

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (failure to report criminal charge), and Termination; Hearing Date: 05/14/13; Decision Issued: 06/03/13; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No.10063; Outcome: Partial Relief.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10063
HEARING DATE: May 14, 2013
DECISION ISSUED: June 3, 2013

PROCEDURAL HISTORY

Grievant received two Written Notices on March 1, 2013. The matter was disputed and a Hearing Officer was appointed on April 2, 2013. The pre-hearing conference was held on April 9, 2013.

Upon Grievant's request the original hearing date of April 30, 2013 was continued to May 14, 2013 at 10:00 am. At this time all evidence presented was heard.

APPEARANCES

Agency Advocate

Agency Representative

Agency's Witnesses (3)

Grievant failed to appear to the May 14, 2013 hearing and no notice was given to Hearing Officer or the Agency at any time prior to the hearing or during the hearing.

ISSUES

Did Grievant's conduct violated Virginia Department of Corrections Operating Procedure 040.1 a Group III offense?¹

Did Grievant's conduct violated Virginia Department of Corrections Operating Procedure 135.1 a Group II offense?²

BURDEN OF PROOF

¹ Agency Exhibit 7 and written notice Agency Ex 6

² Agency Exhibit 2 and written notice Agency Ex 6

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

CONCLUSION OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."³

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

On or about January 28, 2013, Grievant failed to appear on a day he was scheduled to be at work. Evidence presented shows Grievant contacted Virginia Department of Corrections (DOC) on January 27, 2013 to inform them of a "back injury" he sustained and that Grievant would be unable to attend work January 28.⁴

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ See Agency's Exhibit 1 and 3.

January 28, 2013 Grievant's mother contacted DOC to inform them that Grievant would not be attending work that day due to "family problems".⁵

Grievant was arrested on January 27, 2013 at 2:02 am.⁶ He was charged with two separate counts; one count of malicious wounding and one count of coerce, intimidate or harassment by computer.⁷ Grievant was booked after he called in January 27, 2013 reporting a back injury but prior to his mother contacting DOC on his behalf on January 28, 2013. Grievant was released on January 28, 2013 at 7:30 pm.⁸ Grievant met with his supervisor February 1, 2013 and at this point he informed his supervisor he had been arrested but believed both charges would be dropped.⁹

Virginia Department of Corrections Operating Procedure 040.1 part (A)(2) states,

"Employees *charged* (emphasis added) with a criminal offense either on or off the job or a moving traffic violation that occurs on or off the job or in a state vehicle, shall inform their organizational unit head immediately if received during normal working hours, or the next work day if received during non-working hours."

This Operating Procedure specifically states Grievant was required to contact DOC January 28, 2013 of his arrest and criminal charges. Grievant's mother contacted DOC on January 28, 2013 and gave DOC the explanation that Grievant was having "family issues".

Grievant had no prior disciplinary actions during his 20 months of service.

OPINION

⁵ See Agency's Exhibit 3.

⁶ See Agency's Exhibit 4 and 5.

⁷ See Agency's Exhibit 5.

⁸ See Agency's Exhibit 6.

⁹ See Agency's Exhibit 3.

Virginia Department of Corrections Operating Procedure 135.1 part (F) states, “Unexpected absences including reporting to work late or leaving work early should be reported to supervisors as promptly as possible.”¹⁰ This Operating Procedure does not state Grievant must contact his supervisor personally. It does state that a report should be made to a supervisor promptly. For this reason, Grievant’s behavior of having his mother contact his employer to report an unexpected absence does not violate Operating Procedure 135.1 and therefore does not warrant a Group II discipline.

Grievant failed to notify DOC of the criminal charges placed against him on January 27, 2013 until February 1, 2013 and further, knowing of his charges he reported an alternative reason for absence. For this reason, Grievant’s conduct did violate Operating Procedure 040.1 warranting a Group III discipline.

DECISION

For the above reasons the Group III discipline of termination of Grievant is **UPHELD** and the Group II discipline is **NOT UPHELD**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.¹¹ Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly

¹⁰ See Agency’s Exhibit 2.

¹¹ 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.

discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of 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 grievance arose.¹² You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

¹² An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).