

Issues: Group I Written Notice (unsatisfactory attendance, excessive tardiness);
Hearing Date: 01/18/17; Decision Issued: 03/27/17; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10918; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10918

Hearing Date: January 18, 2017

Decision Issued: March 27, 2017

PROCEDURAL HISTORY

On October 11, 2016, Grievant was issued a Group I Written Notice of disciplinary action for attendance/excessive tardiness and unsatisfactory performance. He was removed from employment based on the accumulation of disciplinary action.

On November 9, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 6, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 18, 2017, 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. Grievant had prior active disciplinary action. He received a Group III Written Notice on June 5, 2016 for work place harassment.

Grievant received a Notice of Improvement Needed/Substandard Performance on January 10, 2016. He was informed:

[Grievant] is expected to come to work on time and as scheduled, which means reporting to work and being in muster at 1745. [Grievant] is expected to improve his absenteeism and tardiness for the next (30) days with no call-ins or tardiness. Failure to do so will result in disciplinary action in accordance with Operating Procedure 135.1 "Standards of Conduct."¹

On January 19, 2016, Grievant was placed on leave without pay because he had exhausted his leave balances.

In April 2016, Grievant was notified he would be obligated to present a doctor's note to the Facility managers for each unscheduled absence.

¹ Agency Exhibit 13.

On June 30, 2016, Grievant called the Facility prior to his shift to indicate that he would be late. He did not report to work that day. His pay was “docked”.

On August 25, 2016, Grievant called the Facility to indicate he would not be reporting to work for a reason he expected to be covered by family personal leave. He only had a balance of 1.7 hours of family personal leave which was not sufficient to cover his absence. He did not submit a doctor’s note. His pay was docked for a portion of his scheduled shift on August 25, 2016.²

On August 31, 2016, Grievant sent his supervisors an email appealing the docking of his pay for August 25, 2016. He indicated he should have “called out” for sick leave instead of personal leave.³

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.”⁴ 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.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

“Unsatisfactory attendance or excessive tardiness” is a Group I offense.⁷ Grievant was informed of his obligation to report to work as scheduled. On June 30, 2016 and August 25, 2016, Grievant did not report to work. He did not have sufficient leave balances to cover his absences. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory attendance.

If an employee with an active Group III Written Notice receives additional disciplinary action, that employee may be removed from employment. Grievant has a

² The Agency did not permit Grievant to use his annual leave balance because annual leave could only be used for scheduled absences. Grievant’s absence was unscheduled.

³ Even if Grievant’s absence could have been treated as sick leave and he had available sick leave balances, the Agency would not have allowed him to claim sick leave because he did not present a doctor’s note excusing his absence due to illness.

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(2).

Group III Written Notice. Now that Grievant has received a Group I Written Notice, the Agency's decision to remove Grievant must be upheld.

Grievant argued that the Agency retaliated against him by issuing disciplinary action. He argued his behavior could have been addressed by action other than removal.

The evidence showed that the Agency took disciplinary action against Grievant because of his poor attendance and not as a form of retaliation. Although the Agency could have addressed Grievant's behavior with action other than removal, its action to remove Grievant was authorized under policy and will not be reversed by the Hearing Officer.

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"⁸ 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 I Written Notice of disciplinary action is **upheld**. Grievant's removal based on the 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 believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management

⁸ Va. Code § 2.2-3005.

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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

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

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

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 provide a copy of all of your appeals to the other party, EDR, 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.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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