

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 08/06/13;  
Decision Issued: 08/07/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No.10134; 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: 10134**

Hearing Date: August 6, 2013

Decision Issued: August 7, 2013

#### **PROCEDURAL HISTORY**

On January 24, 2013, Grievant was issued a Group I Written Notice of disciplinary action for failure to submit weekly leave slips.

On February 22, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 9, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 6, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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 employs Grievant as a Regional Principal. No evidence of prior disciplinary action was introduced during the hearing.

Grievant worked for the Department of Correctional Education prior to July 1, 2012. The Department of Correctional Education became part of the Department of Corrections effective July 1, 2012. Grievant became responsible for learning and implementing DOC policies including leave policies.

When Grievant wanted to take leave, he submitted an email to the Supervisor asking to take leave. The Supervisor approved the leave by email. Once Grievant took the leave, he was expected to submit a Leave Activity Reporting Form to the Supervisor for the Supervisor's signature. Once the Supervisor signed the Leave Activity Reporting Form, the Supervisor returned the form to Grievant for his signature. Once Grievant signed the Leave Activity Reporting Form, he was expected to submit it to the human resource office for entry into the Agency's leave reporting database.

On August 8, 2012, Grievant filled out, signed and dated two Leave Activity Reporting Forms. The first form related to leave he took on June 25, 2012 and the second form related to leave he took on August 6, 2012. He submitted the forms to the Supervisor who signed the forms and returned them to Grievant.

The Agency received an anonymous complaint alleging that Grievant was not submitting leave forms for leave he had taken. The Agency conducted an investigation.

For the period beginning August 8, 2012 and ending October 31, 2012, Grievant was approved by the Supervisor to take 104 hours of leave. He failed to submit leave slips to the Supervisor after he had taken that leave. Grievant's leave balances were not reduced to account for the leave taken.

During the Agency's investigation, Grievant was truthful and cooperated with the investigation. During the Step Process, Grievant admitted that he had not submitted the time slips to the Supervisor after taking the leave.

### **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."<sup>1</sup> 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."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

Operating Procedure 110.1(IV)(4) provides:

Weekly timesheets must be signed and dated by the employee and supervisor and submitted to Human Resources or the office Leave Coordinator as appropriate no later than six (6) calendar days following the end of the scheduled work week.

"Failure to ... comply with applicable established written policy" is a Group II offense.<sup>4</sup> During the period after August 8, 2012 through October 31, 2012, Grievant obtained approval to take leave from his Supervisor. Grievant was absent from work while taking leave for 104 hours. Grievant did not submit Leave Activity Reporting Forms to the Supervisor for his signature to account for the 104 hours of leave taken. Grievant did not comply with DOC Operating Procedure 110.1(IV)(4). The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice which must be upheld.

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Grievant argued that the Agency failed to comply with progressive discipline and should have given him a counseling memorandum rather than a Written Notice. Although the Standards of Conduct encourages agencies to engage in progressive discipline, it does not require agencies to do so. Whether the Agency failed to engage in progressive discipline does not affect the outcome of this case.

Grievant expressed several concerns about the quality and accuracy of the Agency's investigation and the actions of the Agency's Special Agent conducting the investigation. Grievant alleged the Special Agent tampered with evidence making up the investigation. The Hearing Officer's decision is based on the evidence presented during the hearing regarding the relevant facts that occurred. Whether the Agency conducted an appropriate investigation or the Agency's Investigator accurately reported the information he received has no bearing on the outcome of this hearing decision. Indeed, the Agency did not call the Special Agent as a witness as part of its case-in-chief.<sup>5</sup> If the Hearing Officer disregards the testimony and documents originating from the Special Agent, the outcome of this hearing remains unchanged.

Grievant argued that the transition of the Department of Correctional Education to the DOC Division of Correctional Education undermined his ability to submit his leave reporting forms on a timely basis. No credible evidence was presented showing that the merger created an impediment to his submitting leave slips on a timely basis. Indeed, on August 8, 2012, Grievant correctly submitted two leave slips to the Supervisor to account for approved leave he had taken.

Grievant argued that the Supervisor was at fault for failing to ask Grievant for his leave slips even though the Supervisor knew Grievant had taken leave. The Supervisor testified that 16 employees reported to him and he relied on those employees to know how and when to submit the leave slips. Although it may have been a better management practice for the Supervisor to monitor Grievant's leave practices, no policy required the Supervisor to do so. Grievant was obligated to monitor his own leave practices.

*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 ...."<sup>6</sup> 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

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<sup>5</sup> Grievant called the Special Agent as a witness.

<sup>6</sup> *Va. Code § 2.2-3005.*

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**.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.