

Issues: Group II Written Notice with suspension (behavior prohibited by the workplace violence policy), Group II Written Notice with termination (failure to report to work as scheduled and failure to follow a supervisor's instructions), Group I Written Notice (insubordination), and Group II Written Notice with termination (leaving the work site during work hours without permission); Hearing Date: 11/03/06; Decision Issued: 11/29/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8446; Outcome: Agency upheld in full on all three Group II's; Employee granted full relief on the Group I



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8446

Hearing Date: November 3, 2006
Decision Issued: November 29, 2006

PROCEDURAL HISTORY

On June 5, 2006, Grievant was issued a Group II Written Notice of disciplinary action with suspension for behavior prohibited by the workplace violence policy. On June 5, 2006, Grievant received a Group II Written Notice of disciplinary action with removal for failure to report to work as scheduled and failure to follow a supervisor's instructions. On June 5, 2006, Grievant received a Group I Written Notice of disciplinary action for insubordination. On June 5, 2006, Grievant received a Group II Written Notice of disciplinary action with removal for leaving the work site during work hours without permission.

On July 5, 2006, 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 October 4, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 3, 2006, a hearing was held at the Agency's regional office. Following the hearing, Grievant's Representative sought to have the Hearing Officer take the testimony of a witness who was not able to attend the hearing when scheduled. The Hearing Officer asked the Representative to proffer the testimony of that witness. The Representative sought a ruling from the EDR Director. On November 17, 2006, the EDR Director issued Ruling Number 2007-1485 ordering the Grievant to respond to the Hearing Officer's request to proffer witness testimony. On November 22, 2006, the Representative sent the

Hearing Officer a fax stating that the testimony of the proposed witness was no longer needed.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 employed Grievant as a Counselor II at one of its Facilities. She had been employed by the Agency for approximately eight years prior to her removal effective June 5, 2006. The purpose of her position was:

Day to day provision of direct substance abuse treatment programming by serving as a credible role model, ensuring therapeutic community structure, facilitating the inmate peer community as the therapeutic agent of change, and overseeing or delivering program services.¹

Prior to the events giving rise to these disciplinary actions, Grievant's work performance was satisfactory to the Agency. Grievant reported to the CSW Supervisor.

On May 2, 2006, the Intern went to Grievant's office and they began discussing when the Intern would return from vacation. They began discussing other matters as well. The Intern asked Grievant why Grievant suggested in a staff meeting that the Intern had been offered a job. The Intern had not attended the staff meeting and learned of Grievant's comment from someone else. The Intern told Grievant that Grievant's comments undermined the Intern's ability to obtain the job because people would assume that the selection was pre-arranged. The Intern also questioned Grievant about other comments Grievant had made. Grievant told the Intern that the Intern had offended Grievant. The discussion became confrontational and heated. Grievant said, "You are going to have to learn the hard way! Get out of my office! Grab up your little stuff and get out!" As the Intern packed her book bag, the Intern said "this is why most of the clients have issues with you." Grievant yelled, "Get out!" The Intern stepped out of Grievant's office and approached the door to the hallway. The door was locked and the Intern did not have a key.² Grievant had a key to the door. The Intern told Grievant she did not have a key and asked Grievant to open the door. Grievant grabbed her keys and began telling the Intern, "You should have never called a CSW names, you made a big mistake. You should have never spoken to a CSW that way; you are an intern you should have known better." The Intern said she was done with the conversation and that Grievant should unlock the door. Grievant said, "You are going to pay for this!" The Intern said "Unlock the door!" Grievant said "Are you threatening me?" The Intern said Grievant was full of it. Grievant said, "I am going to teach you a lesson the hard way; you should have never talked to a CSW that way!" Grievant turned her back to the Intern and told the Intern to go up stairs and ask the guard to unlock the door for her. Grievant walked into her office and shut the door.

The Intern did not know if a Corrections Officer was upstairs to let her out. She feared that if someone was not upstairs, she would have to return to Grievant and again ask to be let out.

