

Issues: Group III Written Notice (hostile work environment/workplace harassment), Group II Written Notice (failure to follow established written policy), and termination; Hearing Date: 01/08/07; Decision Issued: 03/15/07; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 8485/8486; Outcome: Group III for hostile work environment/workplace harassment – Full relief, written notice rescinded; Group II for failure to follow policy – No relief, agency upheld in full; Termination – Full relief, employee reinstated.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8485 / 8486**

Hearing Date: January 8, 2007  
Decision Issued: March 15, 2007

**PROCEDURAL HISTORY**

On September 28, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for the appearance of creating a hostile work environment for staff. On September 28, 2006, Grievant was issued a Group II Written Notice for failure to follow established written policy. On October 2, 2006, 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 December 4, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 8, 2007, 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 actions against the Grievant were 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 Corrections Sergeant at one of its Facilities until his removal effective September 28, 2006. The purpose of his position was, "[p]rovide first line supervision to correctional officers."<sup>1</sup> Grievant began working for the Agency in 2002. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On July 19, 2006, Grievant began his shift at approximately 5:45 a.m. His post was as a building supervisor. He was responsible for four living areas (known as pods) within the housing building.

On July 19, 2006, Nurse P began her first day of work at the Facility. As part of her orientation, she accompanied Nurse T while Nurse T was distributing medication to inmates locked in their cells. Officer M accompanied the two nurses while they handed out pills to inmates living in the housing unit. The housing unit consisted of an open

---

<sup>1</sup> Agency Exhibit 4.

floor area with two floors of cells facing the open area. A stairway permitted access between the floors.

At approximately 12:30 p.m., Nurse T, Nurse P, and Officer M began walking from cell to cell in the housing unit. At approximately 1:03 p.m., Nurse T, Nurse P, and Officer M walked up the stairs from the first floor to the second floor. An unidentified inmate walked below where the group was located and said that they needed to see an inmate in a particular cell because there was an emergency.<sup>2</sup> This inmate was referring to the cell in which Inmate F was located. Since the nurses had not missed giving out medication to any inmate entitled to medication, the nurses ignored that inmate's request and continued what they were doing. This inmate walked to the cell door where Inmate F resided alone inside and spoke with Inmate F.

At approximately 1:06 p.m., Officer D, who was working in the control room, unlocked Inmate F's cell door and Inmate F opened the cell door.<sup>3</sup> Inmate F walked directly below Nurse T, Nurse P, and Officer M and began yelling upwards towards them. Inmate F questioned Nurse T as to what she told the other inmate. Inmate F asked why they did not come by to see what he wanted. Nurse T said she did not know Inmate F was in the cell to which the other inmate referred. Inmate F continued to yell at the nurses. Nurse T thought she realized what Inmate F was concerned about and said that she could not renew his medication order and that Inmate F needed to see the doctor. Inmate F yelled towards the nurses for approximately a minute and a half before walking away. Officer M did not speak to Inmate F to tell him to stop yelling. Nurse P felt threatened by Inmate F.

At approximately 1:08 p.m., Inmate F finished talking to the nurses and then walked near the control booth. Grievant entered the housing unit pod and spoke to Inmate F. At approximately 1:09 p.m., Inmate F and Grievant entered the Interview Room. The Interview Room was on the ground floor at the end of a row of cells. At approximately 1:10 p.m., Grievant and Inmate F exited the Interview Room and stood in front of the control room.<sup>4</sup>

At approximately 1:11 p.m., Nurse T, Nurse P, and Officer M descended the stairs from the second floor to the first floor. Officer M walked behind the two nurses. The bottom step of the stairs is close to the control booth where Inmate F and Grievant were standing. In order to exit the pod, the nurses must walk past Inmate F. As the nurses walked towards the exit door, Inmate F turned and asked Nurse T if he could talk to her. Inmate F continued to ask about his medication. Nurse T told Inmate F that she was having a bad day and that she did not want to argue with him. Inmate F asked Nurse T who was bothering her and said that he would handle the situation. Nurse T

---

<sup>2</sup> There was no emergency or reason for the nurses to have visited Inmate F's cell.

<sup>3</sup> Inmate F used the intercom located inside his cell to ask Officer D to let him outside of the cell.

<sup>4</sup> At approximately 1:10 p.m., the Control Room Officer closed Inmate F's cell door even though Inmate F was not inside.

responded no one was bothering her. Inmate F told Nurse T that he loved her. Inmate F was able to position himself so that Nurse T was isolated from the group standing next the control booth. During the altercation, Nurse T felt threatened by Inmate F's body language and tone of voice.

Grievant watched portions of the interaction between Nurse T and Inmate F and did not take any action to stop Inmate F. At one point, he turned his back to talk to Officer M and told Officer M to go on her break.

After leaving the pod, Nurse T and Nurse P were upset and shaken because of their interaction with Inmate F. They were concerned because none of the security staff were watching them close enough to recognize that Inmate F was creating a problem for them. Nurse T and Nurse P were so upset that they brought their concern to their supervisor, Ms. O. Nurse P told Ms. O that she was so upset by the encounter with Inmate F that she was not sure she wanted to continue working at that Facility. Ms. O contacted Captain B. Captain B told the nurses they should file a charge against Inmate F.

After the nurses left the pod, Grievant told Inmate F to assist with the distribution of ice and food to inmates in their cells. Inmate F's assigned work duties did not include assisting with food distribution.

Lieutenant B reported to work at the Facility at approximately 1:18 p.m. He was scheduled to assume his post at 1:45 p.m. but began working earlier.

Nurse T filled out a Disciplinary Offense Report listing Inmate F's offense as a 129. Under DOC Operating Procedure 861, inmate offenses are described by the level of the offense. Category I offenses include the offense of 129 which is listed as, "Gathering around, or approaching, any person in a threatening or intimidating manner."

