

Issues: Group II Written Notice (failure to follow policy), Suspension, and  
Discrimination; Hearing Date: 06/11/07; Decision Issued: 06/18/07; Agency:  
VSDB; AHO: Lorin A. Costanzo, Esq.; Case No. 8617; Outcome: Agency Upheld  
in Full.

**Commonwealth of Virginia**  
**THE VIRGINIA SCHOOL FOR THE DEAF AND THE BLIND**

**DECISION OF HEARING OFFICER**

In re: Grievance Case No. 8617

Hearing Date: June 11, 2007

Decision Date: June 18, 2007

**PROCEDURAL HISTORY**

On March 2, 2007, Grievant was issued a Group II Written Notice with suspension from 3/5/07 through 3/9/07 for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy for violations of Standards for Interdepartmental Regulation of Children's Residential Facilities and the Policy Handbook for Classified Staff which prohibit any action which is humiliating, degrading or abusive.<sup>1</sup> On March 9, 2007, Grievant timely filed a grievance to challenge the disciplinary action. The grievance proceeded through the resolution steps and when the parties failed to resolve the grievance the agency head qualified the grievance for a hearing.<sup>2</sup> On May 15, 2007, the Department of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On June 11, 2007, a hearing was held at The Virginia School for the Deaf and the Blind ("Agency").

At the start of the grievance hearing on June 11, 2007, Grievant's Representative requested that this matter be continued and the 35 day period for a decision be extended "as Grievant will be represented by an attorney tomorrow". Upon contact with the attorney (by speaker telephone with all parties present and with their consent) it was determined that the attorney had not been retained by Grievant but had an appointment set to meet with Grievant and her mother. It appeared to the hearing officer that:

- a. Qualified interpreters were required to conduct the grievance hearing.
- b. Three interpreters were present for the hearing but could not commit to return if the matter was continued and witnesses were present for the scheduled hearing.
- c. The Agency objected to a continuance.
- d. The motion was first presented by Grievant at the hearing.
- e. Grievant filed the grievance and Grievance procedure requires a hearing and decision within the 35 day period unless extended for just cause.
- f. Grievant had not retained an attorney as of the hearing date but had a meeting scheduled the next day to meet with the attorney.

Upon taking into consideration the above, the motion for a continuance and extension was

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<sup>1</sup> Agency Exhibit 1. Written Notice issued March 2, 2007.

<sup>2</sup> Agency Exhibit 1. Grievance Form A, filed March 9, 2007.

denied. Grievant's Representative further indicated she had two witnesses also she wanted to appear, both minor students at the School. One parent did not want the child to be involved or any contact information released by Agency; the other minor student was available to testify via video camera. Grievant further did not exchange a list of witnesses with Agency nor exchange a copy of any documents to be admitted at hearing. The hearing officer allowed the available student to testify but denied any motion to continue for purposes of requesting an order and/or securing the appearance of the student whose parent did not desire his appearance at hearing.

### **APPEARANCES**

Grievant (also testified as witness)  
Grievant's Representative  
Student (testified via internet two way camera)  
Agency Representative  
Agency Representative (also a witness)  
1<sup>st</sup> Teacher Assistant  
2<sup>nd</sup> Teacher Assistant  
School Superintendent

3 Interpreters

### **ISSUES**

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances.<sup>3</sup> A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.<sup>4</sup>

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant has been employed by The Virginia School for the Deaf and the Blind,

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<sup>3</sup> Section 5.8, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

<sup>4</sup> Section 9, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

("Agency") as a Teacher Assistant ("TA") for over 18 months. Grievant is profoundly deaf and communicates through sign language.<sup>5</sup> She utilizes American Sign Language which is a visual form of communication.

