

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 10/07/02; Decision Date: 10/31/02; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5537



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5537

Hearing Date: October 7, 2002
Decision Issued: October 31, 2002

PROCEDURAL HISTORY

On July 1, 2002, Grievant was issued a Group I Written Notice of disciplinary action for "*Unsatisfactory job performance.*"

On July 10, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 19, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 7, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Assistant Warden Operation
Lieutenant

ISSUE

Whether Grievant should receive a Group I Written Notice 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 employs Grievant as a Corrections Officer Senior. He has worked at his Facility for approximately nine months without any prior disciplinary action. He is a valuable employee to the Agency.

On May 20, 2002¹ at approximately 5:25 p.m., Inmate S was carrying hot soup when he accidentally bumped into another inmate. The soup spilled on Inmate S’s left arm. Inmate S went to Officer B and to Grievant² and asked to go to the medical department. Officer B looked at the inmate’s arm and concluded that the injury was not an emergency and that the inmate did not need to go to the medical department at that time.³ Grievant took no action to refer the inmate to the medical department.

At approximately 9:15 p.m., Inmate S sought medical help from the Facility nurse. She looked at his injury and immediately gave him treatment. Inmate S suffered a peanut-sized blister representing a first or second degree burn.⁴

CONCLUSIONS OF LAW AND POLICY

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

¹ The Written Notice incorrectly states the date of the offense as June 13, 2002.

² Grievant did not see the accident occur, but he did hear Inmate S ask to receive medical treatment. Grievant was not disciplined for having seen the accident, but for failing to report it.

³ Grievant states in his written response, Inmate S “asked [Officer B] if she would call the Medical Department for him and she told him it was not an emergency.”

⁴ Grievant Exhibit D.

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 § 5-10.17.⁵

“Inadequate or unsatisfactory work performance” is a Group I offense.⁶ In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Facility’s practice⁷ is that when an inmate seeks medical treatment, the corrections officers are supposed to refer the inmate for medical treatment.⁸ Corrections officers are not supposed to make medical decisions.⁹ Inmate S’s injury did not appear serious to Officer B¹⁰ and Grievant concurred. Grievant should have attempted to refer the inmate for medical treatment without judging whether the inmate’s claim had merit. Thus, Grievant failed to comply with the Facility’s practice thereby justifying a Group I Written Notice for unsatisfactory job performance.

Grievant contends the discipline against him is too harsh because he has never been given a counseling memorandum. While it is clear that Grievant is a good employee, the Agency is not obligated to issue a counseling memorandum before taking formal disciplinary action. Even good employees occasionally make mistakes and the Agency was justified in issuing the Group I Written Notice.

Grievant contends the Agency conducted a predisciplinary hearing without first notifying him of the purpose of the hearing. The Hearing Officer concludes that whether the Agency properly notified Grievant of the purpose of its predisciplinary hearing is not

⁵ Since the alleged offense occurred on May 20, 2002, the DOCPM 5-10 in effect at that time applies to this appeal. The Agency revised its DOCPM 5-10 effective June 15, 2002.

⁶ DOCPM § 5-10.15(B)(4).

⁷ Institutional Operating Procedure 718-4.0 states, “Emergency complaints should be handled immediately.” Section 718.7.1 states, “in the event an inmate notifies staff that he has a medical emergency that must be addressed immediately, the Building Supervisor or designee should contact the medical department and the medical department must see the inmate.” Grievant did not notify the Building Supervisor of the inmate’s claim of medical emergency.

⁸ If an inmate falsely claims illness, the inmate may be disciplined. The Agency’s practice is to assume an inmate’s request for emergency medical treatment is valid, but if the claim is false, to discipline the inmate accordingly.

⁹ Institutional Operating Procedure 718-7.1(B)(7) states, “[the Facility] enables all inmates (including those in segregation) to request health services daily.”

¹⁰ No evidence was presented regarding whether Officer B was disciplined.

relevant to this hearing. Grievant had the opportunity to present to the Hearing Officer any information he could have presented at the predisciplinary meeting. Thus, any defect in the Agency's due process procedures is moot.

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 **10 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.
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.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 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 10-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.¹¹

¹¹ Agencies must request and receive prior approval from the Director of 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].

Carl Wilson Schmidt, Esq.
Hearing Officer