

Issue: Group II Written Notice with suspension (behavior which undermined the agency's effectiveness); Hearing Date: 10/11/05; Decision Issued: 10/13/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8180



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8180

Hearing Date: October 11, 2005
Decision Issued: October 13, 2005

PROCEDURAL HISTORY

On July 22, 2005, Grievant was issued a Group II Written Notice of disciplinary action with two workdays suspension for:

Behavior that undermined the effectiveness of the agency's activities or the employee's performance.

On August 16, 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 she requested a hearing. On September 15, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 11, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

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 employs Grievant as a Corrections Officer Senior at one of its Facilities. She began working for the Agency in December 1999. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

The Facility has dorm A and dorm B on one side and dorm C and dorm D on the other side of a kitchen. A basement is also available for inmates.

On June 10, 2005, Grievant was the A&B Basement Officer at the Facility. She opened the basement at 6 p.m. and documented this in her log. An Inmate asked Grievant if the inmates could use the basement after the 9 p.m. inmate count for an inmate gathering. Grievant said "no" because the Lieutenant would not permit use of the basement after it was closed for the evening. Grievant told the Inmate that since Grievant was present at the basement at the moment, Grievant would permit the inmates to come down to the basement to have their "get together" to celebrate one of the inmate's birthday. The Inmate and six or seven other inmates left their dorm and went to the A&B basement for the birthday party. The Inmate asked Grievant to call an inmate on side C and D so that inmate could come to the basement. Grievant refused and told the Inmate that no one from the other side would be coming over. The group was in the basement for approximately 30 minutes. They brought food and drinks into the basement for the celebration.

While the inmates were in the basement for the birthday party, the chaplain was holding a function with other inmates in a small visiting room. That function had been scheduled on the master pass list. The master pass list is prepared each Friday and shows the planned activities for the Facility and who would be in attendance. The

master pass list is distributed to each post and held in the Lieutenant's office. On June 10, 2005, the Chaplain had a copy of the master pass list.

Grievant's job duties are determined in part by her post orders. Grievant's post orders required her to "Strictly control inmate movement through gates. *** Monitor inmate movement, and log activities and unusual incidents in the basement."¹

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." 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.

Institutional Operating Procedure 410.3 sets forth the Facility's procedures governing the control of inmate movement through out the Facility. "Staff at the [Facility] shall regulate offender movement at all times." IOP 410.3 defines daily master pass list as a "list of authorized individual offender movement issued daily by a designated official of the facility." The daily master pass list is required for routine scheduled inmate movement and must contain at least the following information:

- Offender's name
- Offender's number
- Housing assignment
- Work assignment
- Destination
- Name of authorizing official
- Time activity is to begin
- Time activity is to end

The master pass list is the inmate's authority to proceed to a designed area at a specific time on a specific day.

IOP 410.3 defines trip pass as a "signed permit authorizing an offender to proceed from one section of the facility to another."

IOP 410.3 states, that "Employees whose posts specifically include traffic control and/or movement control responsibilities shall examine inmate passes and the daily master pass list to verify proper authorization of all inmate movement." Grievant's post

¹ Agency Exhibit 2.

order describes her job summary to include “Strictly control inmate movement through gates. *** Monitor inmate movement, and log activities and unusual incidents in the basement.” Thus, Grievant was obligated to examine the master pass list and verify proper authorization for inmate movement.

A birthday party is an event that should have been placed on the master pass list since it would involve a group of inmates moving at the same time.² Since the birthday party was not placed on the master pass list, Grievant should not have permitted the inmates to move into the basement for a birthday party.

“Failure to follow ... comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1).³ Grievant failed to comply with IOP 410.3 because she permitted inmate movement for the purpose of a birthday party without requiring the inmates to have had their names placed on the master pass list. The effect of Grievant’s action was to circumvent the authority of Facility Managers to have knowledge of and to authorize functions requiring inmate movement. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. Up to a ten workday suspension is permitted upon the issuance of a Group II Written Notice.⁴

Grievant contends that when she opened the basement she was opening it for recreation, showers and other permitted activities. A birthday party, however, was not a permitted activity because it had not been approved by Facility managers and placed on the master pass list.

Grievant contends the master pass list is not needed for the inmates to utilize the basement when it is open for recreation. Grievant’s assertion is supported by the evidence with respect to individual inmates independently entering the basement in order to take showers, etc. The birthday party, however, was not an independent decision made by individual inmates. It was a function involving several inmates who wished to engage in a specific function not normally held in the basement. Just as the names of the inmates attending a religious function were placed on the master pass list, the names of the inmates attending the birthday function should have been placed on the master pass list. Since those names were not on the master pass list, the inmates should not have been permitted to enter the basement for the purpose of having a birthday party.

² Similarly, the name of each inmate attending a religious function in the basement on June 10, 2005 was placed on the master pass list.

³ Although the Agency drafted the written notice in more general terms to describe Grievant’s behavior as undermining the effectiveness of the agency’s activities and the employee’s performance, failure to follow established written policy falls within that general statement. The Agency has adequately presented Grievant with the facts upon which it claims a basis for taking disciplinary action. Thus, the Agency has granted Grievant with adequate procedural due process.

⁴ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

Grievant argues her decision to permit the birthday party was authorized by a memorandum issued by the Facility Superintendent on March 25, 2005. This memorandum states, in part:

The Movies and other Television Events may be viewed in the Basement depending on Staff availability and behavior of the population. The Lieutenant or Officer in Charge will discuss the inmate's request for this privilege and determine the hours of operations.

Grievant's decision was not authorized by this memorandum. Although it refers to an Officer in Charge, Grievant was not an Officer in Charge. An Officer in Charge is the person who may not necessarily hold the rank of Lieutenant but is in charge of the Facility in the Lieutenant's absence.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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.