The Policy Handbook for Classified Staff prohibits any action which is humiliating, degrading, harsh, or abusive. On 9/01/06 Grievant acknowledged in writing receipt of the Policy Handbook for Classified Staff.<sup>6</sup>

The Standards for Interdepartmental Regulation of Children's Residential Facilities, effective December 28, 2006, 22 VAC 42-10-800, prohibits any action which is humiliating, degrading, or abusive.<sup>7</sup>

A matter occurred in the Agency's school cafeteria that ultimately gave rise to disciplinary action and this grievance. This incident was brought to the attention of management by a staff member who observed the incident and reported it on the day of the incident. On February 27, 2007, in the school cafeteria, which was occupied by a number of middle school students and staff, an 8<sup>th</sup> grade male student was observed acting up. A TA went over and asked (by signing) why he was so happy and the student, who communicates by signing, indicated it was because he was having his period. This TA went back to the group of school staff, including Grievant, and related this matter. Grievant signed for the group to "watch this". She proceeded to go over to the student, and signed that if the student had his period he needed to prove it by showing her his P-A-D. The student was observed to have a puzzled expression and Grievant demonstrated the word pad through the use of a physical gesture showing how a pad is inserted into underwear.<sup>8</sup>

In a meeting of March 15, 2007, Grievant acknowledged her behavior was inappropriate but maintained she did not demonstrate inserting a pad into underwear but instead made the gesture for wearing a diaper.<sup>9</sup>

In Grievant's statement of March 3, 2007, Grievant indicated that she believed the student who made the comment of being on his period was actually referring to her. She stated in writing that the student started the conversation and, as a joke, she made a comment back to him.<sup>10</sup> At hearing Grievant testified she could not remember what the comment was that she made back to the student.

## CONCLUSIONS OF LAW AND POLICY

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring,

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<sup>5</sup> Agency Exhibit 1. Grievant's letter of 3/3/07.

<sup>6</sup> Agency Exhibit 2

<sup>7</sup> Agency Exhibit 3.

<sup>8</sup> Agency Exhibit 1. Employee Grievance Procedure – Second Resolution Step Response of 3/21/07; testimony.

<sup>9</sup> Agency Exhibit 1. Employee Grievance Procedure – Second Resolution Step Response of 3/21/07; testimony.

<sup>10</sup> Agency Exhibit 1. Letter of 3/3/07; testimony.

promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code of Virginia, Section 2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

"It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints .... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Section 2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective 9/16/93*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action. Unacceptable behavior is divided into three groups according to the severity of the behavior. Group II offenses include acts and behaviors which are more severe in nature and are such that an additional Group II offense should normally warrant removal. The normal disciplinary action for a Group II offense is issuance of a Written Notice only, or a Written Notice and up to ten workdays of suspension without pay. "Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is indicated as a Group II offense within the Standards of Conduct.<sup>11</sup>

The offenses set forth in Standards of Conduct Section V. "UNACCEPTABLE STANDARDS OF CONDUCT (OFFENSES)" are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of Section V.<sup>12</sup>

The Standards for Interdepartmental Regulation of Children's Residential Facilities prohibits "Any action which is humiliating, degrading, or abusive" (22 VAC 42-10-800). Interpretation of Section 800.5 further provides:

"This standard may apply in many different circumstances that are humiliating, degrading or abusive. The definition of humiliating, degrading, and abusive found in Webster's Dictionary, the

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<sup>11</sup> Exhibit B. Department of Human Resources Management Policies and Procedures Manual, Policy No. 1.60, effective date 9/16/93 - Standards of Conduct.

<sup>12</sup> Exhibit B. Section (V)(A), Department of Human Resources Management Policies and Procedures Manual, Policy No. 1.60, effective date 9/16/93. – Standards of Conduct.

use of professional judgment, and consideration for the individual circumstances will apply. Regulators will not use the same definition of abuse or neglect as used by child protective services.”<sup>13</sup>

On 12/8/05 Grievant indicated by her signature to her Orientation Checklist that the Standards of Conduct and Agency’s Manual of Policies and Procedures have been explained to her.<sup>14</sup>

On February 27, 2007, during middle school lunch period in the school cafeteria a TA observes a male middle student who was acting up. She asked the student why he was in such a happy mood. The student replied he got his period. The TA walked away from the student and told a group of staff in the cafeteria what the student said. This student, the TA, and the Grievant all communicated by signing. Grievant heard what the TA said, signed “watch this”, walked over to the student, and began discussing the student having a period and other matters. At one point Grievant then laughed and turned to look back to a TA who put an index finger over her mouth by way of trying to communicate to Grievant her concern that Grievant needed to stop.

