

Issues: Group III Written Notice (conduct unbecoming, neglect of duty) and Termination; Hearing Date: 09/10/08; Decision Issued: 10/02/08; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8929; Outcome: Partial Relief; **Administrative Review: DHRM Admin Review Request received 10/16/08; DHRM Admin Review issued 12/12/08; Outcome: Hearing Officer's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8929

Hearing Date: September 10, 2008
Decision Issued: October 2, 2008

PROCEDURAL HISTORY

On June 6, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for a neglect of duty and conduct unbecoming a Police Officer.

On June 19 2008, 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 he requested a hearing. On August 4, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 10, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 Virginia Commonwealth University employed Grievant as a Police Officer. He had been employed by the Agency since 1993 prior to his removal effective June 6, 2008. No evidence of prior active disciplinary action against Grievant was presented during the hearing.

The Police Department divides the Agency's campus into different Beats. Beat 4 includes the newly constructed Engineering Building. It contains numerous restrooms. A Police Officer working Beat 4 would not need to leave Beat 4 in order to find a clean and acceptable restroom. In order to leave a Beat, Police Officers were expected to notify the Police Department's Emergency Communications Center and "mark off". This permitted the Police Department to know the location of its police officers in the event of an emergency and to verify that a Police Officer was not leaving his or her Beat when the Officer's presence was essential.

Grievant typically worked in the late evenings and early mornings when the Agency's office buildings were closed to the public. During his years as an employee of the Agency, Grievant developed a preferred location to use the restroom. That location was the Office Building restroom located in Beat 1. This restroom is located on the first floor of the building. On the second floor of the Office Building is an area where people can sit and watch television.

From November 22, 2007 through April 9, 2008, Grievant used his security pass to enter the Office Building after regular business hours on 18 occasions. On the dates Grievant was assigned to work Beat 1, his entry into the Office Building would have been appropriate because the Office Building was located in Beat 1. On several

occasions during that time frame, however, Grievant had been assigned to work Beat 4.¹ He would ride his Police bicycle from the Engineering Building to the Office Building approximately 3 minutes away in order to use the restroom. Grievant failed to contact the Police Department's Emergency Communication Center and "mark off" to indicate that he was away from his post.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least 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 which are more severe in nature and are such that an additional Group II offense should normally warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

The Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice with removal. The Agency has presented sufficient evidence to support the issuance of only a Group II Written Notice.

"Leaving the work site during work hours without permission" is a Group II offense. On several occasions from the period November 22, 2007 through April 9, 2008, Grievant was assigned to work in Beat 4. His work site was the area of the Agency's campus designated as Beat 4. Grievant left that work site without permission, without authorization, and without a legitimate reason.³ The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for leaving the work site during work hours without permission. Upon the issuance of a Group II Written Notice, the Agency may suspend Grievant for up to 10 workdays. Accordingly, Grievant should receive a Group II Written Notice with a 10 workday suspension. Because the Agency has not established a Group III offense, Grievant must be reinstated.

The Agency contends Grievant should receive a Group III Written Notice with removal. The first reason offered by the Agency is the number of times Grievant left his post without permission. This argument fails. Each time Grievant left his post without permission, the Agency could have issued him a Group II Written Notice. Agencies may not take separate offenses and combined those offenses in order to raise the level of discipline issued.

¹ Grievant was also working in Beats other than Beat 4 and he left those Beats to travel to the Office Building. The Agency's presentation, however, focused on Beat 4.

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ If Grievant had contacted the Police Department Emergency Communication Center and informed Agency staff working there that he was leaving Beat 4 and going to Beat 1, the Agency would have considered his absence from Beat 4 as authorized.

