



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11648

Hearing Date: May 17, 2021

Decision Issued: May 21, 2021

PROCEDURAL HISTORY

On December 10, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without approval.

On January 5, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 1, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 17, 2021, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 approximately two years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had a history of poor attendance. He received several notices of needs improvement. He was advised:

In the future, if you call in and did not have time to cover it you will be XX and referred for disciplinary action under the standards of conduct.

Call in 2 hours prior to the shift starting. Ensure the following types of leave are approved by your watch commander. AT, CT, FP. Any further violations of the above policies could result in your termination.

According to HR, [Grievant] you failed to follow supervisor instructions and provide the documentation needed in a timely manner.*** [Grievant] needs to make sure he follows through on providing documentation when his supervisor or Human Resources requests it in a timely manner.

Grievant's work shift began at 5:45 p.m.

On November 9, 2020, Grievant was scheduled to report to work at 5:45 p.m. He was unable to work that day. At 5:08 p.m., Grievant called Captain P and told Captain P that he might not be able to report for his shift at 5:45 p.m. because he was involved in a car accident. Grievant said he had to figure everything out and may have to go see the doctor. Grievant asked to use sick leave if he was unable to report to work that evening. Captain P worked on the day shift so he instructed Grievant to call again later that night to speak with Captain R who was the night shift Watch Commander.¹ Grievant did not comply with Captain P's instruction to call back during the night shift.

On November 10, 2020, Grievant was scheduled to report to work. He did not report to work.

On November 13, 2020, Grievant was scheduled to report to work. He did not report to work. He did not call the Watch Commander to say he would not be reporting for work.

On November 14, 2020, Grievant was scheduled to report to work. He did not report to work. He did not call the Watch Commander to say he would not be reporting for work.

On November 15, 2020, Grievant was scheduled to report to work. He did not report to work. He did not call the Watch Commander to say he would not be reporting for work.

The Lieutenant called Grievant on November 15, 2020 and left a voicemail as part of a "wellness check." On November 16, 2020 at approximately 5 a.m., Grievant called the Institution.

During the Agency's fact finding meeting, the Warden asked Grievant why he did not call the Facility on November 13, 2020. Grievant said he did not have a reason, he just did not call the Facility.

Grievant did not have any available leave balances to cover his absences beginning November 9, 2020. He had 11.5 "Hours Docked" on those five days.

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

¹ The Lieutenant worked as the Watch Commander on November 9, 2020.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

Operating Procedure 1.01 governs Hours of Work and Leaves of Absence. This policy provides:

Security employees and other shift workers are required to notify the officer in charge, or the shift commander, at least two hours prior to the beginning of their shift if they must be absent.

Employees who fail to notify their supervisor, or their supervisor’s designee, should be considered “absent without leave”. This will result in a loss of pay and be treated as a violation of Operating Procedure 135.1, Standards of Conduct.”

“Absence in excess of three days without proper authorization or a satisfactory reason” is a Group III offense. Grievant was absent from work for five days. He called the Facility and spoke with Captain P before his shift began on November 9, 2020. Grievant reported that he might not be able to report to work as scheduled. On November 10, 2020, Grievant did not call the Facility two hours before his shift was scheduled to begin to inform the Agency he would not be reporting for work. Grievant did not call the Facility two hours before his scheduled shift on November 13, 2020, November 14, 2020, or November 15, 2020. He was considered absent without leave on these days. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for absence in excess of three days without proper authorization or a satisfactory reason. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he called the Facility on November 10, 2020 and spoke with Captain P. Grievant asserted he told Captain P that he would be out sick for several days. Grievant presented an image from his cell phone suggesting he called the Facility. The evidence is not sufficient for the Hearing Officer to conclude that Grievant called the Facility and spoke with Captain P on November 10, 2020. Captain P testified he did not recall Grievant calling and if Grievant had called, he would have written a note about the call. In addition, it seems logical that if Grievant had spoken with Captain P on November 10, 2020, Captain P would have advised Grievant to call the Facility again after his scheduled shift started to tell the Watch Commander he would be absent. Grievant’s cell phone image does not show what number Grievant called.

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

Grievant presented a medical provider's note to the Agency during its fact finding process. The note was dated November 10, 2020 and stated Grievant was under the medical provider's care and unable to work from November 10, 2020 through November 15, 2020. The note does not indicate why Grievant was unable to perform his job duties. Grievant did not present any evidence explaining why he could not perform his job duties. There is no evidence to suggest Grievant could not call each day before his shift started to inform the Agency that he would not be reporting to work. In addition, the evidence is not sufficient for the Hearing Officer to conclude Grievant placed the Agency on notice that he may have needed family medical leave or short-term disability.

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 Human Resource Management"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 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.

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

⁵ Va. Code § 2.2-3005.

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.