

Issues: Group II Written Notice with Suspension (failure to follow instructions), and Group II Written Notice (failure to report without notice); Hearing Date: 12/21/12; Decision Issued: 01/02/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9961, 9962; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9961 / 9962

Hearing Date: December 21, 2012

Decision Issued: January 2, 2013

PROCEDURAL HISTORY

On July 30, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor's instructions. On July 30, 2012, Grievant was issued a second Group II Written Notice for failure to report to work without notice.

On August 27, 2012, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Step were not satisfactory to the Grievant and she requested a hearing. On October 18, 2012, the Office of Employment Dispute Resolution (EDR) issued Ruling No. 2013-3458, 2013-3459 consolidating the two grievances for a single hearing. On November 13, 2012, EDR assigned this appeal to the Hearing Officer. On December 21, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 employs Grievant as a Probation Officer at one of its Facilities. The purpose of her position is to, "supervise adult offenders, conduct investigations and document activities."¹ She has been employed by the Agency for approximately seven years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Chief. The Chief had concerns about Grievant's work performance. On July 3, 2012, he met with Grievant to counsel her regarding how to improve her work performance. After the meeting, the Chief presented Grievant with a memorandum specifying his expectations that included:

The Plan is, and [the Chief] instructed her, to write 2-3 Early Release Letters a week, and at least 1 Violation Report a week, until things are under control.²

¹ Agency Exhibit 4.

² Agency Exhibit 1.

Several days later, Grievant and the Chief met and the Chief told Grievant that the requirements of the memorandum would begin on July 11, 2012. As of July 27, 2012, Grievant had not produced any early release letters or violation reports as required.

Grievant was scheduled to meet with offenders on July 20, 2012 at a local courthouse. She decided to take leave that day so she could attend a religious event at her church. She failed to notify all of the offenders with whom she was scheduled to meet that the meetings would have to be scheduled for another day. When Grievant did not appear at the courthouse on July 20, 2012, at least four offenders called the Agency to complain that they had been waiting for Grievant and wanted to know when she would arrive at the courthouse. Grievant did not obtain permission from the Chief to be absent on July 20, 2012. The Agency did not let Grievant claim leave for July 20, 2012 which resulted in her not receiving compensation for that day.

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.”³ 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.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

Failure to follow a supervisor’s instructions is a Group II offense.⁶ Grievant was instructed by her supervisor to produce two to three early release letters and one violation report per week. Grievant failed to produce these documents as required. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s five workday suspension is upheld.

Grievant argued that she was absent from work and unable to present the required reports. The evidence showed that Grievant was scheduled to work after July 11, 2012 and had the opportunity to present the reports to the Chief. No testimony was presented to show that Grievant was absent from work for reasons that would excuse her failure to present the reports.

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ See, Attachment A, DHRM Policy 1.60.

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁷ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was scheduled to work on July 20, 2012 but changed her schedule to take time off. She failed to notify all of the offenders she was scheduled to meet with and some complained to the Agency. Grievant’s work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

The Agency argued that Grievant should receive a Group II Written Notice for being absent on July 20, 2012 without obtaining permission from the Chief to be absent from work and without reasonable notice to the Agency. Grievant failed to obtain permission to be on leave on July 20, 2012 as required by DOC Operating Procedure 135.1(IV)(F)(2) which requires, “[p]lanned absences ... should be arranged in advance with supervisors.” It is clear that Grievant did not speak with the Chief and obtain his permission to be absent on July 20, 2012. What is also clear is that the Chief did not always apply the requirement of employees obtaining his permission to be absent prior to taking leave. Indeed, employees at the Facility were permitted to write their names in a calendar book and then take leave on the date selected. Grievant had done this in the past. The Chief would approve leave for employees who had written their names in the date book even though they had not obtained his permission in advance of the date. Grievant wrote her name in the calendar book for the date of July 20, 2012. Thus, she complied with the policy as it was applied at the Facility. She gave “proper” notice in accordance with the practice adopted at the Facility. There is no basis to take disciplinary action against Grievant for failure to follow written policy. In addition, there is no basis for the Agency to refuse to permit Grievant to use her accumulated leave on July 20, 2012 and be paid for that day.

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

⁷ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

⁸ Va. Code § 2.2-3005.

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary actions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure being absent without proper notice is **reduced** to a Group I Written Notice. The Agency is **ordered** to permit Grievant to use accrued leave to account for her absence on July 20, 2012.

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 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.