on Grievant's behalf.

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 job performance was unacceptable to the Agency. The Captain instructed Grievant to call the Captain immediately once Grievant returned home. Grievant returned from military drill on July 17, 2007 at 4:30 a.m. Grievant did not attempt to call the Captain until 8:08 p.m. on July 18, 2007. Grievant’s response to the Captain was not immediate.⁷ The Agency has presented sufficient evidence to support the issuance to Grievant of a Group I Written Notice.

Grievant argues that the Captain told him that he could take leave on July 17 and July 18, 2007 and, thus, did not have to report to work on those days.⁸ The Captain’s testimony was credible that he did not authorize Grievant to be absent on July 17 and 18, 2007. If the Hearing Officer assumes for the sake of argument that the Captain

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(X)(B)(4).

⁷ Grievant argued that he had 24 hours from the time of his return to contact the Captain. He believed he had 24 hours to contact the Captain based on a conversation he had with a Sergeant on a previous occasion. This argument fails because Grievant did not present any policy that would grant him 24 hours to contact the Facility. Grievant did not present any evidence to suggest that the Captain understood the definition of “immediate” to mean a 24-hour period.

⁸ Grievant points out that he wrote in his pocket calendar that he was off from work from July 17, 2007 through July 23, 2007. Although Grievant may have believed he was not scheduled to work on July 17 or July 18, 2007, his assumption was incorrect. There is no dispute that Grievant understood that the Captain told Grievant to call the Captain immediately upon returning from military drill. If Grievant had complied with the Captain’s instruction, any ambiguity in the Captain’s expectations that Grievant work on July 17 and July 18, 2007 would have been resolved.

authorized Grievant to be absent from work on July 17 and July, 18 2007, Grievant's work performance remained unacceptable to the Agency. Grievant failed to properly manage his leave balances. Grievant did not have available leave balances to enable him to take leave on July 17 and July 18, 2007.⁹ Grievant failed to contact the Human Resources staff as the Captain had suggested.¹⁰ Thus, Grievant entered Leave Without Pay Status without obtaining the Agency's permission. The Agency would have a basis to issue disciplinary action against Grievant even if the Captain authorized Grievant to be absent from work on July 17 and July 18, 2007.

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..."¹¹ 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. 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 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:

⁹ If the Captain had authorized Grievant to be absent on July 17 and July 18, 2007, that authorization would have been with the assumption that Grievant had available leave balances. Indeed, the Captain referred Grievant to Human Resource staff to ensure that Grievant did not use up his leave.

¹⁰ In 2006, Grievant had contacted the Human Resources staff and filled out the necessary form to properly "save" his leave balances.

¹¹ *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.¹²

[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

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.