

Issues: Group I Written Notice (unsatisfactory job performance), and Retaliation;
Hearing Date: 01/29/09; Decision Issued: 05/07/09; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8987, 8988, 8989; 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: 8987 / 8988 / 8989

Hearing Date: January 29, 2009
Decision Issued: May 7, 2009

PROCEDURAL HISTORY

On December 10, 2007, Grievant filed a grievance alleging retaliation and challenging the Agency's action to require her to fill out a leave slip for leaving a training session on December 5, 2007. On December 10, 2007, Grievant filed a second grievance alleging retaliation as specified in the prior grievance.

On May 14, 2008, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance for leaving the training session on December 5, 2007. On June 11, 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 she requested a hearing. On November 21, 2008, the EDR Director issued Ruling Number 2009-2166, 2167, and 2168 consolidating the three grievances for hearing. On December 10, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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?
5. Whether the Agency retaliated against Grievant?

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. Grievant has the burden of proving retaliation. 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:

On December 5, 2007, Grievant was attending a mandatory service training class. At about 2:15 p.m., Grievant and two Corrections Officers began discussing a supervisor by name. That supervisor was not present in the class. The Instructor asked Grievant and the other two officers to stop talking about the supervisor. Grievant continued talking about the supervisor. At 2:30 p.m., the class took a break. When the class resumed at 2:45 p.m., Grievant did not return to class. Grievant was not pleased with the way the instructor spoke to her. Grievant left the Facility. She did not obtain permission from any supervisor to leave the Facility.

The Agency required Grievant to complete a leave form and take two hours of annual leave for the time she missed from the class. Grievant submitted the leave form on December 11, 2007. The Assistant Warden signed the form on December 14, 2007.

The Agency was delayed in issuing disciplinary action to Grievant because she was on leave for several months and away from the Facility.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁴ 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.

One of Grievant’s work duties was to work the number of hours she was scheduled to work. On December 5, 2007, Grievant failed to complete the training class and her shift. Grievant did not seek or obtain permission to leave from Sergeant F. Her work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.⁵

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...”⁶ 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-

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

⁵ Leaving the work site during working hours without permission is a Group II offense. The Agency could have issued Grievant a Group II Written Notice but instead mitigated the disciplinary action to a Group I Written Notice.

⁶ *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.

Grievant argued that the Agency inconsistently disciplined its employees. The evidence showed, however, that Officer J and Officer K also received Group I Written Notices for leaving the training without permission. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁷ (2) suffered a materially adverse action⁸; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁹

Grievant engaged in a protected activity because she filed a grievance. She suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between her protected activity and the adverse action she received. The Agency took disciplinary action against Grievant because she failed to complete the training and left the Facility without permission. The Agency's disciplinary action is not a pretext for retaliation. The Agency's decision to force Grievant to take two hours of leave for the time she missed from work was appropriate under State Policy and not retaliatory.

⁷ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁸ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's request for relief due to retaliation is **denied**.

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
600 East Main St. STE 301
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.