

Issue: Group III Written Notice and Termination (absence in excess of 3 days without authorization); Hearing Date: 05/06/09; Decision Issued: 05/07/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9069; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9069**

Hearing Date: May 6, 2009  
Decision Issued: May 7, 2009

**PROCEDURAL HISTORY**

On January 23, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for being absent in excess of three days without proper authorization or satisfactory reason. Grievant failed to call the Agency prior to the beginning of his shift on three workdays.

On January 25, 2009, 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 April 10, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 6, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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 began working for the agency in August 1998. He was removed from employment effective January 23, 2009.

Grievant had prior active disciplinary action. On July 11, 2006, Grievant received a Group II Written Notice for failure to report to work as scheduled without proper notice to a supervisor. On April 3, 2007, Grievant received a Group II Written Notice with a five day suspension for failure to report for duty as scheduled without proper notice to supervision. On July 10, 2007, Grievant received a Group II Written Notice with a seven day suspension for failure to follow established written policy.

Grievant was scheduled to work on January 17, 18, and 19, 2009. He did not report to work on those days. He did not call the Agency prior to the beginning of the shifts to indicate that he would not be reporting to work. Grievant's son had transferred to a different school in another state because he and his family could no longer afford the tuition at the first school. This created stress for Grievant and distracted him from remembering to call the Agency to advise them that he would be absent.

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

"[A]bsence in excess of three days without proper authorization or satisfactory reason" is a Group III offense.<sup>4</sup> (Emphasis added). Grievant was scheduled to work on January 17, 18, 19, 2009. Grievant did not report to work on those days. The Agency has established that Grievant was absent for three days. It has not established that Grievant was absent in excess of three days – in other words, four or more days. Thus, the Group III cannot be upheld.

"[F]ailure to ... comply with applicable established written policy." is a Group II offense.<sup>5</sup> When Grievant began working for the Agency he signed a "Conditions of Employment". Section 17 states:

Corrections Officers must notify the Officer-in-Charge or the Shift Commander at least two hours before the beginning of their shift if they will be absent due to illness or other unanticipated reasons.

Grievant did not call the Agency prior to the beginning of his shifts scheduled for January 17, 18, and 19, 2009. Accordingly, Grievant failed to comply with the Conditions of Employment thereby justifying the issuance of a Group II Written Notice for failure to follow applicable established written policy.

*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....”<sup>6</sup> 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

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(1).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)

<sup>6</sup> *Va. Code § 2.2-3005.*

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 he was distracted from his responsibility to call because of the stress of having his son transfer from one school to another. Although the circumstances of the son's transfer may be unfortunate, there is insufficient evidence for the Hearing Officer to conclude that the Agency's expectation that Grievant call them prior to his absences was somehow unreasonable or exceeded the limits of reasonableness. In light of the standard set forth in *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

[A]ccumulation of two Group II offenses normally should warrant removal."<sup>7</sup> With the Written Notice giving rise to this grievance, Grievant has accumulated more than two Group II Written Notices. Grievant's removal from employment must be upheld.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is reduced to a Group II Written Notice. Based on the accumulation of disciplinary action, Grievant's 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

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<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(C)(2).

Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>8</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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