The second reason offered by the Agency is that Grievant engaged in loitering. Under the Agency's Standards of Conduct Section 0549, loitering is considered to constitute "Neglect of Duty". The Agency has not established the amount of time Grievant was away from his Beat.⁴ Without knowing the amount of time Grievant was away from his post, it is not possible for the Agency to establish that he was loitering at another part of the Agency's campus. The Agency presented evidence from the Night Supervisor of a custodial crew who observed Grievant and another police officer watching television on the second floor of the Office Building. This witness could not identify the dates on which he observed Grievant watching television. The Agency has not established that Grievant was watching television in the Office Building from the period November 22, 2007 through April 9, 2008. Nevertheless, if the Hearing Officer assumed for the sake of argument that Grievant engaged in loitering and, thus, a neglect of duty, the Agency's Standards of Conduct does not elevate that behavior to a Group III offense. Accordingly, violating the Agency's Standards of Conduct would constitute failure to comply with established written policy under DHRM Policy 1.60, a Group II offense.

The third reason given by the Agency is that Grievant's behavior would constitute "conduct unbecoming a police officer". Agency Standards of Conduct Section 0522(B) states:

Conduct unbecoming a police officer - all circumstances that arise cannot be completely covered in the various listings of violations of conduct, neglect of duty, or disobedience of orders. Therefore, it must be understood that no officer shall conduct himself/herself in a manner, which would bring an undue negative perception upon this agency, the University, or its employees.

The Agency did not provide sufficient evidence to show that by leaving Beat 4, Grievant brought an undue negative perception upon the Agency. Nevertheless, if the Hearing Officer assumes for the sake of argument that Grievant's behavior was conduct unbecoming a police officer, the Agency's Standards of Conduct does not elevate that behavior to a Group III offense. At most, Grievant's behavior would constitute failure to follow established written policy under DHRM Policy 1.60, a Group II offense.

The fourth reason offered by the Agency is falsification of records. The Agency did not present sufficient evidence to show what records Grievant falsified and how he falsified those documents. Grievant did not falsify any records by failing to disclose he had left his Beat.

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..."⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁴ Time devoted to using the restroom is not loitering.

⁵ *Va. Code § 2.2-3005.*
Case No. 8929

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 further the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Virginia Commonwealth University

December 12, 2008

The agency has appealed the hearing officer's decision in Grievance No. 8929. The agency is challenging the decision on the basis that the hearing decision is inconsistent with state or agency policy. The agency head, Ms. Sara R. Wilson, has requested that I respond to this appeal. For the reasons stated below, the Department of Human Resource Management (DHRM) is upholding the hearing officer's decision.

FACTS

The grievant had been employed by the VCU Police Department until he was dismissed for the following:

Failure to comply with written and established policy: VCU Police Department Directives Manual, Article 1, Chapter 5, section 0549, "Loitering," officers and members, while on or off duty, shall not loiter in any location on campus. Such loitering interferes with the performance of duties and brings about criticism of the department. Loitering shall be considered to constitute "Neglect of Duty." By leaving your assigned area for prolonged periods on several occasions, you neglected your assigned area of responsibility. A witness stated that he saw you watching television while in the building on two occasions. Article I, Chapter 5, Section 0522-B, "Conduct Unbecoming of a Police Officer," all circumstances that arise cannot be completely covered in the various listings of conduct, neglect of duty, or disobedience of orders. Therefore, it must be understood that no officer shall conduct himself/herself in a manner which could bring an undue negative perception upon this agency, the University, or its employees. The evidence shows that on eighteen different occasions, from November 22, 2007 to April 9, 2008, you breached a secure building located at 914 West Franklin Street for reasons other than to search the building for intruders. The evidence shows that you did not notify VCU Police Emergency Communications by radio that you were entering the building, your Daily Activity Sheet did not match times presented to the Dispatcher and you informed the Dispatcher you were on a property check in another area while you were actually at 914 W. Franklin St.

The hearing officer's Findings of Fact states the following:

The Virginia Commonwealth University employed the Grievant as a Police Officer. He had been employed by the Agency since 1993 prior to his removal effective June 6, 2008. No evidence of prior active disciplinary action against Grievant was presented during the hearing.

