

Issues: Group III Written Notice (leaving post without permission) and Termination (due to accumulation); Hearing Date: 10/22/09; Decision Issued: 10/26/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9196; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9196**

Hearing Date: October 22, 2009  
Decision Issued: October 26, 2009

**PROCEDURAL HISTORY**

On July 9, 2009, Grievant was issued a Group III Written Notice of disciplinary action for leaving a security post without permission during working hours.

On July 10, 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 September 21, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 22, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
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. He had been employed by the Agency for approximately 10 years until his removal effective July 9, 2009. The purpose of this position was:

Maintain security, custody, and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observers and records their behavior and movement to ensure their safe and secure confinement.<sup>1</sup>

Grievant had prior active disciplinary action. On October 20, 2006, Grievant received a Group III Written Notice for sleeping during working hours.

On July 4, 2009, Grievant began his regular shift at 5:45 a.m. His regular shift ended at 6:10 p.m. Prior to the ending of his shift, Grievant was notified that he had been drafted to work an additional four hours. He was notified that he would be working in the Front Entry of the Administrative Building. As the Front Entry Officer, Grievant was responsible making sure that employees entering the secured area of the Facility were not carrying contraband. When an employee would seek to enter the secured area of the Facility, Grievant would instruct the Master Control Officer to open a secure

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<sup>1</sup> Agency Exhibit 3.

door so they could enter a small room. Once Grievant completed the “shakedown”, he would instruct the Master Control Officer to open a second door to enable the employee to pass into the secured part of the Facility. The Master Control Officer sat in a booth with a window enabling her to see the shakedown area and the Front Entry area.

At approximately 7:14 p.m. on July 4, 2009, Grievant told the Master Control Officer that he was going to step outside. Grievant exited the Facility and walked to the parking lot and got into his vehicle. He drove his vehicle to the front of the parking lot. He used his cell phone to make a telephone call as he sat in his vehicle. Shortly thereafter, the Lieutenant was in the process of exiting the Facility in order to do his outside perimeter check. As he approached the Front Entry area, the Lieutenant noticed that Grievant was absent from his post. The Lieutenant asked the Master Control Officer where was Grievant. The Master Control Officer told the Lieutenant that Grievant was outside. The Lieutenant looked out the front door twice but did not see Grievant. He asked the Master Control Officer again where was Grievant located. The Master Control Officer said Grievant was in his car in the handicapped parking space near the front. At approximately, 7:24 p.m., the Lieutenant walked to Grievant’s car and tapped on the hood to get Grievant’s attention. The Lieutenant instructed Grievant to return to his post.

### **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>2</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>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

“[L]eaving the work site during working hours without permission” is a Group II offense. Grievant’s post order established his work location as the Front Entry Post. His post order stated, “Do not leave your post until you have been properly relieved or authorized to leave.” On July 4, 2009, Grievant left his post without being relieved or otherwise authorized to leave. Grievant left his work site during working hours without permission thereby justifying the issuance of a Group II Written Notice.

Upon the accumulation of a Group III Written Notice and any additional Written Notices, an employee may be removed from employment. Grievant has accumulated a

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

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

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

Group III Written Notice and a Group II Written Notice, thereby justifying the Agency's decision for removal.

The Agency argues Grievant should receive a Group III Written Notice based on the wording of Attachment 2 to the Standards of Conduct which provides:

Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) \*\*\* Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

The Agency has not established extreme circumstances such that the offense should be elevated to a Group III offense. Grievant was not responsible for or able to open or close any secured doors. He was simply responsible for signaling the Master Control Officer that she could open or close a secured door. Grievant's absence from his post was a serious matter, but it was not so serious as to jeopardize public safety such as creating a risk of escape. His absence would merely be an annoyance to anyone wishing to enter the secured portion of the Facility who would have to wait until Grievant returned to be searched and cleared for entry.

Grievant argues he obtained permission of the Lieutenant to exit the Facility. This conclusion is not supported by the evidence. The Lieutenant testified he did not give Grievant permission to leave his post. The Lieutenant's testimony was credible. He denied giving Grievant permission to leave. The Lieutenant's behavior asking the Master Control Officer where Grievant was suggests the Lieutenant did not know Grievant had left his post. The Master Control Officer's incident report is consistent with the Lieutenant being unable to find Grievant. The Agency's practice and the Lieutenant's practice were to permit employees who had been drafted to make telephone calls from inside the facility without leaving their posts. A preponderance of the evidence shows that Grievant left his post without permission from the Lieutenant.

*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>5</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

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<sup>5</sup> *Va. Code § 2.2-3005.*

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 action.

## 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. Grievant's removal is **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>6</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>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.