

Issues: Three Group II Written Notices with termination (failure to follow supervisor's instructions, violating policy regarding physical count, inaccurate information regarding outside employment); Hearing Date: 04/20/05; Decision Issued: 05/03/05; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8028



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8028

Hearing Date: April 20, 2005
Decision Issued: May 3, 2005

PROCEDURAL HISTORY

On December 23, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

You are being issued a Group II Written Notice for failure to follow a supervisor's instructions. During the period of August 5, 2004 through October 19, 2004, on more than one occasion you removed the same female ward from her living unit for long periods of time and as late as 1:00 a.m. under the guise of performing cleaning functions. You took this ward to an isolated area of the facility where there were no other staff or cameras to monitor your activities. This area was not an area of responsibility assigned to you for purpose of sanitation by your immediate supervisor.

Grievant also received a Group II Written Notice of disciplinary action for:

You are being issued a Group II Written Notice for violating Institutional Operating Procedure 207, Physical Count Procedure, in that you failed as the Shift Commander to properly implement this policy a minimum of seven (7) times during the period August 10, 2004 – August 28, 2004.

Grievant also received a Group II Written Notice of disciplinary action for:

You are being issued a Group II Written Notice for failure to follow Department of Juvenile Justice Procedure 05.004.03, Outside Employment, and DJJ Administrative Directive 05.009.2 in that during an official investigation you did not provide accurate information about your outside employment, nor did you have approval for said employment.

Grievant was removed from employment effective December 23, 2004 based on the accumulation of disciplinary action.

On January 18, 2005, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 24, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 20, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions regarding female wards.
2. Whether Grievant should receive a Group II Written Notice of disciplinary action for violating Institutional Operating Procedure 207.
3. Whether Grievant should receive a Group II Written Notice of disciplinary action regarding outside employment and providing inaccurate information to an investigator.

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 Juvenile Justice employed Grievant as a Corrections Lieutenant at one of its Facilities before his removal from employment effective December 23, 2004. Grievant often works as a Shift Commander during the night shift. As Shift Commander, he would be the highest ranking security officer at the Facility and in charge of the Facility. No evidence of prior active disciplinary action was introduced at the hearing.

Throughout his career with the Agency, Grievant's supervisors have instructed him to avoid being alone with female wards outside the view of the Agency's camera system. There are several parts of the Facility where cameras cannot record what is occurring in that area. Grievant knew of these "blind spots". As a Corrections Lieutenant, Grievant had provided similar instructions to his subordinate officers. One reason for this policy is to prevent employees from being placed in a situation where a female ward falsely accuses a male officer of inappropriate behavior thereby causing the Agency to devote resources to resolving the allegation.

A Female Ward reported to several Agency employees that she and Grievant were engaging in sexual behavior. The Agency began an investigation.

In November 2004, an Investigator interviewed Grievant regarding the allegations by the Female Ward. During the interview, the Investigator asked Grievant, "Do you have a job someplace else? Do you have other employment?" Grievant responded, "I am not working now. I used to work a couple of days per week. Sometimes I cut grass." At the time of the interview, Grievant was employed at a bowling alley. He had been working there regularly for several months. Grievant knew or should have known that he was not accurately responding to the Investigator's question by failing to mention his part-time work at the bowling alley.

The Master Control Officer has a line of sight into command alley and into the dining hall adjacent to the kitchen. He observed Grievant take the Female Ward into the kitchen area at 9:30 p.m. Once Grievant and the Female Ward were in the kitchen, the Master Control Officer could not see them and no cameras recorded their actions. The lights were off in the kitchen and remained off for the approximately five minutes Grievant and the Female Ward were in the kitchen. Grievant could have left the Female Ward at the master control booth while he went into the kitchen or he could have taken another person with him rather than being alone with the Female Ward.

The Sergeant reporting to Grievant during the shift was informed by a subordinate that Grievant was observed being alone with the Female Ward. The Sergeant discussed his concern with Grievant. On two occasions, the Sergeant had observed the Female Ward and Grievant enter areas by themselves and outside the

view of cameras. One time, the Female Ward and Grievant were in command alley alone. On another occasion, they were alone in the laundry room. The Sergeant was not aware of employees other than Grievant being alone with wards outside the view of cameras.

Grievant presented witnesses and documents but did not testify during the hearing.

