

Issues: Group I Written Notice (unsatisfactory performance), Misapplication of Policy (compensation), and Retaliation (other protected right); Hearing Date: 11/14/11; Decision Issued: 11/15/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9449, 9560, 9561; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9449 9560 9561**

Hearing Date: November 14, 2011  
Decision Issued: November 15, 2011

**PROCEDURAL HISTORY**

On March 24, 2010, Grievant filed a grievance alleging misapplication of policy regarding her leave. On March 31, 2010, Grievant filed a grievance alleging workplace harassment and retaliation.

On March 23, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On April 20, 2010, Grievant timely filed a grievance to challenge the Agency's action.

The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On March 10, 2011, the EDR Director issued Ruling No. 2011-2830, 2011-2893 qualifying and consolidating the grievances for a single hearing. On October 18, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 14, 2011, a hearing was held at the Agency's office. Grievant was notified of the hearing date but she did not attend.

**APPEARANCES**

Agency Party Designee  
Agency Advocate

**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?
5. Whether the Agency failed to comply with State policy with respect to Grievant's leave?
6. Whether the Agency engaged in workplace harassment and retaliation against Grievant?

### **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. The Burden of proof is on Grievant with respect to the remaining issues in this grievance. 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 employs Grievant as an Inmate's Hearings Officer. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency provided Grievant with a recording device to enable her to record inmate disciplinary hearings. She had been reminded in numerous staff meetings that she was not to use the recorder for any reason other than to record inmate disciplinary hearings. In January 2010, Grievant met with several Facility managers regarding concerns she had expressed to the Agency. She had a recording device in one of her pockets and used the device to record the meeting. She did not advise the meeting participants that she was recording their comments. Shortly after the meeting, she told some of her coworkers that she had recorded the meeting. Facility managers only

learned the Grievant had recording the meeting approximately 45 days after the meeting. Although Grievant claimed she recorded the meeting by accident, the Warden did not believe her. He believed that if she had accidentally recorded the meeting, she would have notified Facility managers at least as soon as she told her coworkers that she had recorded the meeting.

Grievant had an attendance problem. Although she was responsible for knowing the amount of leave she had accrued before taking leave, she did not do so. Grievant used approximately 121 hours of leave more than she had accrued. Grievant refused to repay the leave and the Agency began reducing her paychecks.

### 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>

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>4</sup> In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was given a recording device to use to record inmate disciplinary hearings. She was advised during staff meetings not to use the recorder for reasons other than recording inmate disciplinary hearings. In January 2010, Grievant acted contrary to that instruction when she recorded a meeting she had with Facility managers regarding some of her concerns. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice of disciplinary action for unsatisfactory job performance.

*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

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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)(4).

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 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.

Grievant alleged that the Agency failed to comply with State policy regarding her leave practices. The Agency presented evidence showing that Grievant had used more leave than she had accrued and that the Agency had discretion to recover the leave overpayment by reducing her paycheck. Grievant alleged that the Agency engaged in workplace harassment and retaliation. The Agency denied Grievant’s allegations. Grievant did not appear at the hearing and no evidence was presented to support these allegations. Grievant’s request for relief must be denied.

Based on Grievant’s request, the EDR Director initially delayed assigning the three grievances to the Hearing Officer. On September 22, 2011, the EDR Director issued Compliance Ruling 2012 – 3093 stating:

The stay is lifted as of the date of this ruling and Case Numbers 9449, 9560, and 9561 will be assigned to a hearing officer. We note that if the grievant lacks mental capacity to adequately participate in the hearing, her interests may be represented by a duly authorized representative.

Grievant did not present to the Hearing Officer any documents from her medical providers to establish that her mental and/or physical condition had changed for the worse since the EDR Director’s ruling on September 22, 2011. There was no basis for the Hearing Officer to further delay the grievance hearing.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant’s requests for relief are **denied**.

## APPEAL RIGHTS

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<sup>5</sup> Va. Code § 2.2-3005.

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].

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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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer