

Issue: Group II Written Notice (leaving work without permission); Hearing Date: 06/24/13; Decision Issued: 07/12/13; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 10065; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10065

Hearing Date: June 24, 2013

Decision Issued: July 12, 2013

SUMMARY OF DECISION

The Agency had found Grievant violated its workplace violence policy by leaving the work site during working hours without permission. The Agency then issued Grievant a Group II Written Notice. The Hearing Officer determined that Grievant engaged in the conduct alleged, it was misconduct, and the Agency's discipline was consistent with policy. Thus, the Hearing Officer upheld the Agency's discipline.

HISTORY

On July 30, 2013, the Agency issued Grievant a Group II Written Notice for leaving the work site during working hours without permission. On August 23, 2012, Grievant timely appealed the discipline. Grievant was not satisfied with the initial responses to his grievance and it advanced to the third resolution step and then to the hearing stage of the grievance procedure. On April 23, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal and provided the parties with written notification of EDR's appointment.

Prior to appointing the hearing officer, by memorandum dated March 27, 2013, EDR urged the parties to immediately begin preparing for the hearing. Among other instructions, that correspondence directed the parties to:

- (i) decide what if any individuals they would call as witnesses;
- (ii) determine what documents they would offer as evidence at the hearing;
- (iii) determine their representatives.

Concerning representatives, Grievant was informed that if he desired a representative/advocate, he should direct the representative to call EDR to let it know of the representation. Further, the Agency was required to determine its representative prior to the appointment of the hearing officer. In the March 27, 2013 memorandum, the parties were also reminded that representatives should be available to handle the case within the timeframes set by the hearing officer.

The Hearing Officer held a telephonic prehearing conference ("PHC") on May 22, 2013.¹ The parties agreed to this date. A scheduling order setting forth in writing

¹ The Hearing Officer had scheduled the PHC for May 8, 2013, at 8:00 a.m. – a date and time to which the

discussions held during the PHC was issued on May 24, 2013. It set the hearing for June 24, 2013.²

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. Several were presented.

First, Grievant noted that he had not received the Agency's witness list and documents prior to the hearing date. For this reason, he objected to Agency's Proposed Witness Two. The Hearing Officer afforded the Agency's Advocate an opportunity to respond. She also found that the Hearing Officer had not been provided a copy of the Agency's proposed exhibits and witness list prior to the hearing. After careful consideration, the Hearing Officer sustained Grievant's objection, excluding the taking of testimony from Agency's Proposed Witness Two. Grievant had no objection to the Assistant Warden testifying for the Agency.³

Second Grievant requested that he be allowed to call four witnesses on his behalf: Captain One, Human Resource Staff, Lieutenant, and Officer. The Agency's Advocate noted that she had not received from Grievant copies of any proposed exhibits or a witness list. However, the Agency's Advocate did not object to Grievant offering exhibits or witnesses at the hearing. The Hearing Officer determined that Captain One and Human Resource Staff were available to testify and both were permitted to do so at the hearing. It was determined that Grievant had not requested witness orders for Lieutenant and Officer and neither was available to testify at the hearing as noted by Grievant and/or the Agency Representative at the hearing.⁴

The Hearing Officer also admitted the Agency's Exhibits 1 through 5, Grievant's Exhibit 1, and the Hearing Officer's Exhibit, to which no objections were made.

At the hearing both parties were given the opportunity to make opening and closing statements and to call the witnesses as noted above. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented himself.

APPEARANCES

parties agreed. It was not held as the Hearing Officer was unable to reach the Agency's Advocate.

² Less than a week before the scheduled hearing and about three months after the March 27, 2013 memorandum, Grievant requested a continuance to allot him time to retain an attorney. Considering the hearing had been scheduled for almost a month and the instructions provided in the referenced memorandum, the Hearing Officer denied the motion. See Order entered on June 22, 2013.

³ Copies of the Agency's exhibits were provided to Grievant and the Hearing Officer prior to the hearing beginning. Grievant was provided an opportunity to review them and object if he desired. The Agency's exhibits were received by the Hearing Officer in the mail after the hearing. Grievant reported the same.