The Intern walked upstairs and found the Corrections Officer at the Officer's post. The Intern asked the Corrections Officer if she would walk downstairs and let the Intern out of the building. The Officer said she could let the Intern out on that floor. The Intern said "no" and asked that the Corrections Officer let the Intern out downstairs because

¹ Agency Exhibit 7.

² Because she was not a full time employee, the Intern was not given a key by the Agency.

Grievant refused to unlock the door. The Corrections Officer left her post and walked with the Intern downstairs and let the Intern out of the building.

On May 24, 2006, the Clinical Social Work Supervisor presented Grievant with a memorandum outlining the Agency's allegations against her regarding her interaction with the Intern and indicating that the Agency could issue a Group II Written Notice with suspension. The CSW Supervisor advised Grievant, "You have two days to submit written documentation as to why this Group II notice should not be issued. You have until Friday, May 26, 2006 by 5:00 p.m. to submit your documentation."³

On May 25, 2006, Grievant called the Facility and left a message saying, "I am notifying you that I will be busy this morning drafting my response to your allegations and I also will be providing you with a response. Since tomorrow is my day off, I will be providing you with that response when I get it later." The CSW Supervisor called Grievant at home and told Grievant that her absence was unexcused and she should come to work. Grievant did not report to work on May 25, 2006. Grievant did not obtain prior approval from her supervisor to be absent from work on May 25, 2006.

On May 30, 2006, Grievant did not report to work as scheduled. She did not obtain prior approval from her supervisor to be absent from work. The CSW Supervisor called Grievant at home and told Grievant to report to work. Grievant told the CSW Supervisor that she would bring in a doctor's note. The CSW Supervisor restated that Grievant's absence was unexcused. Grievant responded, "Don't even go there with me [CWS Supervisor's last name]." Grievant disregarded the CSW Supervisor's instruction and did not report to work. Grievant later presented a doctor's note excusing her absence on May 30, 2006.

On June 1, 2006, Grievant met with the CSW Supervisor and a Human Resource Officer regarding the Agency's proposed disciplinary action against Grievant. Grievant became upset and said the Agency was harassing her. She said she was leaving. The HRO told Grievant she could not leave without getting permission from a supervisor. The CSW Supervisor asked Grievant if she was requesting permission to leave and Grievant said "no." The HRO told Grievant that if she left without approval there would be a probability that Grievant would be terminated. Grievant said "Yes, but it won't happen to me." The HRO asked if Grievant understood what the HRO said. Grievant said "no." The HRO said she would get the Warden to explain it better. Grievant stood up from her seat and said, "I am leaving, this is not safe." Grievant then walked out of the door to the room in which they were meeting and she left the Facility. The meeting lasted approximately 30 minutes.

CONCLUSIONS OF POLICY

³ Agency Exhibit 1.

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”⁴ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

Group II for Workplace Violence

Virginia Department of Corrections Operating Procedure 130.3 establishes rule of conduct prohibiting violence in the workplace. Workplace violence is defined as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to beating, stabbing, suicide, shooting, rape, attempted suicide, attempted rape, psychological trauma such as threats, obscene phone calls, and/or electronic communications, an intimidating presence, and harassment of any nature such as stalking, shouting or abusive language.

“Engaging in behavior that subjects another individual to extreme emotional distress” constitutes workplace violence.

Grievant refused to let the Intern out of the building. Grievant threatened to teach the Intern a lesson “the hard way.” The Intern began to panic and was fearful that if a Corrections Officer was not at a post upstairs that the Intern would have to return to Grievant’s office and again ask Grievant to let her out. The Intern perceived Grievant’s behavior as very angry and irrational. She did not wish to engage Grievant a second time because she did not know how Grievant would react. Grievant’s actions were contrary to the workplace violence policy. “[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁷ A suspension of up to ten work days is supported by the Standards of Conduct upon the issuance of a Group II Written Notice. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice with a ten workday suspension.

