

Issue: Group III Written Notice with Termination (leaving security post without permission); Hearing Date: 11/21/11; Decision Issued: 11/22/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9715; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9715

Hearing Date: November 21, 2011
Decision Issued: November 22, 2011

PROCEDURAL HISTORY

On July 20, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for leaving a security post without permission.

On September 1, 2011, Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 21, 2011, a hearing was held at the Agency's office. Grievant was notified of the hearing date but did not appear.

APPEARANCES

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 Correction Officer at one of its Facilities until her removal effective July 21, 2011. She had been employed by the Agency since May 2006. The purpose of Grievant's position was:

Contributes to the agency's public safety mission by supervising offenders in an institutional setting. Provide security over of adult offenders at the institution and allowing transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement. Interacts with visitors, staff, offenders and the public to maintain orderly and secure operations.¹

Grievant had prior active disciplinary action. On June 8, 2011, Grievant received a Group II Written Notice.

On June 26, 2011, Grievant was working a security post at the Facility. She was responsible for driving a vehicle around the Facility's perimeter to ensure that the perimeter had not been breached. She carried a shotgun while working her post. Grievant left her post by driving her vehicle to the Facility's barracks. Grievant took the shotgun inside the barracks contrary to Facility's practice. Grievant did not notify Facility Supervisors that she was leaving her post. She did not obtain permission from a supervisor to leave her post.

¹ Agency Exhibit 3.

When the Major later spoke with Grievant about the incident, Grievant admitted that she left her post without permission.

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

“Leaving a security post without permission during working hours” is a Group III offense.⁵ On June 26, 2011, Grievant was assigned to a security post at the Facility. She left a security post without permission from a supervisor and without having another employee assume her post. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. 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....”⁶ 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.

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

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(V) (D) (n).

⁶ Va. Code § 2.2-3005.

During the Grievant's Step Process, Grievant alleged that she called over the radio to be relieved of her post, Agency managers did not respond to her request, and she had to leave her post due to a personal emergency. Grievant did not appear at the hearing to testify regarding her defenses. The Major testified that Grievant did not request to be relieved of her post. No evidence was presented to support Grievant's allegations. 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 with removal 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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.