

Issues: Group II Written Notice (failure to call in) and Suspension; Hearing Date: 07/15/09; Decision Issued: 07/16/09; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9132; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9132

Hearing Date: July 15, 2009
Decision Issued: July 16, 2009

PROCEDURAL HISTORY

On January 21, 2009, Grievant was issued a Group II Written Notice of disciplinary action, with one day suspension. The offense was failure to report or call in for scheduled shift on January 4, 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 June 30, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on July 1, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, July 15, 2009. The grievance hearing was held on July 15, 2009, at the Agency's regional office, with one witness testifying via telephone (as agreed by the parties).

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Advocate for Agency
Two Witness for Agency

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?

The Grievant requests rescission of the Group II Written Notice, and asserts that the agency did not comply with the prescribed Grievance Procedure Manual during the management resolution steps.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The applicable Standard of Conduct, Policy 1.60, defines Group II offenses to include acts of misconduct of a more serious (compared to Group I) and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Agency Exh. X.

The Offense

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Through the testimony of the Agency's facility superintendent and chief of security, it is clear that the Grievant did not report or call in on January 4, 2009. The Grievant, in March 2008, requested annual leave for dates beginning December 22, 2008, with a return to work date of January 4, 2009. The Agency approved the leave request, with the exception of December 24 and 25, 2008. Agency Exh. IV. The Grievant took leave as approved, worked December 24 and 25, 2008, but did not report or call in for his scheduled shift on January 4, 2009, the stated return to work date on the annual leave request. The Grievant concedes that he did not report to work on January 4, 2009, but states the reason was a misunderstanding and misreading of his leave request. The Grievant thought his leave extended through January 4, 2009, rather than a return to work date of January 4, 2009.

The Grievant has two other active Written Notices: a Group II for failing to report for a scheduled shift and a Group I for repeated tardiness.

The Grievant points to the applicable Grievance Procedure Manual, that provides, in § 3.2, that within 5 workdays of the receipt of the grievance, the second-step meeting must be held. Further, within 5 workdays of the second-step meeting, the second-step respondent must provide a written response on the grievance "Form A" or an attachment. The Form A states that the date received was February 25, 2009, the meeting occurred on February 27 and March 10, 2009, and that the response was dated March 23, 2009. The Grievant asserts the Agency did not comply with the grievance procedure and, thus, the Group II Written Notice should be invalidated. The Grievant notes that if he missed his prescribed deadline for filing his grievance, he would not be allowed to proceed with his grievance.

While it appears that the Agency did not comply with the timelines of the grievance procedure, GPM § 6 addresses the method of relief for noncompliance with the grievance procedure. GPM § 6.1 provides that all claims of noncompliance should be raised immediately, and that by proceeding with the grievance after becoming aware of a procedural violation one may forfeit the right to challenge the noncompliance at a later time. GPM § 6.3 goes further to outline the process for remedying noncompliance, including ultimately seeking relief from the Director of EDR. Thus, the hearing officer is without authority to address this noncompliance issue. A hearing officer may address claims of party noncompliance occurring during the hearing phase. See GPM § 6.3.

Based on the uncontroverted facts, the hearing officer finds that the Grievant engaged in the behavior described in the Written Notice, and that the conduct was properly characterized as a Group II Written Notice. The prior active Written Notices fully justify the issuance of the Group II for failure to report or call in for the scheduled shift on January 4, 2009. I find that the Grievant's conduct was inadvertent, nevertheless the conduct justifies a Group II Written Notice as it obviously had an impact on business operations and/or constituted neglect of duty. In addition, the cumulative, repeat nature of the offence when considering the prior, active Group Notices justifies the Group II offense.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice is suspension of up to 10 workdays for a first Group II Offense. A second active Group II Notice normally should result in termination; however, when mitigating circumstances exist, an employee may be suspended for up to 30 workdays and/or demoted or transferred with reduced responsibilities and a disciplinary salary reduction; or transferred to an equivalent position in a different work area with no change in salary. The policy provides for reduction of discipline if there are mitigating circumstances such as conditions that compel a reduction to promote the interests of fairness and objectivity; or based on an employee's otherwise satisfactory work performance.

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." 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.

Hearing Rules § VI.B.1 (alteration in original). Therefore, if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B.¹

In this case, the first two elements have been met. Regarding the third, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts

¹ Cf. Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

within the bounds of reasonableness. Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. While there is no indication that the Grievant's violation of policy had any malevolent intent, in this case, the Agency's action in assessing a Group II offense is within the bounds of specific policy and already has been mitigated to a much lesser sanction than allowed by policy.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action, with one day suspension, is **upheld**.

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 decision 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 is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state 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 the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of 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 the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

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 **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **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; the day following the issuance of the decision is the first of the 15 days). 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 an 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 the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer