

Issues: Group III Written Notice with suspension (approaching an employee in an intimidating manner) and Group II Written Notice (failure to follow supervisory instructions and insubordination); Hearing Date: 12/19/05; Decision Issued: 12/28/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8201; Outcome: Employee granted partial relief; **Administrative Review: HO**
Reconsideration Request received 01/11/06; Outcome: Original decision upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8201

Hearing Date: December 19, 2005
Decision Issued: December 28, 2005

PROCEDURAL HISTORY

On June 30, 2005, Grievant was issued a Group III Written Notice of disciplinary action with suspension from July 5, 2005 through July 11, 2005 for "approaching an employee in an intimidating manner." Grievant also received a Group II Written Notice for "Failure to follow supervisory instructions" and insubordination.

On July 15, 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 November 16, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

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 Psychiatrist. The purpose of her position is:

Provide psychiatric services to inmates in accordance with established policies and procedures and consistent with contemporary health care standards. Provides mental health services to include psychiatric assessment, evaluation, diagnosis, treatment planning, psychopharmacological services, medication management, treatment reviews, crisis intervention, psychoeducation, and psychotherapy. Serves in a consultative role to treatment, security, and administrative staffs and as a member of the multidisciplinary treatment teams. Provides training services for institutional staff.¹

¹ Grievant Exhibit 7.

No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On April 6, 2005 at approximately 9 a.m., the Senior Psychologist was in the Medical Clerk's Office speaking with the Secretary. At approximately 9:10 a.m., Grievant entered the office. The Senior Psychologist introduced the Secretary, a new employee, to Grievant.² Grievant said to the Secretary, "You know what will help me. I would like for you to fill out the green forms to put them in the charts for me as opposed to the white sheets." The Senior Psychologist replied, "No, [the Secretary] will not be doing that. The green forms are consultation forms that is used by medical nurses to refer to us, the mental health department." Grievant responded, "Why? What's the big deal about the forms. Shouldn't you use the forms when you make referrals to the psychiatrist?" The Senior Psychologist said, "The green forms are used by medical for referrals and they are not used for progress notes. The forms will not be placed in the file for you to use as progress notes." Grievant said, "Well, that's not how other Senior Psychologists do it at other institutions. Shouldn't there be some consistency?" The Senior Psychologist said, "I am not at other institutions, I am in charge of the Mental Health Department and the green forms will not be placed in the chart and this is not open for discussion."

Grievant and the Senior Psychologist began their discussion standing approximately five feet apart. The Senior Psychologist took a step backwards. Grievant stepped forward and said "I think we should talk about it. We are two adults and there should be some discussion." The Senior Psychologist took a second step backwards and said, "I will not argue with you. This is not open for discussion." After this statement, the Senior Psychologist walked out of the room.

At approximately 10:09 a.m., Grievant called the Senior Psychologist on the telephone. Grievant was uncertain as to why the Senior Psychologist had a negative reaction to her. Grievant told the Senior Psychologist, "[Senior Psychologist] did I offend you this morning? I am sorry if I did. I just thought that we are two adults and we should discuss this issue." The Senior Psychologist replied, "[Grievant], again it is not open for discussion. Your apology is accepted." Grievant said, "Well, I see that you are not going to talk about this. I also feel bad because I should have called you earlier to congratulate you on your award." The Senior Psychologist thanked Grievant and the conversation ended.

On May 18, 2005, the Warden received a call from an employee in the Deputy Director's office regarding an inmate. The Deputy Director had received calls from an inmate's family members and wanted information regarding the medical treatment of an inmate. Shortly after the call from the employee in the Deputy Director's office, the Warden received a call from that inmate's mother and grandmother regarding their concerns about the medical treatment provided to the inmate. The Warden did not know the medical status of the inmate, but she knew that Grievant would most likely

² Grievant had already met the Secretary but the Senior Psychologist was not aware of this.

know the answers to the questions posed by the Deputy Director and by the inmate's mother and grandmother.

The Warden walked to the medical department where Grievant was working. The Warden told Grievant that the Deputy Director's office and the inmate's family had called concerned about the medical treatment given to the inmate. Grievant responded to the Warden, "You give me a diagnosis and I will treat him." The Warden left the room.

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 "(DOC PM)" § 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." DOC PM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOC PM § 5-10.17.

Group III

The Agency contends Grievant approached the Senior Psychologist in an intimidating manner. The Senior Psychologist testified that the intimidation resulted from Grievant moving very close to the Senior Psychologist and invading her "personal space." During the hearing, the Senior Psychologist demonstrated Grievant's behavior and it appeared that Grievant and the Senior Psychologist stood approximately 12" to 18" apart at the time Grievant was perceived as exercising intimidating behavior.

There is no doubt that the Senior Psychologist believed Grievant had approached her in an intimidating manner, but the evidence is insufficient to support this conclusion. Grievant and the Senior Psychologist began their conversation standing approximately five feet apart. The Senior Psychologist was the first to move. She took a step backwards. This means Grievant and the Senior Psychologist were standing more than five feet apart. Grievant took one step forward. Grievant is 5'5" tall and the Senior Psychologist is 5'4" tall. There is no reason to believe that Grievant's step forward was significantly longer than the Senior Psychologist's step backwards. In other words, when Grievant stepped forward the gap between Grievant and the Senior Psychologist most likely returned to approximately five feet. Based on the series of events (as presented primarily by the Senior Psychologist), Grievant could not have taken one step and ended up reducing the distance between them from more than five feet (after the Senior Psychologist's first step) to 12" to 18" (after Grievant's first forward step). Grievant's explanation that she stepped forward in response to the Senior Psychologist's movement backwards so that they could continue their conversation is plausible. The Agency has not presented sufficient evidence to support its conclusion

that Grievant approached another employee in an intimidating manner. The Group III Written Notice with suspension must be reversed.

Group II

The Warden was the highest ranking employee at the Facility. Grievant was obligated to comply with the Warden's request for information. Grievant knew that the Warden was not responsible for making a medical diagnosis and that such a request was an absurdity. Grievant's response to the Warden was disrespectful, defiant, and reflected a disregard of the Warden's rank and position within the Facility. Grievant's behavior was insubordinate.

DOCPM § 5-10.7(C) states, "The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this procedure." In the Agency's judgment, insubordination, as displayed by Grievant, is a Group II offense. The Hearing Officer agrees. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.³

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 Employment Dispute Resolution...."⁴ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."

Grievant contends that the Group II Written Notice should be reversed because she did not receive adequate notice of the Agency's contention that she was insubordinate. Grievant points to the Group II Written Notice which describes the offense as, "Failure to follow supervisory instructions." No evidence was presented by the Agency showing that the Warden gave Grievant an instruction and that Grievant failed to comply with that instruction. Accordingly, Grievant believes that the Group II Written Notice is defective and should be removed.

³ Grievant denies the events occurred as stated by the Warden because she stated she did not recall making the alleged statements. The Warden's testimony was clear and credible. There is no reason to disregard the Warden's testimony.

⁴ *Va. Code § 2.2-3005.*

Grievant's argument fails because of the attachment to the Group II Written Notice. The attachment advised Grievant of issues such as "Insubordination as it relates to "you diagnose, I'll treat him." The attachment also stated:

With regards to the issue of you're telling me to diagnose and you will treat him, you are being issued a Group II for Failure to Follow Supervisors Instructions. On May 18th, I entered the medical unit to [inquire] about an inmate which I was receiving telephone calls from [the Central Office] on. I asked you to provide me with information to be able to return the telephone call and report on the inmate's status. You informed me to diagnose him and you would treat him. [Nurse] was present at this discussion. Today instead of offering an explanation or apology, you stated you didn't remember.⁵

Although it is clear the Agency confused "failure to follow a supervisor's instructions" with "insubordination", the Agency also advised Grievant that it considered her behavior to be insubordination and then described the specific behavior to which the Agency objected. Accordingly, the Agency presented sufficient notice of the charge against Grievant in order for Grievant to present an adequate defense to the Agency's allegation. There is no basis to mitigate the Group II Written Notice.

Grievant also objects to the Group II Written Notice because it does not contain any discussion regarding mitigation. Grievant has not offered any policy requiring the Agency to discuss mitigation on the Written Notice or policy that would permit a Hearing Officer to reverse a Written Notice failing to contain such discussion. Thus, Grievant's argument fails.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension is **rescinded**. The Agency is directed to provide the Grievant with **back pay** for the period of suspension, July 5, 2005 through July 11, 2005 less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. The Agency is directed to remove the Group III Written Notice from Grievant's personnel file and place it in a grievance or separate confidential file.

The Agency's issuance to the Grievant of a Group II Written Notice is **upheld**.

APPEAL RIGHTS

⁵ Grievant Exhibit 6.

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.⁶

[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].

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8201-R

Reconsideration Decision Issued: January 18, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant argues that she did not make the statement “You diagnose and I’ll treat.” Grievant argues this is a case of “she said, she said.” She argues a second witness, Ms. FH, had a grudge against Grievant. Grievant’s argument fails for two reasons. First, on the Form A, Grievant denied making the statement but admitted, “I have no recollection of this conversation ever taking place” Second, the Warden’s testimony was credible. She recalled many details of the conversation. The Warden had no motive to be untruthful about Grievant. Upon hearing Grievant’s statement, the Warden reacted immediately by leaving the room. The Warden’s action was consistent with someone hearing an unusual and insubordinate remark from a subordinate employee. Based on the evidence presented, the Warden’s testimony was more credible than Grievant’s testimony. Accordingly, the Agency has met its burden of proof.

Grievant argues the Agency took too long to issue disciplinary action. It sometimes takes agencies several months to investigate, initiate, and process disciplinary action. Any delay by the Agency in this case was not sufficient to alter the outcome of this appeal.

Grievant states:

There are staff in administration at the DOC who would agree to serve as witnesses. They believe that there was failure of due process and

misapplication of policies and procedures. One of the witnesses was unable to attend the hearing due to sickness.

Grievant had the opportunity to call any relevant witnesses during the hearing. Grievant did not make a motion to continue the hearing due to illness of a witness. Grievant cannot now present additional testimony that she could have presented during the hearing.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer