



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11626**

Hearing Date: February 24, 2021  
Decision Issued: March 17, 2021

**PROCEDURAL HISTORY**

On October 5, 2020, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to report to work without notice.

On November 2, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 23, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 24, 2021, a hearing was held by remote conference.

**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 employed Grievant as a Corrections Officer at one of its facilities. He began working for the Agency on July 10, 2011. Grievant had prior active disciplinary action. He received a Group I Written Notice on May 9, 2019 for "no call, no show". He received a Group II Written Notice on May 31, 2019 for refusal to work overtime.<sup>1</sup>

The Agency had concerns regarding Grievant's attendance. On April 30, 2020, the Lieutenant notified Grievant that he was obligated to present a note from a health care provider if he was absent from work.

Grievant was out of work on medical leave. On July 8, 2020, the HR Officer spoke with Grievant and told Grievant to report to work on July 9, 2020. Grievant understood he was expected to report to work on July 9, 2020.

On July 9, 2020, Grievant experienced a family emergency regarding his grandmother. He became focused on addressing the emergency. Grievant did not report

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<sup>1</sup> The Agency was unable to produce copies of the prior written notices but these notices were reflected in the Agency's HR data base. Grievant did not deny having prior active disciplinary action.

to work as scheduled. He did not call the Facility to inform anyone that he would not be reporting to work.

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

“Failure to report to work without proper notice to supervisor” is a Group II offense.<sup>3</sup> Grievant was scheduled to report to work on July 9, 2020. He did not report to work. He did not call a supervisor to inform the Agency that he would not be reporting to work. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove him from employment.

Grievant argued that the incident took place in July 2020 and the Agency waited until October 2020 to take disciplinary action. The Agency’s delay does not affect the outcome of this case. The Agency’s delay benefited Grievant and did not undermine the Agency’s issuance of disciplinary action.

Grievant argued the Agency should engage in progressive discipline. In this case, the Agency notified Grievant of its concerns about his attendance including issuing a Group I Written Notice for failure to report to work. The issuance of a Group II Written Notice for a second failure to report to work without notice is consistent with progressive discipline and is authorized by the Standards of Conduct.

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>4</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

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<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>3</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>4</sup> Va. Code § 2.2-3005.

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 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 II Written Notice of disciplinary action with removal is **upheld**.

## 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 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 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.<sup>[1]</sup>

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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