

Issue: Group II Written Notice with 10-day suspension (failure to follow established written policy); Hearing Date: 03/30/04; Decision Issued: 05/11/04; Agency: DOE; AHO: Carl Wilson Schmidt, Esq.; Case No. 632



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 632

Hearing Date: March 30, 2004
Decision Issued: May 11, 2004

PROCEDURAL HISTORY

On December 17, 2003, Grievant was issued a Group II Written Notice of disciplinary action with ten workday suspension for:

On or about October 24, 2003, [Grievant] corrected a student in front of others by speaking to the student in a loud voice and jumping up and down in anger, causing the student to begin crying.

On or about November 17, 2003, during a magic show in the Deaf Elementary Department, [Grievant] grabbed a student by the forearm and forcibly removed the student from the room.

During the current 2003-2004 school year, [Grievant] on a regular basis, became angry in the classroom and exhibited her anger by stomping her feet, slamming her fist on a table or student's desk, and yelling and screaming at the students.

On several occasions this year, the last occurring on December 4, 2003, [Grievant] has slammed medication on the desk of a student in a very aggressive manner, which frightened the student and other students in the classroom.

During the current 2003-2004 school year, [Grievant] grabbed the arms of a student and led the student out of the classroom.

During the current 2003-2004 school year, [Grievant] gave a student zeros daily for two weeks because the student failed to bring a pencil to class.

The conduct cited above is in violation of our behavior management policy as established in VSDB-S behavior Systems Training Manual; the Standards for Interdepartmental Regulation of Children's Residential Facilities, 22 VAC 42-10-800, Prohibitions, and 22 VAC 42-10-820, Physical Restraint; and the Teacher Handbook.

On January 14, 2004, 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 March 3, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 30, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Counsel
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to follow established written policy.

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 Virginia Department of Education employs Grievant as a Trainer and Instructor II at Virginia School for the Deaf and Blind. Grievant teaches students with hearing impairment although some students have limited hearing. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

In order to gain the attention of students in a classroom, it is appropriate for a teacher to quickly turn on and off the room lights, tap on a table to gain the attention of those sitting at the table, tap a student on the shoulder to gain the student's attention, and/or waive his or her hands above the head until the students observe the teacher.

Even though some students may be hearing impaired, the facial expressions of a teacher who yells can convey that teacher's anger to the students. When a teacher yells at a hearing impaired student, that student can be just as upset and fearful as when a teacher yells at a hearing child.

On November 17, 2003, Grievant's class attended a magic show at the Facility. The magic show was a repeat performance for fifth graders. Before the magic show started, Grievant told the fifth graders not to reveal how the tricks were done to fourth grade students who had not yet seen the show. During the performance, Grievant observed Student K telling another student how a trick was performed. Grievant walked to Student K, grabbed her by the arm, and escorted Student K to a private area where Grievant informed Student K that her behavior was inappropriate. Student K then returned to the student audience watching the show.

On several occasions during the school year, Grievant became angry at one or more of her students and yelled at them to get their attention. When she yelled, her facial expressions expressed her anger. She did not smile, her eyebrows were down, and the tone of her voice was harsh. Her voice was so loud that another teacher could hear Grievant even though the door to Grievant's classroom was closed.

When Grievant has sought to obtain the attention of students sitting at a table, she has slammed her hand down on the table on several occasions. She did not tap the table lightly, but rather abruptly hit the table in order to startle the students and cause them to pay attention to her. In addition, on several occasions, Grievant jumped up and down while waiving her hands in the air in order to get the attention of her students.

CONCLUSIONS OF 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 require correction in the interest of maintaining a productive and well-managed work

force.” DHRM § 1.60(V)(B).¹ 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.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

The Agency uses a “Behavior Systems Training Manual” to govern staff interactions with students. This policy requires staff to “handle infractions individually and privately when possible.” All staff “have the authority to address and correct any student in violation of school rules. This will be done in the least embarrassing, quickest and least disruptive method possible.” Agency staff are prohibited from engaging in any “action or language, which is humiliating, degrading, harsh, or abusive.”² Staff are also prohibited from engaging in “aggressive responses.”

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.³ Grievant acted contrary to the Behavior Systems Training Manual when she (1) yelled at students in anger, (2) slammed her hand down on the table, and (3) jumped up and down in frustration when students were not reacting to her request to have their attention. Grievant’s actions had the consequences of startling students and creating unnecessary concern and possibly fear regarding Grievant’s display of anger or frustration. Her actions were more aggressive than necessary and contrary to the standard of acceptable behavior within the Facility.

The Agency has not established that Grievant acted inappropriately during the magic show. Grievant grabbed Student K’s arm, but there is no evidence that Grievant jerked Student K or squeezed Student K’s arm excessively.⁴ Student K did not resist Grievant’s attempts to remove her from the student audience. Grievant reprimanded Student K in private.

In addition, the Agency has not established its assertion that Grievant inappropriately grabbed the arm of a student and led the student out of the classroom. The Agency contends a teacher observed Grievant engaging in this behavior. During the hearing, that teacher testified she had not seen Grievant do anything inappropriate.

The Agency has not established that Grievant slammed medication on a table in front of Student K. Student K is diabetic and regularly receives medication. The

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² 22 VAC42-10-800(5) prohibits Grievant from engaging in any “action which is humiliating, degrading, or abusive.”

³ DHRM § 1.60(V)(B)(2)(a).

⁴ Grievant did not engage in physical restraint as prohibited by 22 VAC42-10-820.

Agency contends the Program Assistant observed Grievant “hit the desk with the pill”, but the Program Assistant testified she had not observed this.

The Agency has not established that Grievant acted inappropriately by requiring a student to bring a pencil to class. All students were expected to bring a pencil to class. Failure to bring a pencil to class meant that the student did not receive a star on a star chart and did not earn free time. No evidence was presented suggesting any student would have expected different consequences for failing to bring a pencil to class. No evidence was presented showing Grievant knew the student had some extraordinary circumstances preventing him from bringing in a pencil.

When an agency alleges a number of reasons supporting its level of disciplinary action and the agency is unable to establish all of those reasons, the Hearing Officer has greater discretion to determine the appropriate level of disciplinary action. In this instance, Grievant acted contrary to established written policy but not to the degree alleged by the Agency. Accordingly, a Group II Written Notice with *five* workday suspension is appropriate.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with ten workday suspension is **modified** to a Group II Written Notice with five workday suspension. The Agency is directed to provide the Grievant with five workdays of **back pay** less any interim earnings that the employee received during those days and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2).

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. 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 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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.