Grievant contends she did not refuse to let the Intern out but rather had difficulty selecting the appropriate key from her key ring that contained many keys. She testified she was too upset to identify the proper key. Based on the credibility of the testimony, the Intern’s version of events is most likely to have occurred. The Intern’s testimony

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁷ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

was credible. The Corrections Officer testified that the Intern told her that Grievant “kicked” the Intern out of Grievant’s office and Grievant would not let the Intern out of the door. If Grievant’s hands had been shaking as she claimed, she could have handed the keys to the Intern and let the Intern unlock the door and then return the keys to Grievant.

Group II for Failure to Follow a Supervisor’s Instructions

“[F]ailure to follow a supervisor’s instructions ...” is a Group II offense.⁸ On May 25, 2006 and May 30, 2006, the CWS Supervisor called Grievant at home and told her to report to work. Grievant understood the instruction and chose to reject it. She did not report to work on those days thereby justifying the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

The Agency argues Grievant also failed to report to work as scheduled without proper notice to her supervisor. However, Grievant called the Agency prior to her scheduled shift and informed the Facility staff that she would not be at work as scheduled. Accordingly, Grievant gave proper notice to the Agency. Grievant did not have prior approval for her absences but Grievant was not disciplined for failing to obtain prior approval.

Grievant argues the CSW Supervisor told her that Grievant would have to “use her own leave” for the days she was absent and, thus, Grievant’s absences were approved by the CSW Supervisor. By saying Grievant would have to use leave for her days of absence, the CSW did not intend to approve Grievant’s absences. Grievant should not have assumed her absences were authorized especially in light of the CSW Supervisor’s instruction to immediately report to work.

Grievant testified she presented a doctor’s note to the Agency excusing her absence from work on May 30, 2006. Grievant did not present a note excusing her absence on May 25, 2006. Thus, Grievant’s failure to follow her supervisor’s instructions on May 25, 2006 cannot be disregarded.

Group I for Insubordination

The Agency has not presented sufficient evidence to support the issuance of a Group I Written Notice for insubordination. Disagreeing with a supervisor is not in itself insubordination. How an employee communicates that disagreement determines whether that disagreement reflects insubordination. Although Grievant worked at a correctional facility, she was not a sworn corrections officer in uniform and holding rank. Thus, she was not expected to follow lawful orders without questioning them. Grievant’s tone of voice and demeanor during her conversation with the CSW Supervisor was not so offensive as to take an expression of disagreement and convert it into insubordination. The Group I Written Notice for insubordination must be reversed.

⁸ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Group II Written Notice for Leaving the Work Site

“[L]eaving the work site during working hours without permission” is a Group II offense.⁹ On June 1, 2006, Grievant reported to work as scheduled. She met with the CSW Supervisor and a Human Resource Officer to discuss possible disciplinary action against Grievant. Grievant left the meeting and left the Facility without asking for or obtaining permission from the CSW Supervisor. She left prior to the end of her work shift.¹⁰ The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

Accumulation of Disciplinary Action

[A]ccumulation of two Group II offenses normally should warrant removal.¹¹ Grievant has accumulated at least two Group II Written Notices and, thus, her removal from employment must be upheld.

Mitigation

Grievant contends the disciplinary action should be mitigated. *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....”¹² 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.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.¹³

DECISION

⁹ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(3).

¹⁰ Grievant’s assertion that she was unsafe to remain in the meeting is unfounded. Grievant’s safety was not in doubt during the meeting.

¹¹ Virginia Department of Corrections Operating Procedure 135.1(XI)(C)(2).

¹² *Va. Code § 2.2-3005.*

¹³ For example, Grievant argues she felt panic consistent with her prior depression and had to leave the June 1st meeting. Although Grievant’s mental health concern may explain why she left the meeting, it does not provide a reason to mitigate the disciplinary action.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension for workplace violence is **upheld**. 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 I Written Notice of disciplinary action for insubordination is **reversed**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for leaving the work site without permission is **upheld**. Grievant's removal from employment is **upheld** based on the accumulation of disciplinary action.

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 all of your appeals to the other party and to the EDR Director. 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.¹⁴

[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

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.