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).

Failure to Follow a Supervisor’s Instructions

Failure to follow a supervisor’s instructions is a Group II offense.² Grievant had received numerous instructions from his supervisors to avoid being alone with female wards outside the view of a camera. Grievant had given similar instructions to his subordinates. The Sergeant expressed his concerns to Grievant about Grievant’s behavior, yet Grievant continued to place himself in situations where he was alone with the Female Ward out of camera view. Grievant’s behavior is contrary to supervisor’s instructions thereby justifying issuance of a Group II Written Notice.

Grievant argues he was alone with the Female Ward because he was showing her where she could obtain cleaning supplies or for other legitimate business reasons. Whether Grievant was alone with the ward for legitimate business reasons is not the issue. Grievant acted contrary to instructions by being alone with the Female Ward irrespective of the reason to do so. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

Physical Count Procedure

The Agency contends Grievant failed to comply with established written policy regarding the count procedure. Security staff periodically count the number of wards in

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

² DHRM Policy 1.60(V)(B)(2)(a).

the Facility in order to make sure no ward has escaped. Institutional Operating Procedure 207 governs Physical Count Procedure. Section 207-4.5(10) and (11) provides that the Master Count Sheet upon which the count is recorded must contain “The signature of the Shift Commander who recorded the count” and “The signature of the Shift Commander on duty during the time the count was taken. This officer is also verifying the correctness of the recorded count.”

The Agency has not carried its burden of proof to show Grievant acted contrary to established written policy. Grievant received no training regarding the policy yet he was expected to carry out the policy daily. Several other Shift Commanders had delegated responsibility for signing the master count sheet to subordinate supervisors. It is unclear how rigorously the Agency applied IOP 207-4.5. Accordingly, the Group II Written Notice for failure to comply with physical count procedures must be reversed.

The Agency contends Grievant deleted signing of the master count sheet more frequently than did other shift commanders. The Agency has not established when delegation amounts to too much delegation such that an employee should be disciplined. No credible evidence was presented showing the Agency had informed its shift commanders when delegation was at a level warranting disciplinary action.

Interview by Investigator

Paid employment or self employment outside of the Agency is permitted if approved by the Agency. To obtain permission, an employee must obtain a “Request to Engage in Outside Employment” form and submit it to the employee’s supervisor for review. Once the form is approved by the Agency, an employee may engage in outside employment.³ Grievant’s supervisor knew of Grievant’s outside employment and approved of that employment. There is no reason to believe Grievant’s written request would have been denied. Grievant’s failure to formally obtain written approval for his outside employment is not, in itself, of material significance. Grievant’s comments to the Investigator regarding his outside employment, however, are more problematic.

Employees providing “false or misleading information to investigators” may “result in disciplinary action.”⁴ The Investigator asked Grievant if he another job. Grievant responded that he used to work some days and sometimes he cut grass. Grievant was employed at a bowling alley but did not reveal this to the Investigator. He refrained from revealing this information to mislead the Investigator into thinking he did not have outside employment other than former employment of cutting grass. Grievant acted contrary to Agency policy thereby justifying issuance of a Group II Written Notice.

³ See, Agency Exhibit 6a, Employment Outside of Primary Position.

⁴ The Agency submitted Exhibit 6b, Policy 05-009.2 effective November 29, 2004. This policy was effective after Grievant’s interview with the investigator. The Agency had a prior policy dated 12/15/02 containing the same language. See, DJJ Policy 05-009.2 (D)(3) (effective December 15, 2002).

Grievant argues his response should be ignored because the purpose of the investigation was not regarding his outside employment. He adds that his response was influenced because of the hostility investigators displayed towards him. Grievant's argument fails because Grievant knew he was speaking with investigators. The investigators had the right to ask what ever questions they wished. Agency policy clearly required Grievant to respond truthfully. Grievant did not remain silent. He chose to provide an answer designed to mislead the investigators.

Accumulation of Disciplinary Action

An employee with two active Group II Written Notices may be removed from employment. Grievant has two active Group II Written Notices. Accordingly, the Agency's removal of Grievant from employment must be upheld.

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

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow physical count procedures is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action regarding outside employment and providing false and misleading information is **upheld**. Based on the accumulation of disciplinary action, Grievant's removal from employment 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 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.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.