

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions, perform assigned work, or comply with established written policy);
Hearing Date: 02/24/06; Decision Issued: 03/02/06; AHO: Carl Wilson Schmidt,
Esq.; Case No. 8277; Outcome: Employee granted partial relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8277

Hearing Date: February 24, 2006
Decision Issued: March 2, 2006

PROCEDURAL HISTORY

On December 14, 2005, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy with a ten workday suspension. On December 14, 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 January 30, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 24, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Corrections Officer at one of its Facilities. She has been employed by the Agency for over ten years. On October 31, 2005, Grievant received a Group III Written Notice for taking items from a vending machine without permission to do so.¹

On July 14, 2005, Grievant observed Officer R and an Inmate arguing. Officer R began hitting the Inmate. Grievant used her radio to call out a "10-33" to indicate an emergency was occurring in her area and that immediate assistance from available security staff was needed. Several security staff came to Grievant's location and stopped the fighting between Officer R and the Inmate. Officer R told others that the Inmate had experienced a seizure. Grievant did not write an incident report. She did not notify her supervisor that she had observed Officer R beating the Inmate. The Inmate later made a complaint and the matter was investigated by Agency staff. Grievant was interviewed by the Agency's Investigator and made statements admitting she had not acted properly.

¹ Agency Exhibit 7.

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.

“[I]nadequate or unsatisfactory job performance” is a Group I offense.² In order to prove inadequate or unsatisfactory job 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.

Grievant’s Employee Work Profile requires her to document activities in accordance with institutional and divisional operating procedures.³ She has received training making her aware of her obligation to write reports. Grievant knew that the Agency does not tolerate officers assaulting inmates. When Officer R assaulted the Inmate, Grievant knew she should have written a report and presented that report to her supervisor. By failing to do so, her work performance was unsatisfactory thereby justifying issuance of a Group I Written Notice. The Agency’s policy, DOCPM § 5-10, *Standards of Conduct*, does not authorize suspension in this case upon the issuance of a Group I Written Notice.⁴

The Agency contends Grievant should receive a Group II Written Notice for failure to follow a supervisor’s instruction, perform assigned work or otherwise comply with applicable established written policy. No evidence was presented showing that Grievant failed to comply with a supervisor’s specific instruction. Grievant was not assigned particular work for which she failed to perform. The Agency has not presented evidence of any written policy or post order requiring⁵ Grievant to write a report of an assault and present that report to her supervisor.⁶ In the absence of a written policy, Grievant’s behavior cannot be treated as a Group II offense.

² DOCPM § 5-10.15(B)(4).

³ Agency Exhibit 6.

⁴ DOCPM § 5-10.15(C)(2) authorizes a suspension of up to five work days when an employee receives a third active Group I Written Notice. The policy is silent regarding whether an employee may be suspended with an active Group III Written Notice and an active Group I Written Notice.

⁵ Grievant’s obligation to write a report and notify her supervisor of the assault arose because of the training she had received and the duties listed in her Employee Work Profile.

⁶ The Hearing Officer permitted the Agency to submit a copy of any applicable policy or post order after the date of the hearing. The Agency failed to do so.

Grievant argues she (1) told Officer M that she witnessed an assault, (2) wrote an incident report which Officer M viewed, (3) contacted Sergeant S and told him she had witnessed an incident, (4) Sergeant S told her she did not need to submit a report since she was not involved in the emergency response, and (5) she could not find the report when the matter was investigated by the Agency three months later. It is difficult to determine what portions of Grievant's arguments are true. Significant portions of Grievant's case are contradictory. In particular, Grievant told the Agency's Investigator that she "never mentioned to anyone that [she] saw [Officer R] hitting [the Inmate], yet she stated during the hearing that she told Officer M of the assault. Grievant told the Agency's Investigator that she did not mention to anyone that she observed the assault "because no one asked me, but at the time I did not feel I had an obligation to come forward." During the hearing, however, she argued that she contacted Sergeant S and he told her she did not need to make a report. Sergeant S denies he received a call from Grievant about any report she had written. Grievant admitted to the Agency Investigator, "I realize now that I should have come forward on my own and reported my observations to supervisory personnel." This admission confirms the Agency's assertion that Grievant did not make a report and present it to her supervisor. When Grievant's presentation is viewed as a whole, it is so inconsistent that the Hearing Officer cannot find many of Grievant's assertions to be credible. Thus, the Grievant is not able to rebut the Agency's case against her.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** for the period of suspension, 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.

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.⁷

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.