

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 11/10/09; Decision Issued: 12/29/09; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 9093; Outcome: No Relief – Agency Upheld in Full.

DECISION OF HEARING OFFICER

In Re: Case #9093

Hearing Date: November 10, 2009

Decision Issued: December 29, 2009

PROCEDURAL HISTORY

This offense regards failure to report for duty as ordered on October 31, 2008. Grievant filed his grievance¹ in a timely fashion after he had exhausted a first stage (1-29-09), a second stage (2-23-09) and a third stage (4-8-09) resolution hearing. The matter was qualified for hearing on 4-16-09. In a letter dated 5-19-09, the Hearing Officer received appointment from the Department of Employment Dispute Resolution (EDR). The matter was scheduled for hearing during a pre-telephone conference on 6-2-09 at which time the case was set for 6-11-09 at 1:30 p.m. but due to Grievant's disability was ultimately rescheduled for 11-10-09 at 10:00 a.m. at the location of Grievant's employment. Grievant was pro se and Agency was represented by an advocate, both of whom were present at the hearing. All documents that were submitted as evidence by Agency and Grievant were marked as exhibits as they were presented. Testimony was taken in person. Each witness was sworn, and the matter was completed on the November 10 date.

APPEARANCES

Grievant as witness

One (1) witness for Grievant

Representative for Agency

Advocate for Agency

¹ Agency Exhibit 2

Three (3) witnesses for Agency

ISSUES

The Grievant asserts that he was disciplined for not working "overtime" when, in fact, he did not report for a "shake down" which was not an overtime issue. Had it been overtime, Grievant should have been given more than 13 hours notice of need to report to work. Agency asserts Grievant failed to report to work on a day he was to report to work for a "shake down". Grievant had signed an employment contract² stating he understood he would be called and expected to be at work on special days other than his regular shift.

BURDEN OF PROOF

The burden of proof is on the Agency in this case as it is a disciplinary action involving a Written Notice level Group I disciplinary action. The Agency must prove by a preponderance of the evidence that the action taken was warranted and appropriate under the circumstances.

APPLICABLE LAW

The Virginia Department of Corrections Operating Procedure No. 135.1: *Standards of Conduct*³ addresses "Timely and Regular Attendance/Performance (see S.O.C. (IV)(D)(1),(2),(4)). The *Standards of Conduct* (X)(A) states, with regard to Group I offenses, "First Group offenses include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force." *Standards of Conduct* (X)(B)(1) details that a Group I offenses include unsatisfactory attendance.

² Agency Exhibit 2

³ Agency Exhibit 3

MITIGATION

Under the *Rules for Conducting Grievance Hearings*, Section VI, B, I, a hearing officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Disciplinary actions should be fair and objective. The Grievant's previous record of performance should be considered. The disciplinary action should not be overly harsh when considering the severity of the offense.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). EDR's Hearing Rules provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or...an employee's long service, or otherwise satisfactory work performance."

The Agency testified that "failure to report to work" is a Group II offense (135.1 IV,D) (Group II Offenses definitions XI,B,6)⁴. However, considering the Grievant's length of service, the Agency did reduce the disciplinary action to a Group I offense. Agency's discipline did not exceed the limits of reasonableness.

⁴ Agency Exhibit 3

FINDING OF FACTS

History

Grievant has been employed at the Agency for 17.5 years. Grievant was issued a Group I disciplinary action⁵ on 11-12-08 for violation of Virginia Department of Corrections Operating Procedure *Standards of Conduct* 135.1⁶. Disciplinary action states that Grievant refused to work overtime hours as required. On June 1, 1991 Grievant signed an employment agreement evidencing his knowledge he would at times be called to work other than his normal work week hours.

OPINION

Grievant does make a point that he was disciplined, according to his formal disciplinary action notice, for the wrong action, i.e...failure to work overtime...when in fact what he did was fail to work a "shake down" which was scheduled within his 160 hour work cycle. While evidence supports this fact, it is not an egregious enough misuse of words to cause Grievant to not know why he was being disciplined. Grievant recalls 2 previous circumstances where he was excused from attending a shade down. Once he was excused for not having a baby sitter, and once he was excused for needing to meet an insurance adjuster after wind had damaged his roof. Grievant admits both times he made requests and both times the requests were granted that he not attend a shake down. In the instant issue he had a deer hunting trip planned and informed his supervisors he wouldn't be available for the shake down. He was not this time given permission to not show up for work. He was aware he was expected to be on duty on the day in question. There was no testimony of any confusion about what was expected of Grievant on the shake down

⁵ Agency Exhibit 2

⁶ Agency Exhibit 3

day. Grievant took it upon himself to not show up for work. Correctional officers have a special duty to protect the public which duty should not be taken lightly. Disregarding the orders of a superior to be present for a shakedown maneuver is simply not acceptable.

DECISION

Hearing Officer **upholds** the Group I disciplinary Action.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering

the hearing officer to revise the decision to conform it to written policy.

Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution
830 East Main Street, Suite 400
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided, and if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within **thirty days** of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which grievance arose. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer