



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12056

Hearing Date: March 7, 2024

Decision Issued: March 28, 2024

PROCEDURAL HISTORY

On November 21, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination for "fail[ing] to report to work without notice, follow instruction or policy, report for mandatory training, unsatisfactory attendance, and absent in excess of 3 days without authorization."¹

On December 4, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 8, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. A pre-hearing conference was held on January 10, 2024. Grievant participated in the pre-hearing conference during which the parties agreed to the date (March 7, 2024), time (10:30 am) and location (Agency offices in Greenville, Virginia) for the hearing. On March 7, 2024, as scheduled, a hearing was held at Agency offices in Greenville, Virginia. The Grievant did not appear for the hearing. Prior to commencing the hearing, the Hearing Officer called the telephone number she had for Grievant and received no answer. The hearing proceeded as scheduled without Grievant's participation.

APPEARANCES

Agency Advocate
Agency Party Designee
Witnesses

¹ Agency Ex. at 1.

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
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:

Prior to his dismissal, Grievant was a Corrections Officer at a Department of Corrections Facility.

As a Corrections Officer, Grievant was required to be certified in firearms use and to maintain that certification through mandatory annual training and re-qualification.² Grievant was last certified for firearms use on October 27, 2022.³ In order to remain certified and qualified for his job as a Corrections Officer, Grievant had to complete annual firearms training before October 27, 2023.⁴

During December 2022, the Facility advised its security personnel, like Grievant, of their mandatory training dates for calendar year 2023 so that the information would be available to personnel as they plan vacations and annual leave for the upcoming year.⁵

² See Agency Ex. at 172 (DOC Operating Procedure 350.3, Firearms, Chemical Agents and Less Lethal Training, Procedure IV, B).

³ Agency Ex. at 51-54, 50.

⁴ Hearing recording at 1:01:19-1:03:42.

⁵ Hearing recording at 43:25-45:26.

Grievant's annual mandatory firearms training was scheduled to occur on October 11, 2023.⁶ Grievant did not attend the mandatory firearms training on October 11, 2023.

As a Corrections Officer at the Facility, Grievant was required to call the watch commander or an officer in charge at least two hours before the start of his shift if he would not be able to report for duty.⁷ Superintendent, Major and Sergeant testified that the standard "call-out" procedure for the Facility required employees, like Grievant, to call the Facility at least two hours prior to the start of their shift. Employees were required to call-out by telephone so that the call could be logged in the logbook. The person taking the call would document in the logbook information such as the reason the employee provided for calling out and the date and time the employee called.⁸ Major confirmed that the Facility's "call-out" procedures were reviewed with Grievant when he was issued a prior written notice in August 2023⁹ and Sergeant testified that he had reviewed the "call-out" procedure with Grievant on more than one occasion.¹⁰

Grievant called out of work on Monday, October 16, 2023.¹¹

The mother of Grievant's child also worked for the Agency at the Facility. On October 17, 2023, the mother of Grievant's child provided the Agency with a note from their child's doctor which stated: "[d]ue to a family illness or injury, please excuse parents of [Child] from work on 10/17/2023 until illness resolves."¹²

After receiving the doctor's note regarding Grievant's child's illness from the mother of Grievant's child, Major advised her that she could not communicate with the Agency on behalf of Grievant regarding Grievant's employment matters, such as leave, and that Grievant would need to communicate directly with Major or other appropriate personnel if he also was requesting to use leave. Major also contacted Grievant via email advising Grievant that the Agency needed "an official return to work date" for him.¹³ Grievant never responded to Major's email and never provided the Agency with an official return to work date. Grievant did not communicate with anyone else at the Facility to request leave for October 17, 2023, or any day thereafter. Grievant also never received approval to use leave or miss work on October 17, 2023, or any date thereafter from Major, Superintendent or anyone else with authority to grant such approval.¹⁴

Grievant was expected to report for work on October 30, 2023, October 31, 2023, November 1, 2023, and November 2, 2023.¹⁵ Grievant did not report to work on those dates.¹⁶ Grievant did not have approval to take leave on those dates. Grievant did not

⁶ Hearing recording at 43:25-45:26, Agency Ex. at 31-32, 46.

⁷ See Agency Ex. at 106 (DOC Operating Procedure 110.1, Hours of Work and Leaves of Absence, Procedure, III) and see Agency Ex. at 70-71.

⁸ Hearing recording at 16:27-17:05.

⁹ Hearing recording at 52:07-53:35.

¹⁰ Hearing recording at 1:11:48-1:12:24.

¹¹ Hearing recording at 49:35-51:53.

¹² Agency Ex. at 4, see also Hearing recording at 45:50-48:37.

¹³ Agency Ex. at 11.

¹⁴ Hearing recording at 14:44-15:02, 45:50-48:37.

¹⁵ Agency Ex. at 17, Hearing Recording at 35:42-36:52.

¹⁶ Agency Ex. at 17, Hearing Recording at 35:42-36:52.

contact an on-duty watch commander or anyone else at the Facility to “call-out,” request leave, or otherwise explain his absence from work on those dates.¹⁷

During the hearing, evidence was introduced showing that Grievant had received a Group III Written Notice of disciplinary action with suspension on August 14, 2023, for failing to report for duty in excess of three days without proper notice or authorization.¹⁸

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”¹⁹

There was information in the Written Notice suggesting that Grievant’s failure to provide the Agency with a working telephone number was among the misconduct for which Grievant was being disciplined. The Agency clarified during the hearing that Grievant had met the Agency’s deadline for providing a working telephone number and that the Agency was abandoning that allegation of misconduct. Therefore, the Hearing Officer did not consider any allegations regarding Grievant’s providing the Agency with a working telephone number in reaching her decision in this case.

