

Issues: Group II Written Notice (failure to follow instructions/policy), and Termination (due to accumulation); Hearing Date: 06/01/12; Decision Issued: 06/04/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9817; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9817

Hearing Date: June 1, 2012
Decision Issued: June 4, 2012

PROCEDURAL HISTORY

On February 10, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed from employment based upon the accumulation of disciplinary action.

On March 6, 2012, 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 she requested a hearing. On May 1, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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. She had been employed by the Agency for approximately 7 years prior to her removal effective February 10, 2012. Grievant had prior active disciplinary action. On June 1, 2009, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions. Grievant did not report to work as scheduled and did not call a supervisor to report that she would be absent for her shift. On November 16, 2009, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions. Grievant did not report to work as scheduled and did not call her supervisor to report that she would be absent for her shift.

Grievant suffered the death of a cousin and desired to attend the relative's funeral. She was scheduled to work on January 18, 2012, the date the funeral had been scheduled. Several days prior to the funeral, Grievant submitted to the Captain a written request to take annual leave on January 18, 2012. The Captain neglected to respond to Grievant's request. On January 17, 2012, Grievant approached the Captain and inquired regarding the status of her leave request to attend the funeral. The Captain believed he was "short staffed" and told Grievant that he did not intend to approve her request because her cousin was not a member of her immediate family under the Agency's policy. Grievant knew that she had not been authorized to take leave by the Captain. Although she could have appealed the Captain's decision to the Major or to the Assist in Warden, Grievant took no further action regarding her request. On January 18, 2012, Grievant did not report to work as scheduled. She attended her

cousin's funeral. Grievant did not contact the Facility before the beginning of her shift to inform the Agency that she would not be reporting to work as scheduled on January 18, 2012.

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

DOC Operating Procedure 110.1(IV)(B)(4) provides:

Notification of absence, or request for use of leave, does not mean that leave will be approved. The Organizational Unit Head or designee, reserves the right to approve all leave as deemed appropriate. In instances where leave is not approved, subsequent failure by the employee to report as required will be considered an unauthorized absence or absence without leave, and will result in a loss of pay (Double XX) and treated as a violation of the Operating Procedure 135.1, Standards of Conduct.⁴

Failure to follow a supervisor's instructions and insubordination are Group II offenses.⁵ Grievant was scheduled to work on January 18, 2012. On January 17, 2012, Grievant asked the Captain regarding the status of her leave request and she was told she was expected to report to work on January 18, 2012. Grievant failed to report to work on January 18, 2012 contrary to the Captain's expectations and in a manner constituting insubordination.

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

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

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

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

⁴ Agency Exhibit F.

⁵ DOC Operating Procedure 135.1(V)(C)(2)(a) and DHRM Policy 1.60 (B)(2)(b).

“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.

Mitigating circumstances exist with respect to the Agency’s allegation of Grievant’s failure to follow a supervisor’s instruction and insubordination. Grievant did not report to work on January 18, 2012 because she had to attend a cousin’s funeral. The funeral was not something for which Grievant could plan. Her attendance at the funeral was not for any personal gain or personal objective. The Agency permits its employees to attend funerals even though they may miss work. Although the Agency had to work “short staffed” on January 18, 2012 because of Grievant’s absence, had the Captain properly and timely responded to Grievant’s request which she made several days before January 18, 2012, the Captain easily could have selected another employee to work in Grievant’s place. The Captain’s refusal to permit Grievant to attend the funeral was unreasonable and unnecessary. The Captain’s refusal arose out of his failure to act timely rather than any institutional needs that could not have been overcome. The Hearing Officer will evaluate the disciplinary action with the assumption that Grievant did not act contrary to the Captain’s instruction and was not insubordinate towards the Captain.

“Failure to report to work as scheduled without proper notice to supervisor” is a Group II offense.⁷ Grievant was aware of the Agency’s policy requiring that she call the Facility prior to the beginning of her shift to inform the Agency that she would be absent from work. Grievant was disciplined on two occasions in 2009, in part, because she failed to call a supervisor to inform the supervisor that she would not be reporting to work as scheduled. On January 18, 2012, Grievant was scheduled to report to work but she did not do so. She did not call a supervisor at the Facility before the beginning of her shift or after her shift began. Grievant failed to give proper notice to a supervisor as required by the Agency’s policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant has prior active disciplinary action. With the disciplinary action giving rise to this grievance, Grievant will have more than two Group II Written Notices thereby justifying removal. The Agency’s decision to remove Grievant must be upheld.

⁶ Va. Code § 2.2-3005.

⁷ DOC Operating Procedure 135.1(V)(C)(2)(d).

Although mitigating circumstances exist with respect to the reason Grievant failed to report to work, no mitigating circumstances exist with respect to Grievant's failure to notify the Agency of her absence. There remains sufficient evidence to support the issuance of a Group II Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal due to accumulation of disciplinary action 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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.