

Issues: Group I Written Notice (unsatisfactory attendance) and Group II Written Notice with demotion and pay reduction (failure to follow instructions); Hearing Date: 11/06/09; Decision Issued: 11/10/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9179, 9213; 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: 9179 / 9213**

Hearing Date: November 6, 2009  
Decision Issued: November 10, 2009

**PROCEDURAL HISTORY**

On December 11, 2008, Grievant was issued a Group I Written Notice of disciplinary action for failing to report to work. On June 17, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions to report to work. Due to accumulation of disciplinary action, Grievant was demoted and received a disciplinary pay reduction.

Grievant timely filed grievances to challenge the Agency's action. The outcome of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On September 24, 2009, the EDR Director issued Ruling No. 2010-2424, 2010-2427 consolidating the two grievances for a single hearing. On October 6, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 6, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Lieutenant at one of its Facilities. The purpose of his position was:

Direct and manage the administrative functions for a housing unit, by planning, developing, implementing and supervising programs to meet the inmate's needs. Responsible for the unit's program operation, security, sanitation and staff supervision.

Grievant had prior active disciplinary action. On February 5, 2009, Grievant received a Group II Written Notice for failure to follow a supervisor's instruction. Based on the accumulation of disciplinary action, Grievant was demoted to a Corrections Officer with a disciplinary pay reduction.

Grievant was scheduled to work on November 18, 2008 and November 19, 2008. On November 18, 2008, Grievant's car broke down and he had to take it to the repair shop. Grievant called the Facility and informed the Major of his circumstances. The Major expected Grievant to be at work on November 19, 2008. On November 19, 2008, Grievant's vehicle remained in the shop and he could not get to work. He called the Facility and spoke with the Major. The Major was displeased that Grievant was not

going to report to work. She told Grievant that November 18, 2008 and November 19, 2008 would become his rest days and that he should report to work on November 20 and 21, 2008. Grievant understood the instruction but did not believe it. He thought the Major was giving the instruction because she was angry with him. On November 20 and 21, 2008, Grievant did not call the Facility to report that he would not be at work and he did not show up for work as scheduled.

Grievant was scheduled to work the evening shift on May 8, 2009. He reported to work dressed to play basketball for the Facility's basketball team. The team was scheduled to play a game on May 9, 2009 and the team was practicing in a gym on May 8, 2009. Grievant believed the Warden Senior had excused Grievant from work that day. The Watch Commander informed Grievant that Grievant was not excused from work. The Watch Commander allowed Grievant to report to work late on May 8, 2009. He instructed Grievant to go get his uniform on and report to work at midnight. Grievant returned to his home, washed his uniform, and fell asleep. Grievant did not report to work at midnight as instructed by the Watch Commander.

### **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.<sup>4</sup> Grievant was instructed by the Major to work on November 20 and 21, 2008. Grievant failed to report to work as scheduled. His failure to report to work constituted unsatisfactory attendance. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory attendance.

Grievant argues that he did not realize the Major expected him to report to work on November 20 and 21, 2008 and that she was merely upset with his failure to report to work on November 18 and 19, 2008. Grievant understood the instruction. To the extent Grievant assumed the Major did not actually intend for him to report to work, he did so at his own risk.

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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(X)(B)(1).

Failure to follow a supervisor's instruction is a Group II offense.<sup>5</sup> Grievant reported to the Watch Commander. On May 8, 2009, the Watch Commander instructed Grievant to go home, get his uniform, and report to work at midnight. Grievant understood the instruction. He went home, washed his uniform but fell asleep. Grievant did not comply with a supervisor's instruction thereby justifying the issuance of a Group II Written Notice.

Grievant argued that he was not supposed to be working on May 8, 2009 in accordance with the Warden Senior's instruction to the Watch Commander. The Warden Senior testified that it was up to the Watch Commander to determine whether Grievant could be excused from work and that the Warden Senior did not make a decision regarding whether Grievant should work on May 8<sup>th</sup>. The Warden Senior testified that the Watch Commander called him on May 8<sup>th</sup> and asked if the Warden Senior had given Grievant permission to miss work. The Warden Senior told the Watch Commander that the Warden Senior had not given Grievant permission to miss work and that it was up to the Watch Commander to determine whether Grievant should work that night. The Watch Commander determined that Grievant should work the remainder of his shift.

Upon the accumulation of two Group II Written Notices, an Agency may remove an employee. In lieu of removal, the Agency decided to demote Grievant and reduce his salary. The Agency's decision must be upheld.

*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 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary actions.

## DECISION

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<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

<sup>6</sup> *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for unsatisfactory attendance is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice for failure to follow a supervisor's instruction is **upheld**. Grievant's demotion and disciplinary salary reduction must be **upheld** based on the accumulation of disciplinary action.

## 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 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>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.