At approximately 1:30 p.m., Captain B told Grievant to "lock up" Inmate F. This meant that Inmate F was to be moved from his cell to a segregation unit for prehearing detention. Grievant did not immediately lock up Inmate F.

Grievant informed Lieutenant B regarding what occurred prior to Lieutenant B's arrival to the Facility. Lieutenant B reviewed the video of the incident but only viewed a part of the video. Because he only viewed a part of the video he incorrectly concluded that the charges against Inmate F were not appropriate and may not be upheld on appeal. He wanted to question the nurses to confirm what happened.

Lieutenant B and Grievant approached Nurse T and Nurse P regarding the charge against Inmate F. Because Lieutenant B was Grievant's supervisor, Lieutenant B took the lead. Lieutenant B asked Nurse T to repeat what happened. Lieutenant B continued to ask Nurse T if she was sure she felt intimidated by Inmate F because he watched the tape and Inmate F was down stairs and she was upstairs. Nurse T said she felt intimidated. Grievant asked Nurse T if she was sure she wanted to go through

with submitting the charge. Lieutenant B asked Nurse T if she would allow him to talk to Inmate F instead of filing the charge and if he did anything like that again, Inmate F would be locked up. Lieutenant B said “[Inmate F] is going to put up a fight.” Nurse P asked Lieutenant B if she also needed to write a statement and Lieutenant B said she did not have to make a statement.

Grievant left the Facility at approximately 9:40 p.m. Lieutenant B left the Facility at approximately 10:15 p.m.

## CONCLUSIONS OF POLICY

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.”<sup>5</sup> 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.”<sup>6</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>7</sup>

### Creating the Appearance of a Hostile Work Environment

DHRM Policy 2.30, *Workplace Harassment*, defines a hostile work environment as, “[a] form of sexual harassment when a victim is subject to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.”

The Agency contends Grievant created the appearance of a hostile work environment because:

On July 19, 2006 you failed to follow established written policy because you entered the pod and allowed [Inmate F] to remain in the pod and get in the nurses face. According to you, you did not intervene because you felt the nurse and inmate were flirting with each other because it happens all the time.

You claim you instructed [Inmate F] to stay away from the control booth, but then stood there and allowed him to go back to the control booth.

You were the first line supervisor for that building but claim you had no knowledge of [Inmate F's] behavior in the building.

---

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

As a result of this action, [Inmate F] was allowed to approach the Nurse in a threatening and intimidating manner. In addition, instead of [Inmate F] returning to his cell, he was allowed to stay in the pod, approach the nurses a second time and then continue to hang in the pod for a couple of hours. Your poor judgement created a hostile work environment for the nurses.

To the extent a hostile work environment was created, it was created by Inmate F. Grievant was not responsible for the behavior of Inmate F with respect to Inmate F creating a hostile work environment. Grievant was responsible for supervising Inmate F so that Inmate F would not be in a position to bother the nurses. Grievant did not participate in Inmate F's actions or condone them, Grievant did not remain vigilant so that he would know what Inmate F was doing. Grievant's failure to supervise was not an intentional action that created the appearance of a hostile work environment. The Group III Written Notice issued to Grievant for creating the appearance of a hostile work environment must be reversed.

#### Failure to Follow Established Written Policy

"[F]ailure to ... comply with applicable established written policy" is a Group II offense.<sup>8</sup> Grievant's post order set forth the Agency's expectations regarding his specific work performance while working at that post. Post Order # 73 provided, in part, that Grievant was:

Responsible for observing and supervising inmates on the floor, to maintain security, custody and control of your assigned areas.

Ensure that you only work authorized inmates that are assigned to your area ...

Do not leave your post until you have been properly relieved or authorized to leave.

Remain alert, attentive, and observant at all times.

Responsible for providing direct supervision of all Corrections Officers assigned to your unit.<sup>9</sup>

The Facility's written policy as disseminated by its post orders required Grievant to properly observe and supervise inmates. Grievant did not properly supervise Inmate F because Grievant did not intervene to stop Inmate F's interaction with Nurse T as

---

<sup>8</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

<sup>9</sup> Agency Exhibit 5.

Nurse T was attempting to exit the pod. Grievant had Inmate F perform work duties by distributing food and ice even though Inmate F had not been assigned to Grievant for the purpose of working in the pod. Grievant acted contrary to established written policy thereby justifying the issuance of a Group II Written Notice.

*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...”<sup>10</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because he was distracted from properly supervising Inmate F. Upon a review of the video of the interaction, the Hearing Officer finds that Grievant observed Inmate F’s interaction with Nurse T for a long enough period of time to determine that he should have intervened. Although he was distracted from Inmate F when he was speaking directly to Officer M, this distraction was not sufficient to mitigate his responsibility to properly supervise Inmate F. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for the appearance of creating a hostile work environment for staff is **rescinded**. The Agency’s issuance to Grievant of a Group II Written Notice for failure to follow established written policy is **upheld**.

The Agency is ordered to **reinstate** Grievant to his former position, or if occupied, to an objectively similar position.<sup>11</sup> Grievant is awarded full **back pay**, from which interim earnings (including unemployment compensation) must be deducted. Grievant’s full **benefits** and **seniority** are restored.

---

<sup>10</sup> *Va. Code § 2.2-3005.*

<sup>11</sup> Grievant was represented by counsel and may be entitled to attorney’s fees. Grievant should review the *Rules for Conducting Grievance Hearings* to determine whether such fees are appropriate and, if so, submit the required information to the Hearing Officer within the required time frames.



## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>12</sup>

---

<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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