

Issue: Group III Written Notice with suspension, demotion, pay reduction and transfer (leaving a security post without permission during work hours); Hearing Date: 08/11/05; Decision Issued: 08/19/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8148



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8148

Hearing Date: August 11, 2005
Decision Issued: August 19, 2005

PROCEDURAL HISTORY

On April 28, 2005, Grievant was issued a Group III Written Notice of disciplinary action with suspension from April 30, 2005 to May 2, 2005 and demotion to Corrections Officer Senior, ten percent pay reduction and transfer for:

Leaving a security post without permission during working hours. On April 12, you departed the [Center] at approximately 12:30 a.m. and you were not scheduled to depart until 6:15 a.m. You did not have permission from supervision to leave your post.

On April 28, 2005, Grievant received a Group II Written Notice of disciplinary action with suspension from May 5, 2005 to May 6, 2005 for:

Failure to report to work as scheduled without proper notice to supervisor. You were scheduled to work on 4-13-05 and you did not report and you did not have proper authorization to be on leave.

On May 2, 2005, 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 21, 2005, the Department of Employment Dispute

Resolution assigned this appeal to the Hearing Officer. On August 11, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 employed Grievant as a Corrections Sergeant at one of its Facilities until his demotion with pay reduction to a Corrections Officer Senior effective April 28, 2005. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant worked at a Center located near several other correctional institutions. He reported to Lieutenant G who also worked at the Center. During the evening shift when Lieutenant G was not present, Grievant would serve as the Unit Commander in charge of the Center. He reported to Lieutenant H who worked at a nearby correctional institution. The Center preferred to have a sergeant and two correctional officers working the evening shift. It was not unusual, however, for there to be three correctional officers working the shift. When this happened, the most senior correctional officer was in charge of the Center.

On April 10, 2005, Grievant spoke with Lieutenant G regarding returning to work following military duty. Grievant was released from his military duty on April 9, 2005 with travel time. Grievant told Lieutenant G he needed additional time off before returning to work. Lieutenant G told Grievant that the Center was short-staffed and Grievant needed to report to work on April 12, 2005. Grievant asked why he could not have off April 12, 2005. Lieutenant G responded that Officer M was scheduled to work but her mother or grandmother was in the hospital but that he was unsure. Lieutenant G said if Officer M's mother is in the hospital, Officer M would not have to come to work but that if it was her grandmother, she would have to come to work as scheduled. Since Lieutenant G was not sure of whether it was Officer M's mother or grandmother who was in the hospital, Lieutenant G told Grievant to speak with Sergeant M who would be more familiar with Officer M's circumstances. Shortly thereafter, Lieutenant G left to travel to another city and was not available to be contacted.

On April 12, 2005, Grievant reported to work as scheduled at 6 p.m.¹ He called Lieutenant H located at a nearby correctional institution and said that the Center was short-staffed and asked if an officer could come over to the Center. Lieutenant H indicated he would consider Grievant's request after assessing the staffing needs of his own institution. Grievant called a second time later in the shift and spoke with Sergeant H.² Grievant told Sergeant H the Center was short-staffed and asked if someone could be sent over.

After lockdown³ at Lieutenant H's facility, Lieutenant H sent Officer B to the Center. Grievant removed Officer H from the control booth and instructed Officer B to assume responsibility for the control booth. Officer H began working another post at the Center. At approximately 12:30 a.m. in the morning of April 13, 2005, Grievant left the Center and went home. He did not formally designate anyone to be in charge because the remaining security staff knew that the most senior officer was in charge. Officer H was the most senior officer.

Grievant called Sergeant M as he was previously instructed to do so by Lieutenant G. Grievant asked Sergeant M about Officer M's status. Sergeant M said he did not know whether Officer M's mother or grandmother was in the hospital. Grievant assumed he could take April 13th off as authorized by Lieutenant G unless Sergeant M called him to advise him that Officer M would not come into work. Grievant did not report to work on April 13, 2005.

CONCLUSIONS OF POLICY

¹ His shift was approximately from 6 p.m. until 6 a.m.

² Sergeant H reported to Lieutenant H and worked in the same facility with Lieutenant H.

³ Lockdown is when inmates are confined to their cells.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

Group III Written Notice

“[L]eaving a security post without permission during working hours” is a Group III offense.⁴ Grievant assumed the post of Corrections Sergeant at the Center. He left that post without obtaining permission from his superior, Lieutenant H. Accordingly, the Agency has presented sufficient facts to support its issuance of a Group III Written Notice. Demotion with pay reduction, suspension, and transfer is within the range of discipline authorized upon issuance of a Group III Written Notice.⁵

Grievant contends he asked Lieutenant H for permission to have a corrections officer relieve him of his post so that he could go home. Lieutenant H denies this conversation occurred. Sergeant H denies this conversation occurred. Grievant asserts that Officer H overheard some of his conversation with Lieutenant H during which Grievant discussed having someone relieve him so he could go home. Officer H denied hearing that portion of the conversation. Based on the evidence presented, the Hearing Officer can only conclude that Grievant did not seek and obtain permission from Lieutenant H to leave the facility.

Group II Written Notice

“[F]ailure to report to work as scheduled without proper notice to supervisor” is a Group II offense.⁶ In order to meet its burden of proof, the Agency must establish that Grievant knew or should have known that he was scheduled to work and that he failed to report to work without notifying his supervisor. In this case, the strength and clarity of an instruction to report to work is lacking. Lieutenant G initially said Grievant could have April 13th off. He indicated, however, that Grievant may have to work depending on the status of Officer M. Lieutenant G deferred the decision to report to Sergeant M by telling Grievant to contact Sergeant M for guidance regarding Officer M’s status. Grievant complied with Lieutenant G’s request and contacted Sergeant M. Sergeant M did not know Officer M’s status and did not inform Grievant he had to report to work. Grievant relied on Lieutenant G’s original comment that Grievant could have the day off

⁴ DOCPM § 5-10.17(B)(14).

⁵ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

⁶ DOCPM § 5-10.16(B)(4).

and Grievant did not report to work. The evidence is sufficient to show that Grievant knew he *might* have to work but it is not sufficient to show that Grievant knew or should have known he had to work. Grievant could not obtain further clarification from Lieutenant G because Lieutenant G had traveled to another city and could not be reached by Grievant. The Group II Written Notice is not supported by the evidence and must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, suspension, pay reduction and transfer is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension must be **reversed**. The Agency is directed to provide the Grievant with **back pay** for the period of suspension, May 5, 2005 to May 6, 2005 less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3).

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution

830 East Main St. STE 400
Richmond, VA 23219

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 give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.⁷

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.