

Issue: Group II Written Notice (unsatisfactory job performance); Hearing Date: 12/14/11; Decision Issued: 12/27/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9712; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 01/08/12; Reconsideration Decision issued 02/07/12; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9712

Hearing Date: December 14, 2011
Decision Issued: December 27, 2011

PROCEDURAL HISTORY

On May 26, 2011, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory work performance.

On June 21, 2011, 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 November 15, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 14, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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?

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 employs Grievant as a Counselor at one of its Facilities. The purpose of Grievant's position is:

Provides a range of casework management services, programming, and guidance for offenders in a correctional facility to enhance the security of the facility and promote offenders' long-term pro-social behaviors.¹

Grievant had prior active disciplinary action. On August 4, 2010, Grievant received a Group I Written Notice for Unsatisfactory Performance. The nature of the offense was:

A review of the offender records clearly supports the allegations of non-compliance. You were advised in writing of your need to comply with the directions to include documenting offender contacts in the offender's record and submission of monthly contact reports. You have consistently failed to do so, therefore demonstrating inadequate or unsatisfactory job performance.²

Grievant had difficulty getting to work at the beginning of his scheduled shift because he did not have a field vehicle to drive. To accommodate Grievant's

¹ Agency Exhibit 4.

² Agency Exhibit 5.

circumstances, the Agency permitted Grievant to report to work in the midmorning. After what the Agency considered to be a reasonable period of time for Grievant to obtain a vehicle, the Agency notified Grievant to report to work under his customary work schedule. On February 10, 2011, the Supervisor instructed Grievant to begin reporting to work at 8 a.m.

On February 14, 2011, Grievant received a Notice of Improvement Needed/Substandard Performance containing and Improvement Plan stating:

1. You have been instructed to carry a logbook with you to the housing unit to write down the offenders' concerns. Within 24 hours you will then transfer your counselor notes into VACORIS. ***
2. On February 10, 2011 you were informed that as of March 1, 2011, your work schedule will be 8 a.m. to 4:30 p.m."

On March 1, 2011, Grievant reported to work at 10:30 a.m. instead of 8 a.m. He had not obtained permission from the Supervisor to report late to work.

A master pass list contains the names of offenders who are permitted to move from one part of the Facility to another on a particular date. One of Grievant's duties included drafting a master pass list. On March 25, 2011 at 2:32 p.m., Grievant talked to the Supervisor. The Supervisor wanted Grievant to meet with him and submit a master pass list on March 28, 2011. Grievant stated he could not provide the master pass list on March 28, 2011. The Supervisor instructed Grievant to submit a master pass list on March 29, 2011 at 2:15 p.m. On March 29, 2011, Grievant was at work but did not meet with the Supervisor and submit a master pass list.

On April 4, 2011, the Supervisor reviewed notes Grievant had written in his logbook. The Supervisor examined the Agency's database to determine whether Grievant had entered the information from his logbook into the database. The Supervisor observed that Grievant had failed to enter into the database his notes regarding his interaction with several inmates.

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."³ 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

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

warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁶ Grievant was instructed to report to work on March 1, 2011 at 8 a.m. He reported to work at 10:30 a.m. contrary to the Supervisor’s instruction. Grievant did not have permission from the Supervisor to be late. On March 25, 2011, the Supervisor informed Grievant that Grievant was expected to meet with the Supervisor on March 29, 2011 at 2:15 p.m. to provide a master pass list. Grievant failed to meet with the Supervisor on March 29, 2011 at 2:15 p.m. Grievant’s work performance was unsatisfactory to the Agency and contrary to the Supervisor’s instruction. Grievant was instructed by the Supervisor to enter his notes into the Agency’s database within 24 hours of meeting with an offender. On April 4, 2011, the Supervisor reviewed Grievant’s log book and noticed that Grievant had not entered his notes into the Agency’s database as previously instructed. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

The Agency issued a Written Notice to Grievant for unsatisfactory work performance. Unsatisfactory work performance is usually a Group I offense. The Agency issued Grievant a Group II Written Notice instead. An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his/her personnel file. Grievant received a Group I Written Notice on August 4, 2010 for unsatisfactory work performance. The Written Notice issued on May 26, 2011 represented a second Written Notice for unsatisfactory work performance. Accordingly, the Agency was authorized elevate the level of disciplinary action from a Group I offense to a Group II offense.

Grievant argued that he did not report to work at 8 a.m. on March 1, 2011 because he had did not have a reliable method of transportation. Employees are expected to report to work as scheduled. The Agency may select the start time of an employee’s work shift. Employees are solely responsible for reporting to work at the beginning of their shifts. Grievant’s inability to obtain a vehicle and report to work does not excuse his failure to report to work on March 1, 2011 at 8 a.m.

Grievant argued that he did not have enough time to draft a master pass list for the March 29, 2011 meeting. He indicated that he was absent from work on March 28, 2011 because of an unexpected medical issue and that he would have written the master pass list on March 28, 2011. Grievant’s absence on March 28, 2011 does not excuse his failure to produce a master pass list. Completing a master past list did not

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

require much time. He had adequate time to complete the list on March 25, 2011 prior to the ending of his shift at 4:30 p.m.

Grievant argued that it was unnecessary for him to enter the notes in his logbook into the database because they were not significant and not for offenders assigned to him. The evidence showed that Grievant was expected to enter all information about any offenders that he recorded in his logbook into the Agency's database regardless of its significance.

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..."⁷ 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 argued that the Agency retaliated against him, discriminated against him for taking Family Medical Leave, and created a hostile work environment based upon his National Origin. No credible evidence was presented to support these allegations. The evidence showed that the Agency took disciplinary action against Grievant because of his behavior and not based on Grievant's protected status or actions.⁸

DECISION

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

APPEAL RIGHTS

⁷ Va. Code § 2.2-3005.

⁸ Grievant allege that the Agency's evaluations of his work performance were arbitrary or capricious and discriminatory based upon his National Origin. No credible evidence was presented to support this allegation.

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.⁹

[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].

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9712-R

Reconsideration Decision Issued: February 7, 2012

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Many of the “facts” that Grievant contends should be controlling were not presented as evidence during the hearing.¹⁰ Grievant argues that several of the Agency’s actions denied him procedural due process. Grievant has not referred to any policies that would support his conclusion or form a basis to reverse the disciplinary action. The Agency did not deny Grievant procedural due process. If the

¹⁰ The original Hearing Decision contains a typographical error. The decision refers to a “field vehicle”. The decision should have simply referred to a “vehicle”. Grievant did not have a personal vehicle for a period of time.

Hearing Officer assumes for the sake of argument that the Agency denied him procedural due process, any such defect was cured by the hearing process during which Grievant had the opportunity to present any evidence and arguments he believed necessary to support his position in the grievant. The request for reconsideration is **denied**.

APPEAL RIGHTS

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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer