

Issue: Group III Written Notice with Termination (leaving security post without permission); Hearing Date: 03/31/11; Decision Issued: 04/04/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9540; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9540

Hearing Date: March 31, 2011
Decision Issued: April 4, 2011

PROCEDURAL HISTORY

On September 14, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to report to work. On September 14, 2010, Grievant received a Group III Written Notice of disciplinary action with removal for leaving a security post.

On October 3, 2010, 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 March 8, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 31, 2011, a hearing was held at the Agency's 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 Corrections Officer at one of its Facilities. He had been employed by the Agency for more than five years. The purpose of his position was to, "provide security, custody and control of adult offenders, resulting in a safe and secure environment for staff, inmates, and citizens of the Commonwealth of Virginia." Grievant had prior active disciplinary action. On May 29, 2009, he received a Group I Written Notice for unsatisfactory attendance.

Grievant was absent from work for several weeks due to an injury. He was on short-term disability. He was scheduled to return to work on September 8, 2010. Two hours prior to the beginning of the shift, Grievant called the Facility and informed a supervisor that he would not be reporting to work because of a "family emergency". Grievant reported to work the following day and presented a note from a medical provider stating, in part:

Patient Name: [Ms. A]

Please excuse [Grievant] from work on September 08, 2010 due to a doctor's appointment.

Grievant had a zero balance for his annual leave, sick leave, and family personal leave. Grievant was placed on leave without pay status but was not disciplined for entering pay without leave status

On September 9, 2010, Grievant was working at a post in the housing unit. He reported to the Sergeant who was the housing unit manager. At 6:50 a.m., Grievant asked that he be relieved of his post so that he could go to the restroom. At 7:03 a.m., another Corrections Officer assumed Grievant's post. Grievant left his post. He returned to his post at 7:12 a.m. Grievant did not tell the Sergeant that he had "soiled himself". At 7:50 a.m., another Corrections Officer relieved Grievant of his post so that Grievant could take a 30 minute break as permitted under the Facility's practice. The Agency does not permit employees to leave the Facility in the middle of their shifts. Grievant decided to leave the Facility. As he left the Facility he stopped at a vending machine. He also passed by the Captain but did not tell the Captain that he was leaving the Facility and why he was leaving.

At approximately 8:38 a.m., Grievant called the Lieutenant by telephone. Grievant told the Lieutenant that he was home. The Lieutenant asked Grievant who had given him permission to leave his post or the institution. Grievant stated that nobody had given him permission and that he took it upon himself to go home. Grievant told the Lieutenant that he had "soiled himself" and was upset and agitated due to some coworkers making fun of him. The Lieutenant asked Grievant who had made fun of him and if he had told anybody of the incident. Grievant stated that he had not told anybody about the incident. The Lieutenant asked Grievant how anyone would know to make fun of him if he had not informed anyone of the incident. Grievant stated that he assumed that they were making fun of him. The Lieutenant informed Grievant that leaving his post and the institution without permission was not acceptable. Grievant stated that he would not come back to work until he spoke with the Warden. The Lieutenant informed Grievant that the Warden was not there. The Lieutenant contacted the Captain and told him of the incident and transferred the call to him. The Captain spoke with Grievant and persuaded Grievant to return to the Facility.

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."¹ 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

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Group II Written Notice

The Agency contends that Grievant should receive a Group II Written Notice for “failure to report to work as scheduled without proper notice to supervisor”. The evidence showed that Grievant was expected to contact the Facility within two hours of his shift to notify the Agency that he would not be reporting is scheduled. On September 8, 2010, Grievant contacted a supervisor at the Facility within two hours before the beginning of his shift and, thus, he gave proper notice to a supervisor. The Group II Written Noticed must be reversed.⁴

Group III Written Notice

Group III offenses include, “leaving a security post without permission during working hours.” On September 9, 2010, Grievant was assigned to a post within the Facility. He was relieved of his post with the expectation that he would return in 30 minutes. Grievant knew that security staff were not permitted to leave the Facility during their shifts. Grievant left the Facility and did not return to his post within a 30 minute time period thereby abandoning his post. Grievant left a security post without permission during working hours. The Agency presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an employee may be removed from employment. Accordingly, Grievant’s removal 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...”⁵ 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

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁴ Although the Written Noticed mentions that Grievant did not have any available leave to cover his absence, an Agency witness testified that the Agency was not taking action against Grievant for being absent without sufficient leave available.

⁵ Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the disciplinary action against him should be mitigated because he left his post due to a medical condition which caused him to lose control of his bowels and defecate in his uniform. He argued that it was necessary for him to leave the Facility in order to clean up. The difficulty with Grievant's argument is that it remains an argument. Grievant did not present any sworn testimony to establish a factual basis for his claim. The Warden testified that he did not believe Grievant's claim and did not know why Grievant left the Facility.

If the Hearing Officer assumes for the sake of argument that Grievant needed to leave the Facility as a result of a medical emergency, the outcome of this case does not change. An Agency witness testified that if Grievant had brought to the attention of a supervisor of the reason why he needed to leave the Facility, he would have been permitted to do so. The Agency took disciplinary action against Grievant because he took no action to notify a supervisor prior to leaving the Facility. An Agency witness testified that Grievant stopped at a vending machine prior to leaving the Facility and briefly spoke to the Captain as he left the Facility. Grievant had the opportunity to inform the Captain of his immediate need to leave the Facility, but he failed to do so. The Agency has presented sufficient evidence to show that even if Grievant had an immediate need to leave the Facility, he failed to properly notify a supervisor that he was leaving. Grievant's failure to properly notify a supervisor prior to leaving the Facility is an aggravating circumstance that counters the mitigating circumstance claimed by Grievant.

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 II Written Notice of disciplinary action for failure to report to work as scheduled without proper notice to a supervisor is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for leaving a security post without permission during working hours 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.
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 14th St., 12th 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.⁶

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.