

Issue: Group II Written Notice (unsatisfactory performance, failure to follow instructions, failure to work OT as required); Hearing Date: 08/16/19; Decision Issued: 09/05/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11353; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11353

Hearing Date: August 16, 2019
Decision Issued: September 5, 2019

PROCEDURAL HISTORY

On January 17 2019, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance, failure to follow instructions, and refusal to work overtime as required.

On February 14, 2019, 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 May 6, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 2019, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections Officer at Facility 1. Grievant began working for the Agency in March 2011 at the age of 56. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant suffered from:

- Left knee degenerative joint disease.
- Acquired genu varum deformity.
- Chondromalacia of Patella.
- End-stage knee arthritis.
- Mechanical complications of hardware.

Grievant did not know the precise nature of his medical condition until June 2019 when he received knee surgery. He knew his knee hurt and swelled often and that his condition had lasted for many years.

Grievant's position required that he devote approximately eight percent of his time to climbing stairs, ladders, and towers.

The Agency had a significant shortage of staff to fill mandatory positions at Facility 2. The Agency decided to "draft" employees from Facility 1 to work at Facility 2 for two weeks. Employees from Facility 1 were to work 12 hour shifts for seven days, have 7 days off, and then work another seven days of 12 hour shifts at Facility 2.

The security level of Facility 1 was lower than the security level of Facility 2.

Facility 1 had some stairs to climb to enter the facility. It also had stairs into a lower level and stairs to climb into a tower. When Grievant worked at Facility 1, the number of stairs he had to walk was not significant. He had to climb approximately ten stairs to enter Facility 1. He would have to descend approximately ten stairs if he needed to go to the lower level. If he worked in a tower, he typically climbed stairs at the beginning of his shift and climbed down those stairs at the end of his shift. In a typical day at Facility 1, Grievant would spend 11 of his 12 hour shift working in areas that did not require him to climb stairs.

Facility 2 had pods with cells on two tiers. A corrections officer working at Facility 2 would be “constantly up and down the stairs all day long” according to a corrections officer from Facility 1 who was drafted and worked at Facility 2.

In August 2018, the Captain issued a draft list based on seniority showing Grievant would have to work at Facility 2 in January 2019. Grievant told the Captain he did not want to work at Facility 2 because of medical and personal reasons. Grievant told the Captain Grievant had a problem with his knee.

Approximately five employees on the list refused to go to Facility 2. This moved Grievant’s position on the list higher and caused the Agency to expect Grievant to work at Facility 2 several months earlier than planned. The five employees received disciplinary action for refusing to work at Facility 2.

On September 25, 2018, the Lieutenant instructed Grievant to report to Facility 2 to begin working there. Grievant told the Lieutenant that because of the constant swelling of his left knee, he would not be able to climb the stairs at Facility 2 since it is a two-tiered environment. Grievant also told the Lieutenant that Grievant did not have enough time to prepare to go to Facility 2 and that staff were not being treated equally because one employee was taken off the draft list because she was unable to find a babysitter.

Grievant did not report for work at Facility 2. He continued working at Facility 1.

Grievant told the Superintendent that he had a knee problem and he planned to take care of it in the following year.

Grievant had surgery on his knee in June 2019.

CONCLUSIONS OF POLICY

An agency may not discriminate against an employee who has requested a reasonable accommodation under the Americans with Disabilities Act. Executive Order 1 prohibits discrimination against “otherwise qualified persons with disabilities.” DHRM

Policy 2.05 requires that all aspects of human resource management be conducted without regard to disability.

It is not necessary for an employee to use “magic words” such as “reasonable accommodation” or “disability” in order to constitute an employee’s request for reasonable accommodation and trigger the Agency’s obligation begin the interactive process required by the Americans with Disabilities Act.¹

In August and September 2018, Grievant informed Agency managers that he suffered from knee pain and that he would not be able to go up and down stairs at Facility 2. His statements to the Captain, Lieutenant, and Superintendent were sufficient to place the Agency on notice that Grievant was requesting a reasonable accommodation. The Agency disregarded Grievant’s concerns and assigned him to work at Facility 2 without regard to whether there was a reasonable accommodation that would allow him to work at Facility 2.² The Agency’s expectation that Grievant work at Facility 2 without the option of a reasonable accommodation constituted discrimination against him because of a disability. The Agency’s disciplinary action was in furtherance of that discrimination and must be reversed.

The Agency argued that Grievant did not request a reasonable accommodation. Grievant was not obligated to use the words “reasonable accommodation” or submit paperwork requesting an accommodation in order to constitute a request for reasonable accommodation. Grievant placed the Agency on notice of his request based on the description of his medical condition and expression of his concerns about working at Facility 2.

The Agency argued Grievant should have gone to Facility 2 to first determine if he was able to perform the duties depending on the assignment he was given. Once Grievant notified the Agency of his concerns about his knee and his ability to perform work, he was not obligated to further explore whether he could perform duties at Facility 2.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

¹ See, EEOC, Practical Advice For Drafting And Implementing Reasonable Accommodation Procedures Under Executive Order 13164.

² A reasonable accommodation might have been to allow Grievant to work at a part of Facility 2 that did not have many stairs or allow him to do roving patrol which involved driving a vehicle around the perimeter of Facility 2.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.