The incident was reported that same day by a TA who observed it. The Agency investigation interviewed two staff member (including the TA who made the report) and one student who were eyewitnesses and who concurred in their observations. All three stated to the Agency during the investigation and both staff members testified at hearing that Grievant discussed with the male student his having a period, asked him to prove it by showing her his pad, and when the student looked puzzled Grievant further demonstrated through use of gesture how a pad is inserted into underwear. An additional witness, the student who was a party to the discussion, indicated to the Agency and at hearing that he discussed a diaper and not a pad. He also testified Grievant said to him “well you’re a girl” and “That’s funny you have a period”. The parent of the minor student who concurred with the two staff observers did not want the student to testify at hearing and the child did not testify.

During the Agency’s investigation Grievant admitted her behavior was not appropriate. When asked why she did it Grievant indicated she didn’t know why but wanted to tease the student because others tease students.<sup>15</sup> Grievant contends that the matter was not humiliating, degrading or abusive, the student in question did not complain, and the conversation was private.

Grievant’s actions start with telling other staff in the cafeteria to “watch this” and going over to the student. While she contends she did not start the conversation she went over to the student and brought to him a discussion involving his having a period and his proving it. Two staff members observed her discussing a pad and its placement.<sup>16</sup> The conversation (via American Sign Language) was visual and in a public place. The school cafeteria was occupied by other staff and approximately 30 students, many of whom converse in American Sign Language.

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<sup>13</sup> Agency Exhibit 3. Standards for Interdepartmental Regulation of Children’s Residential Facilities, effective December 28, 2006.

<sup>14</sup> Agency Exhibit 5C1.

<sup>15</sup> Agency Exhibit 5B. Page 8 of 9.

<sup>16</sup> Agency Exhibit 4A and 4B; testimony.

The conversation was or could have been observed by other staff and students, both male and female. This was not a private conversation nor was it expected to be when Grievant told others to “watch this” and proceeded to confront a male student about being a girl and his having a period. Witnesses observed Grievant discussing a pad. Testimony and Agency written reports indicated gestures being made of a pad’s placement and the student being asked to prove matters concerning his having a period. Grievant’s discussion was conducted in a public setting. After asking others to watch she brought to the male student a discussion of his being a girl and having a period in this public setting.

The Agency and its staff have a duty to the children in its charge. Grievant was present in the cafeteria as an employee of the Agency and was charged with performing duties as such and following policy. The effect of the conversation and the possible effect of the conversation on both the student involved and on students who could have observed the public conversation are relevant. During the March 15, 2007, meeting Grievant acknowledged the behavior was inappropriate but contended she made a gesture for wearing a diaper and not pad. It is not contested that Grievant walked over to the student, began talking with the student, and that this discussion generated a conversation with a male student about him having a period. This discussion was held with the minor in a busy school cafeteria with other students and staff present who could observe and understand the signing. Before walking over to the student Grievant told others “watch this”, and was observed laughing during the conversation.

Student testified Grievant came over to him and talked to him about his being a girl and having a period. The two staff witnesses who observed the incident and the other student who gave information to Agency investigation reported the conversation was about a period and a pad. Two staff members testified they observed the discussion in the cafeteria and it involved discussion of a pad and Grievant demonstrated the pad’s placement. Testimony was also introduced that the student was told, in relation to discussion of him having a period, to prove it. In an interview Grievant said she wanted to tease the child. She also said she made a statement to Student and this was a joke. However, she was not able to remember, at hearing, what the statement/joke was she made to the student.

Grievant contends that any conversation she may have had with the student was private and not subject to onlooker interpreting. She further contends her civil rights were violated as she cannot have a private conversation because of comments as she has no hearing and uses her hands to speak.<sup>17</sup> American Sign Language, by its very nature is visual. Any conversation in the cafeteria using American Sign Language was open to observation by other students and staff and as such there is no reasonable expectation of privacy. A number of staff and students who communicate by signing were in the cafeteria when the incident occurred. Staff observed the signing and at least two students observed the signing. A private conversation could have been accomplished by the parties to the conversation going off to a room without others present or by signing in such a manner as not to be seen by others. Grievant did neither and in fact told other staff to “watch this” before leaving to converse with the student. There was no reasonable expectation of privacy. The conversation was public.

Grievant wanted others to see her conversation with the child and wanted to tease the

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<sup>17</sup> Agency Exhibit 1. Letter of Grievant dated March 3, 2007.

child about his having a period and being a girl. She chose to do this in public in the cafeteria where any number of people, both staff and students, both male and female, could observe the conversation. Viewing the totality of the situation the actions of Grievant were a violation of policy and prohibited under the Standards for Interdepartmental Regulation of Children's Residential Facilities and the Policy Handbook for Classified Staff which prohibit actions which are humiliating, degrading, or abusive.