⁴ During the course of the hearing, Grievant requested an Attorney who represented him in another matter be allowed to testify. The Agency did not object, and that witness testified for Grievant.

Advocate for Agency
Witnesses for the Agency (1)
Grievant
Witnesses for Grievant (4, including Grievant)

ISSUE

Was the discipline warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person, the Hearing Officer makes the following findings of fact:

1. Grievant has been employed as a correctional officer with the Agency, a dormitory style prison, for over two years. During this period his state work service has been satisfactory. He also received a “contributor” rating on his most recent performance evaluation. (A Exhs. 1, p.1 and 4, p. 3).
2. On July 2, 2012, Grievant worked the day shift. Normally 45 employees are scheduled to work that shift. But on July 2, 2012, the shift was significantly understaffed. Five officers were out on scheduled leave; three officers were out on short term disability; seven officers called in sick and were out on unscheduled leave; and three supervisors were out on scheduled leave. Normally, the shift commander is only authorized to have no more than six absences from a shift to maintain daily operations. (Testimony of Assistant Warden; A Exh. 2, p. 1).
3. The absences noted during the day shift on July 2, 2012, resulted in a significant staffing shortage. This affected or had the imminent potential of affecting the safe functioning of the prison. (Testimony of Assistant Warden; A Exh. 2, p. 1).
4. Grievant was assigned to the Department of Correction Education School (“DCE”) post during his shift on July 2, 2012. In the DCE area of the prison approximately 75 to 100 inmates at a time are provided educational/vocational training in classes. (Testimonies of Assistant Warden and Grievant).
5. Duties of correctional officers working the DCE post include, but are not necessarily limited to, checking the inmates into their assigned classes, providing security in the hallways and classrooms where inmates are receiving their respective training.

(Testimony of Assistant Warden).

6. The DCE post is basically “shut down” for a two hour period, from about 10:50 a.m. to 12:50 p.m., because the inmates leave the post to have lunch in a different area of the prison. During this two hour closure, correctional officers who are assigned to the DCE post take a lunch break, usually 30 minutes or an hour at the discretion of the watch commander. Unless permission is granted, an officer on break is not allowed to leave the prison. During the remaining time of the DCE closure when the officers are not on their respective lunch breaks, the correctional officers perform other tasks within the prison as assigned by their watch commanders, to include, but not limited to working in the dining area and relieving other officers on the shift. (Testimonies of Assistant Warden and Captain One).

7. On July 2, 2012, most correctional officers assigned to DCE received a one hour lunch break. (Testimony of Assistant Warden).

8. By June 2012, Grievant determined that he was facing imminent foreclosure of his home. He was attempting to obtain an immediate appointment with an attorney regarding his legal issue. Prior to Friday, June 29, 2012, Grievant informed Captain 2 that he had a legal matter that may necessitate his leaving work during working hours to address. Grievant was not able to provide the specific date he anticipated needing to leave work. On Friday, June 29, 2013, Grievant learned his father had scheduled an appointment with an attorney for 11:00 a.m. on Monday, July 2, 2013. Grievant did not work the Friday before the appointment and did not request leave to attend the appointment on the day he learned of it. (Testimony of Grievant; A Exh. 1, pp. 4 – 7).

9. When Grievant reported to work on Monday, July 2, 2012, he asked the Watch Commander if he could leave work at 10:30 a.m. to attend the attorney appointment. The Watch Commander denied the request and Grievant was informed that it was due to critical staff shortage and what would be considered bad shift management. Grievant appealed the denial by asking the Assistant Warden for permission. In doing so, Grievant stated words to the effect of “This is a matter of my life.” Assistant Warden also denied the request to leave due to the perilous staff shortages, he had been informed of by the Watch Commanders. (Testimony of Assistant Warden; A Exh. 1, p. 6 , A Exh. 2).

