

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 03/07/08; Decision Issued: 03/08/07; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 8518; Outcome: No relief, agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8518

Hearing Date: March 7, 2007
Decision Issued: March 8, 2007

PROCEDURAL HISTORY

On October 6, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow established written policy. On October 25, 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 January 24, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 7, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate

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. She has been employed by the Agency for approximately 17 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Visitors can meet with inmates in the visiting room at the Facility. Vending machines are located in the visiting room so that visitors can purchase food items for the inmates they are visiting. After visiting hours, inmates are searched for contraband prior to returning to their cells. Corrections officers are expected to collect any food items remaining and throw them away.

On June 3, 2006, Grievant was working in the visiting room. She was walking around conducting a security check when an inmate asked her if she wanted a sandwich and a back of chips. The inmate said he was not going to eat the sandwich and did not want to throw it away. Grievant replied, "yes" and said that she would have it tomorrow.

On June 4, 2006, Grievant was working in the visiting room. Someone visiting an inmate offered to Grievant food. Grievant accepted and ate the food. She knew that she should not have taken the food but she did so anyway.¹

¹ See Agency Exhibit 2, Grievant's Investigative Interview dated June 30, 2006.

Agency investigators began an investigation of fraternization at the Facility. Grievant was interviewed by Special Agent M and during her interviews, Grievant answered the investigator's questions truthfully. She admitted to receiving food from an inmate on June 3, 2006 and from an inmate visitor on June 4, 2006. The Agency considered Grievant's length of service, work performance, and truthfulness when determining the appropriate level of disciplinary action.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

Virginia Department of Corrections Procedure 130.1(V)(B), *Rules of Conduct Governing Employees Relationships with Offenders*, states that,

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. ***

When a security employee takes a gift from an inmate or an inmate visitor, the employee may create the expectation or impression that the employee owes the inmate a favor in return. Receiving a gift from an inmate or visitor may cause a security employee to believe he or she owes a favor to an inmate. In any case, receiving a gift from an inmate creates a distinction between those inmates who have given the security employee a gift and those inmates who have not given the security employee a gift.

An inmate who is in the position of having a security employee owe the inmate a favor or in the position of being able to expose a security employee for improperly given gifts, is an inmate who can create a security problem for the Institution.

By accepting gifts of food from an inmate and a visitor, Grievant placed herself in the position of possibly owing a favor to an inmate. She created the appearance of impropriety thereby acting contrary to Virginia Department of Corrections Procedure

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

130.1(V)(B), *Rules of Conduct Governing Employees Relationships with Offenders*. “[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁵ The Agency has presented sufficient evidence to support its issuance to Grievant 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...”⁶ 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. She argues the offense is too severe for a first time offense. The *Rules* make it clear that the Hearing Officer is not a “Super Personnel Officer” who can impose his own personal preference in disciplinary action. The Agency has presented sufficient evidence to show that its decision to discipline and the level of discipline was authorized by policy. Upon such a showing, the Hearing Officer may not disturb the Agency’s conclusion simply because the Hearing Officer would have issued a different level of discipline had the Hearing Officer been in the shoes of the Agency. 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 II Written Notice of disciplinary action 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:

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁶ *Va. Code § 2.2-3005*.

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.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.