Grievant contends she was being discriminated against from the hearing staff because she is profoundly deaf. She indicated three individuals who were discriminating but two of these three were deaf. She then indicated she felt discriminated because they had written statements against her. Insufficient evidence was presented to support her contentions. Also Grievant contends she was discriminated against by holding her to a different standard than other employees with regards to having students come to her home.<sup>18</sup> Grievant and management met on February 13, 2007 concerning Agency policy regarding taking students to Grievant's home. Grievant was informed, per policy, that students are permitted to visit staff homes with written parental permission but all off-campus trips, including student visitations to homes of staff, require supervisor's approval. Grievant was told that her supervisor will not approve taking students to Grievant's home. Grievant had parental permission to take a male student home but Agency expressed concern over Grievant's taking a male day student home so he could participate in an evening activity at the school. Grievant lives alone in an apartment and concern was expressed over potential problems having a male student visit could lead to. This concern and the imposed restriction on student visits to her home arose after incidents were brought to Agency attention of a student giving Grievant a massage, her stroking a student's hair, her making statements about students touching her, and students coming into Grievant's apartment. These matters had been previously raised by the Agency with Grievant and were a concern in their decision not to grant supervisor's approval.<sup>19</sup> Unique circumstances were considered and the Agency's action was consistent with policy. The evidence does not indicate an inconsistent application of policy with how other similarly situated employees may have been treated. Grievant's contention of discrimination or that she was held to a different standard is not supported by the evidence.

The *Standards of Conduct* provides that while disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b. an employee's long service or otherwise satisfactory work performance.<sup>20</sup>

The Agency gave consideration to mitigating and aggravating circumstances. There were no active prior group offenses. However, there were a number of prior incidents/counseling sessions during Grievant's approximately 18 months of employment with Agency. There were at least

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<sup>18</sup> Agency Exhibit 1.

<sup>19</sup> Agency Exhibit 5, pages 6, & 7 of 9.

<sup>20</sup> Agency Exhibit B. DHRM Policy No. 1.60, effective 9/16/93, Section (VII)(C)(1).



four incidents/counseling sessions in the 2005-2006 school year and approximately six in the 2006-2007 school year prior to 2/27/07.<sup>21</sup> Grievant raised the matter of a specific determination concerning one incident and presented for admission Exhibit A. As to this one incident (not part of the above count) it was determined at the second resolution step determination that “I am directing that no adverse information regarding this incident be filed in your official file?”<sup>22</sup> The Agency took into consideration the prior incidents/counseling sessions, the fact that a number of these involved inappropriate conduct with students, and their strong concerns over the duties and responsibilities owed to the Agency’s students.

The normal disciplinary action for a Group II offense is issuance of a Written Notice only or a Written Notice and up to ten workdays of suspension without pay. Grievant was given 5 workdays of suspension with the issuance of the Group II Written Notice. Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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.

Upon reviewing the facts de novo (afresh and independently, as if no determinations had yet been made) it is determined that (i) Grievant engaged in the behavior described in the Written Notice; (ii) The behavior constituted misconduct; (iii) the Agency's discipline was consistent with law and policy. Furthermore the Agency’s discipline did not exceed the limits of reasonableness. The Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group II Written Notice with 5 day suspension was warranted and appropriate under the circumstances.

## **DECISION**

For the reasons stated herein, the Agency’s issuance of a Group II Written Notice of with disciplinary action taken in addition to issuing written notice of suspension from 3/5/2007 through 3/9/2007 and return to work 3/12/2007-6:15 AM. is **UPHELD**.

## **APPEAL RIGHTS**

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing

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<sup>21</sup> Agency Exhibit 5A; Agency Exhibit 5B page 6 & 7 of 9.

<sup>22</sup> Exhibit A. Employee Grievance Procedure, Grievance Form A. dated 12/12/06.

officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

**2. A challenge that the hearing decision is inconsistent with state policy or Agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management  
101 N. 14th Street, 12th Floor  
Richmond, Virginia 23219

**3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution  
830 East Main St., Suite 400  
Richmond, VA 23219.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Lorin A. Costanzo, Hearing Officer