10. In response to Grievant’s immediate request for leave, management asked Grievant if the appointment could be rescheduled or if management could assist in rescheduling Grievant’s appointment. Further, management asked Grievant if he could assure his superiors that he would be back to work by 1:00 p.m. Grievant was unable to guarantee this, but did state he expected to be back shortly and prior to the inmates returning to DCE. When Grievant was in the process of leaving, the Assistant Warden attempted to dissuade Grievant from doing so. The Assistant Warden informed Grievant he did not have permission to leave work and warned Grievant that if he did so he would be “written up” and may lose his job. (A Exh. 1, pp. 4-7; Testimony of Assistant Warden).

11. Nevertheless, Grievant left work to attend the appointment in an attempt to stop any foreclosure of his home. Grievant did not return to work on July 2, 2012, because he was upset that the Agency denied his leave request. (A Exh. 1, p. 7).

12. On July 30, 2012, management issued Grievant a Group II Written Notice for leaving the work site during working hours without permission. (A Exh. 1, p. 1). The Agency had determined that Grievant's conduct was a Group III Offense; that is, leaving a security post without permission during working hours. But due to Grievant's two years of satisfactory service with the Agency, it was mitigated to a Group II Offense. (A Exh. 1, p. 1; A Exh. 2, p. 2).

13. Agency Policy 135.1(V)(C)(2)(c) provides that leaving the work site during working hours without permission is a Group II offense. (A Exh. 5, p. 8).

14. Agency Policy 135.1(V)(D)(2)(n) provides that leaving a security post without permission during working hours is a Group III Offense. Group III Offenses normally warrant termination. (A Exh. 5, p. 10).

15. Grievant perceives the Watch Commander as being bias and not objective in his decision making. He also perceived the Assistant Warden as being bias and vindictive. (Testimony of Grievant; A Exh. 1, pp. 7-8).

16. Grievant's attorney concluded that on July 2, 2012, Grievant's presence was necessary in the attorney's office regarding a civil matter in which Grievant was involved. The attorney noted in a letter dated August 23, 2012, that the July 2, 2012 appointment was the first available one. (G Exh. 1, p. 13; Testimony of Attorney).

17. Supervisors do attempt to work with staff and accommodate leave requests. (Testimony of Captain One).

18. If a leave request is denied, the employee is expected to report or remain at work during the time that he/she requested off. If the employee takes leave without permission, he/she is subject to be disciplined. (Testimony of Captain One). Grievant was aware of this policy prior to and on July 2, 2012. (Testimony of Assistant Warden; A Exh. 4).

19. Grievant expected the Watch Commander to resolve the shortage problem and permit him to leave for the appointment. (A Exh. 1, p. 5).

20. The evidence was insufficient to determine that any other employee left the work place during working hours without permission. (Testimony of Personnel Assistant).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900

et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁵

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.⁶

These standards provide that Group I offenses are acts of misconduct that are less severe in nature, but warrant correction in the interest of maintaining a productive and well-managed work force. Group II offenses are acts and behavior that are more than minor misconduct.⁷ Group III offenses are usually so severe in nature that a first occurrence normally warrants dismissal. Management may mitigate discipline if in its judgment it is proper to do so.

Agency management issued Grievant a Group II Written Notice on July 30, 2013. That notice described the nature of the offense as leaving the work site on July 2, 2012, during working hours without permission. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

I. Analysis of Issue before the Hearing Officer

⁵ Grievance Procedural Manual §5.8

⁶ Virginia Department of Corrections Operating Procedure 135.1

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

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group II Written Notice and did that behavior constitute misconduct?

The undisputed facts demonstrate that Grievant was not authorized to leave the work site during his working hours on July 2, 2012. But he did. Also, Agency Policy 135.1(V)(C)(2)(c) provides that leaving the work site during working hours without permission is a Group II offense. Thus, the Hearing Officer finds Grievant engaged in the conduct alleged in the Group II Written Notice and it was misconduct under Agency policy.

B. Was the discipline consistent with policy and law?

As noted previously, Agency policy provides that the conduct of Grievant was a Group II offense. The Agency's disciplinary notice is consistent with that policy

II. Mitigation.

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁸ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁹ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁰

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must

⁸ Va. Code § 2.2-3005 and (c)(6)

⁹ *Rules for Conducting Grievance Hearings* VI(A)

¹⁰ *Rules for Conducting Grievance Hearings* VI(B)

uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found Grievant engaged in the behavior described in a written notice and that the behavior was misconduct. Also, the hearing officer has found the Agency's discipline was consistent with law and policy.

