

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 06/01/09;  
Decision Issued: 06/04/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9077; 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: 9077**

Hearing Date: June 1, 2009  
Decision Issued: June 4, 2009

**PROCEDURAL HISTORY**

On November 19, 2008, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance.

On December 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 April 30, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party 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 employs Grievant as a Corrections Office at one of its Facilities. He has prior active disciplinary action consisting of a Group I Written Notice issued on April 6, 2009 for excessive tardiness.

Grievant's Facility is a correctional institution that must be staffed 24 hours a day, seven days a week. At the beginning of the year, security employees notify Agency managers of the times during which they wish to take annual leave. Those leave requests are either granted or denied. Agency managers begin scheduling several hundred employees using 28 day cycle sheets and taking into account each employee's scheduled annual leave. If employees need to take leave throughout the year, they are encouraged to make their requests far enough in advance to enable Agency managers to find replacement workers. If annual leave is scheduled in advance and employees adhere to those schedules, the Facility is able to minimize its overtime expenditures while ensuring a fully functioning Facility dedicated to public safety.

Grievant's regular workday consists of 11.5 hours.

At the beginning of 2008, Grievant accrued 64 hours of Sick Leave and 32 hours of Family Personal leave. Grievant exhausted his Sick Leave balances in March 2008.

After the time period in which Grievant exhausted his Sick Leave balances, Grievant was absent from work due to illness on the following days:

April 25, 2008  
August 6, 2008  
August 25, 2008  
September 30, 2008  
October 9, 2008  
October 10, 2008  
October 24, 2008  
October 28, 2008

Grievant was absent from work on October 9 and 10, 2008 due to a work related injury compensable under the Agency's workers' compensation program.

### **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>

Unsatisfactory attendance is a Group I offense.

Employees are given Sick Leave accrual balances so that they can be paid when absent from work (usually on short notice) due to illness. Employees are not obligated to give lengthy advanced notice of when they intend to take Sick Leave because often their illnesses or unexpected. The Agency is not attempting to discipline Grievant for using his Sick Leave.

With respect to absences not covered by Sick Leave, the Agency expects its employees to provide sufficient advance notice to enable the Agency to schedule other employees to work so that the Facility is adequately staffed.

In this case, Grievant was absent from work due to illness for eight workdays for a total of approximately 92 hours. Grievant's absences from work on October 9 and October 10, 2009 were because of an injury compensable under the workers' compensation program. The Hearing Officer will consider these 22 hours as protected leave for which the Agency cannot discipline Grievant. The Hearing Officer raised the issue of whether any additional leave was protected under the Family Medical Leave

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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).

Act. Grievant did not make this claim and did not present any evidence to suggest his absences were otherwise protected under the Family Medical Leave Act. Based on the number of days (6) Grievant was absent from work without giving the Agency reasonable advance notice of his absence, the Hearing Officer concludes that the Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory attendance.

Grievant argues that he had available leave balances in the form of annual leave, compensatory leave and family personal leave. The Agency did not deny Grievant his salary on those days he was unexpectedly absent. The availability of these leave balances does not mean Grievant can take leave at his sole discretion without adequate notice to the Agency. Grievant was expected to give reasonable advance notice and obtain approval to use annual<sup>4</sup>, compensatory<sup>5</sup>, and family personal leave<sup>6</sup>. Grievant failed to do so.

Grievant contends that he had doctor's excuses justifying his absences from work. The Agency does not contend that Grievant's absences from work were not legitimate. The Agency objects to the absence of adequate notice from Grievant to enable it to probably schedule its employees.

The Agency conducted a program for all of its employees who were having difficulty regularly working as scheduled. Agency managers explained the consequences to the Agency when employees fail to report to work as scheduled and discussed options such as light duty work when employees could work but not at their full capacity. Grievant attended the program. He argues that as part of the program, the Watch Commander was supposed to notify him when his absences were problematic yet the Watch Commander failed to do so. The Agency replied that it discontinued the program and, thus, the Watch Commander did not notify Grievant. The Hearing Officer concludes that the purpose of notifying Grievant when his absences were problematic was not a precondition to discipline. Providing notification to Grievant was to assist him. There is no reason to believe that if the Watch Commander had notified Grievant that his attendance was inadequate that Grievant would have changed his behavior.

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<sup>4</sup> DHRM Policy 4.10 provides, Employees must request and receive approval from their supervisors to take annual leave. Employees should make their requests for leave as far in advance as possible."

<sup>5</sup> DHRM Policy 3.10 provides, "When practicable, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request to use compensatory leave. The agency may also schedule use of compensatory leave at a time convenient to agency operations."

<sup>6</sup> DHRM Policy 4.57 provides, "Family/Personal Leave (F/P) may be taken at the discretion of the employee for any purpose (family, illness, attend a funeral, or other personal needs, etc.) provided the employee gives reasonable notice and his/her supervisor approves the absence."

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>7</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 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 absent due to illness and not able to work. The Agency has given Grievant a Group I Written Notice, the lowest level of disciplinary action. Grievant was aware of his attendance obligations and the consequences to the Agency of his absences. If the Hearing Officer were to consider Grievant’s illnesses in excess of his Sick Leave balances to be a mitigating factor, it would have the effect of minimizing the distinction between Sick Leave and annual leave, etc. It would also serve to re-write the Standards of Conduct regarding what constitutes unsatisfactory attendance. The Agency’s ability to operate would be adversely affected if it could not discipline employees whose attendance was unsatisfactory.

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 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:

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.

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<sup>7</sup> Va. Code § 2.2-3005.

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 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.