

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 03/07/16;
Decision Issued: 03/08/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10758; 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: 10758

Hearing Date: March 7, 2016
Decision Issued: March 8, 2016

PROCEDURAL HISTORY

On March 17, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance.

On April 10, 2015, 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 she requested a hearing. On January 18, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 7, 2016, a hearing was held at the Agency's office. Grievant chose not to attend the hearing.

APPEARANCES

Agency Party Designee
Agency Representative
Witness

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 Corrections Officer at one of its facilities. Grievant had prior active disciplinary action. On July 10, 2014, Grievant received a Group II Written Notice with a one workday suspension for falsifying a doctor's note.

Grievant was absent for 20 days in the leave years 2014 and 2015. She was absent from work on March 1, 2014, March 2, 2014, March 3, 2014, April 26, 2014, April 27, 2014, June 12, 2014, June 13, 2014, September 18, 2014, September 19, 2014, November 7, 2014, November 26, 2014, December 4, 2014, December 18, 2014, December 19, 2014, and January 2, 2015,

Grievant was absent from work on more days than any other employee at the Facility.

Grievant received 72 hours of sick leave in January 2014. She exhausted her sick leave balance in June 2014.

The Agency provided Grievant with the necessary paperwork to file a claim under the Family Medical Leave Act. Grievant wrote on September 28, 2014, "I am also aware of FMLA and have contacted human resources, and received the paperwork. I have yet to have the paperwork filled out, I would like to see if this matter can be resolved without having to do so."¹

¹ Agency Exhibit 1.

Grievant was placed on leave restriction on October 12, 2014. She was required to bring doctor's notes when absent due to illness.

On December 5, 2014, Grievant received a counseling memorandum from the Captain stating, in part:

In the future, you should make your doctor's appointment[s] on your off days. You need to arrive on time for shift duties. When calling out for work, you need to be clear that you will or will not be in for shift duties. You are already on leave restriction from [facility], several tardy slips, and a counsel for poor attendance. This is a fresh start, let's be proactive.²

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

"Unsatisfactory attendance" is a Group I offense.⁶ Grievant was absent from work 20 days from March 1 through January 2, 2015. She exhausted her sick leave balance. Her attendance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

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"⁷ 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

² Agency Exhibit 1.

³ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁶ DOC Operating Procedure 135.1 (V)(B)(2)(a).

⁷ Va. Code § 2.2-3005.

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 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 14th St., 12th 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 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 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.