Next the Hearing Officer determines if the discipline exceeds the limits of reasonableness. Grievant essentially asserts that he did not deserve the Group II Written Notice and makes several arguments to bolster his claim.

First, he contends that because he had no disciplinary history, the Group II Notice, is too severe. When Grievant became an employee of the Agency he received Agency policy, including the prohibition against leaving the work site during working hours without permission and the consequences for such behavior. He was therefore on notice of what could happen if he declined to follow this policy. What is more, the Assistant Warden warned Grievant as he proceeded to leave the workplace on July 2, 2013, that he would be disciplined if he left work without permission and risked losing his job. Grievant response indicated that he was willing to face whatever the consequences may be. This was so because Grievant believed he had a chance of saving his home from foreclosure.

The Hearing Officer recognizes Grievant's predicament. That said, the Agency, has the authority to manage its affairs. Also, the prison management had the responsibility of maintaining safety at the prison and for the public. The evidence demonstrates that almost half of the shift (18 out of 45 employees) on July 2, 2012, was out on leave. The evidence shows that normalcy could be maintained with no more than six absent from the shift. With far more than six on leave, management had legitimate and looming safety concerns. And the Hearing Officer finds its denial of leave was responsible action and reasonable under the circumstances. This is so even though Grievant was facing the unfortunate imminent foreclosure of his home. Thus, Grievant's clean disciplinary record prior to the July 2, 2012 behavior fails to mitigate or exonerate him from the Group II Offense.

Next, Grievant contends that others, including his Watch Commander, had left the Agency during working hours without permission. The inference being that they were either not disciplined or less harshly so. The Grievant bears the burden of proving different treatment under similar circumstances. Grievant did present the testimony of the Personnel Assistant to support this claim. While she was a credible witness, her testimony failed to substantiate Grievant's assertion. Moreover, the Assistant Warden testified that if anyone else had left his/her work site without permission the discipline would have been the same. The Hearing Officer finds this witness' testimony credible also. In addition, it contradicts Grievant's claim of disparate treatment. Thus, the Hearing Officer finds Grievant's claim unsupported by the evidence.

Similarly unsubstantiated are Grievant's claims that the Assistant Warden and Watch Commander were biased and or vindictive and for these reasons they refused to

grant his leave request. Furthermore, the contention that Grievant's superiors were not trying to accommodate him is negated by the evidence. As several in management attempted to assist Grievant while contemporaneously facing a security dilemma due to the numerous "sick call ins" on July 2, 2012, and other leave absences. For example, Grievant was asked if he could assure he would be back by 1:00 p.m. Grievant responded he could not. Grievant also was not receptive to rescheduling the appointment as he deemed it important to meet with the attorney as scheduled.

In addition, Grievant contends that it took too long for management to issue the Group II Notice. The evidence shows that the offense occurred on July 2, 2012, and the Assistant Warden issued the Group Notice 28 days later. Further, the evidence demonstrates that the Assistant Warden required time to obtain permission to move forward with the recommended discipline and meet with Grievant. Considering the evidence, the Hearing Officer does not find the 28 day delay in issuing the Group II Notice unfairly burdened Grievant.

What is more, the evidence indicates that the Agency determined that Grievant's conduct was a Group III Offense; that is, leaving a security post without permission during working hours. But due to Grievant's two years of satisfactory work service with the Agency, it was mitigated to a Group II Offense.

After careful deliberation of the above and all other evidence, to include, but not limited to Grievant's tenure with the Agency and latest work performance evaluation, the Hearing Officer cannot find the Agency's discipline was unreasonable.

DECISION

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. Having done so, for the reasons noted here, the Hearing Officer upholds the Agency's discipline.

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
Departmental of Human Resource Management
101 N. 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 N. 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.¹¹

Entered this 12th day of July 2013.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate
Agency Representative
Grievant
Director of EDR

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.