The Police Department divides the Agency's campus into different Beats. Beat 4 includes the newly constructed Engineering Building. It contains numerous restrooms. A Police Officer working Beat 4 would not need to leave Beat 4 in order to find a clean and acceptable restroom. In order to leave a Beat, Police Officers were expected to notify the Police Department's Emergency Communications Center and "mark off". This permitted the Police Department to know the location of its police in the event of an emergency and to verify that a Police Officer was not leaving his or her Beat when the Officer's presence was essential.

Grievant typically worked late in the evenings and early mornings when the Agency's office buildings were closed to the public. During his years as an employee of the Agency, Grievant developed a preferred location to use the restroom. That location was the Office Building restroom located on Beat 1. This restroom is located on the first floor of the building. On the second floor of the Office Building is an area where people can sit and watch television.

From November 22, 2007 through April 9, 2008, Grievant used his security pass to enter the Office Building after regular business hours on 18 occasions. On the dates Grievant was assigned to work Beat 1, his entry into the Office Building would have been appropriate because the Office Building was located in Beat 1. On several occasions during that time, however, Grievant had been assigned to work Beat 4. He would ride his Police bicycle from the Engineering Building to the Office Building approximately 3 minutes away in order to use the restroom. Grievant failed to contact the Police Department's Emergency Communication Center and "mark off" to indicate that he was away from his post.

In his decision, the hearing officer determined that agency management officials did not prove that the grievant had committed all the violations with which he was charged. He therefore directed that the Group III Written Notice with dismissal be reduced to a Group II Written Notice with reinstatement and a ten-day suspension and restoration of leave and seniority.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the

disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the hearing officer modified the disciplinary action by reducing the Group III Written Notice with dismissal to a Group II Written Notice with a ten-day suspension. He gave the following as his reasons for his actions:

1. Regarding the agency's first reason for issuing a Group III Written Notice, the hearing officer stated, in part, "The reason offered by the Agency is the number of times Grievant left his post without permission. This argument fails. Each time Grievant left his post without permission, the Agency could have issued him a Group II Written Notice. Agencies may not take separate offenses and combine those offenses in order to raise the level of discipline issued."

The records show that all the violations committed by the grievant occurred before the effective date of the current Standards of Conduct Policy. However, because management officials took disciplinary action **after** the effective date of the current policy (April 16, 2008), the provisions of the current policy apply. The current policy provides that agencies may take into consideration separate offenses and combine them in order to raise the level of discipline issued. However, the evidence does not support that the agency used the accumulation of the number of violations (number of times he left his post without permission) as the basis for elevating the level of discipline.

2. Regarding the second reason proffered by the Agency for issuing the Group III Written Notice, the hearing officer stated, in part, "is that Grievant engaged in loitering. Under the Agency's Standards of Conduct Section 0549, loitering is considered to constitute "Neglect of Duty". The Agency has not established the amount of time away from his Beat. Without knowing the amount of time Grievant was away from his post, it is not possible for the Agency that he was loitering at another part of the Agency's campus."

In summary, the hearing officer determined that the evidence did not support the Agency's allegations.

3. The hearing officer evaluated the third reason given by the Agency to support a Group III Written Notice, "... Grievant's behavior would constitute conduct unbecoming of a police officer". This reason was dismissed with the hearing officer stating, "The Agency did not provide sufficient evidence to show that by leaving Beat 4, Grievant brought an undue negative perception upon the Agency."

4. Concerning the fourth reason, falsification of records, the hearing officer stated, "The Agency did not present sufficient evidence to show what records Grievant falsified and how he

falsified those documents. Grievant did not falsify any records by failing to disclose he had left his Beat.”

Thus, given that the hearing officer found that the evidence presented by the Agency could sustain only one of the four violations with which the Grievant was charged and that violation was a Group II Offense, the Department of Human Resource Management has no basis to interfere with the application of the hearing decision.

Ernest G. Spratley