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

Agency employees are expected to report to work as scheduled and seek approval from their supervisor in advance for any changes to the established work schedule, including the use of leave.²⁰

Grievant was expected to report for work on October 30, 2023, October 31, 2023, November 1, 2023, and November 2, 2023.²¹ Grievant did not report to work on those dates.²² Grievant did not have approval to take leave on those dates. Grievant did not contact an on-duty watch commander or anyone else at the Facility to “call-out,” request leave, or otherwise explain his absence from work on those dates.²³

Based on the information Grievant provided when he filed this grievance, it appeared that if Grievant had participated in the hearing, Grievant would have argued

¹⁷Hearing recording at 34:19-34:48, 35:42-36:52, 55:50-56:35, 1:04:55-1:06:30, 1:10:01-1:11:46 and see Agency Ex. at 17, 22-29.

¹⁸ Agency Ex. at 14-16.

¹⁹ See Agency Ex. at 138-141 (DOC Operating Procedure 135.1, Standards of Conduct).

²⁰ See Agency Ex. at 126-127 (DOC Operating Procedure 135.1, Standards of Conduct).

²¹ Agency Ex. at 17, Hearing Recording at 35:42-36:52.

²² Agency Ex. at 17, Hearing Recording at 35:42-36:52.

²³Hearing recording at 34:19-34:48, 35:42-36:52, 55:50-56:35, 1:04:55-1:06:30, 1:10:01-1:11:46 and see Agency Ex. at 17, 22-29.

that he was absent from work on October 30, 2023, October 31, 2023, November 1, 2023, and November 2, 2023, because he “was on COVID leave.” Grievant did not participate in the hearing and offered no evidence to support any claim that he was on approved leave on those dates. Contrary to such an assertion, Agency witnesses credibly testified that Grievant was not approved to take leave on those dates and Grievant did not follow policy to request leave or “call-out” on those dates.

Agency Operating Procedure 350.2 requires Agency employees to complete all training necessary to meet minimum requirements specified by law, regulation, executive order, policy, or procedure.²⁴ As a Corrections Officer, Grievant was required to be certified in firearms use and to maintain that certification through mandatory annual training and re-qualification.²⁵ Grievant was last certified for firearms use on October 27, 2022.²⁶ Grievant did not report for his mandatory firearms training on October 11, 2023.

Grievant did not participate in the hearing. Based on the information Grievant provided when he filed this grievance, it appeared that Grievant would have argued that he missed the mandatory firearms training because he had been on vacation the week before and had not been contacted regarding the training. Such an argument is not persuasive in this case. Major credibly testified that as early as December 2022 he provided Grievant with Grievant’s mandatory training dates for calendar year 2023, including the date for Grievant’s mandatory firearms training which was scheduled for October 11, 2023.²⁷ Agency witnesses credibly testified that by January 2023, the schedule for 2023 annual mandatory firearms training was firmly set, affected staff, including Grievant, had been advised of their training dates, and the training schedule had been posted in the Facility’s Watch Office and available for review at any time throughout the year by Grievant and other affected staff.²⁸ Grievant also was included among staff who received an email from Administrative Lieutenant dated September 27, 2023 reminding staff of the upcoming annual firearms training and that “you must attend the training that has been scheduled for you.”²⁹

The preponderance of the evidence shows that Grievant engaged in misconduct when he failed to attend mandatory training in violation of policy and instruction and when he, without notice or approval, failed to report to work on October 30, 2023, October 31, 2023, November 1, 2023, and November 2, 2023.

²⁴ See Agency Ex. at 154-155 (DOC Operating Procedure 350.2, Training and Development, Procedure III).

²⁵ See Agency Ex. at 172 (DOC Operating Procedure 350.3, Firearms, Chemical Agents and Less Lethal Training, Procedure IV, B).

²⁶ Agency Ex. at 51-54, 50.

²⁷ Hearing recording at 43:25-45:26, Agency Ex. at 46.

²⁸ Hearing recording at 24:50-25:50, 43:25-45:26, 58:30-1:01:18; see also Agency Ex. at 31-32, 46.

²⁹ Agency Ex. at 44-45.

Whether the Agency's discipline was consistent with law and policy

Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.³⁰ Group III offenses include, but are not limited to, endangering others in the workplace, illegal or unethical conduct, significant neglect of duty, disruption of the workplace, or other serious violation of policies, procedures, or laws.

Unauthorized absences involving three or more consecutive workdays is normally a Group III offense.³¹ In this case, Grievant had received a prior active Group III written notice for similar misconduct.

The Agency's discipline was consistent with law and policy. The Agency has met its burden.

Mitigation

Virginia 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...."³² 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 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 Grievant of Group III Written Notice of disciplinary action with termination is **upheld**.

³⁰ See Agency Ex. at 139 (DOC Operating Procedure 135.1, Standards of Conduct).

³¹ See Agency Ex. at 139 (DOC Operating Procedure 135.1, Standards of Conduct).

³² Va. Code § 2.2-3005.

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.³³

Angela L. Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

³³ 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.