

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice with suspension (failure to follow policy), Group I Written Notice (unsatisfactory performance), Group II Written Notice (failure to follow instructions); Hearing Date: 10/31/07; Decision Issued: 11/20/07; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8723; Outcome: Partial Relief; **Administrative Review: HO**
Reconsideration Request received 12/04/07; Reconsideration Decision issued 12/10/07; Outcome: Original decision affirmed; Administrative Review: EDR
Ruling Request received 12/05/07; Outcome pending



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8723

Hearing Date: October 31, 2007
Decision Issued: November 20, 2007

PROCEDURAL HISTORY

Grievant received four Written Notices all issued on July 20, 2007. He received a Group II Written Notice for failure to properly serve a disciplinary charge to a resident. He received a Group II Written Notice with suspension for failing to write an incident report, call for assistance, or report the incident in a timely manner. He received a Group I Written Notice for unprofessional and disruptive behavior. And Grievant received a Group II Written Notice for failure to follow a supervisor's instructions. Based on the accumulation of disciplinary action, Grievant was demoted with a ten percent salary reduction.

On August 8, 2007, 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 October 4, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 31, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel

Agency Party Designee
Agency Advocate
Witnesses

ISSUES

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 Juvenile Justice employed Grievant as a Corrections Sergeant at one of its Facilities until his demotion to a Security Officer III with a 10% disciplinary pay reduction effective July 20, 2007. Grievant began working for the Agency approximately 8 years ago. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On the morning of May 1, 2007, a Resident at the Facility exposed himself to a Nurse. The Nurse drafted a disciplinary charge¹ against the Resident. When Grievant began working at approximately 6:30 p.m. that evening, he was given responsibility to serve the disciplinary charge on the Resident. Grievant took the charge to the

¹ A disciplinary charge is also known as a Discipline Report.

Resident's building. Grievant and Officer D entered the Resident's room to serve the charge. Grievant read the disciplinary report to the Resident and then asked him how he pled. The Resident pleaded not guilty. Grievant then gave the Resident a pen and asked the Resident to sign and initial the disciplinary report. Grievant placed the disciplinary report on the Resident's bunk. The Resident acted as though he was reading the disciplinary report. The Resident picked up the disciplinary report and ripped it up. Grievant left the Resident's room.

Grievant informed the Lieutenant that the Resident had ripped up the disciplinary charge. Grievant asked the Nurse to rewrite the charge. She did so. Grievant drafted a disciplinary charge against the Resident for ripping up the original disciplinary charge drafted by the Nurse. Because Grievant drafted a charge against the Resident, he could not serve that charge on the Resident.

Sergeant F became responsible for serving the re-drafted Nurse's charge and the disciplinary charge Grievant drafted. Grievant accompanied Sergeant F and they walked to the Resident's room. As Sergeant F was about to begin reading the charge to the Resident, Grievant noticed the Resident had food items Grievant considered to be contraband. Grievant's practice had been to remove contraband immediately from a resident when he observed it in the resident's possession. Grievant took some of the food items and threw them outside of the room. Grievant grabbed a tray containing food and was about to move it outside of the room. The Resident grabbed the tray and tried to stop Grievant. Sergeant F told Grievant that the tray was not contraband and that the Resident could keep the tray. Grievant released the tray. Grievant observed a small container of syrup and grabbed it. The Resident grabbed the syrup at the same time and the syrup squeezed out of the container. Some of the syrup got on Grievant's hands so Grievant wiped his hands on the Resident's sheet. The Resident threw it at Grievant and lunged towards Grievant. Grievant and the Resident scuffled until Sergeant F got between Grievant and the Resident and ended the conflict. As a result of the scuffle, a button on Grievant's shirt had been torn off. Grievant and Sergeant F left the Resident's room without serving the two charges. Grievant left without realizing that a few written notes in his pocket had fallen during the scuffle.

At approximately 8 p.m., Grievant and Sergeant F met with the Lieutenant and told him of the altercation with the Resident. The Lieutenant asked them why they did not call for assistance on the radio. They responded that the matter had been resolved before it was necessary to call for assistance.

The Lieutenant and Sergeant F walked to the Resident's room and spoke with the Resident. The Resident complained that Grievant should not have been sent with Sergeant F to serve the two charges because earlier that morning Grievant had assaulted the Resident.² The Lieutenant told Grievant of the Resident's allegation that Grievant had assaulted him earlier in the morning. This was the first time Grievant

² No evidence was presented to substantiate the Resident's assertion that Grievant had assaulted him earlier that morning.

learned of the Resident's allegation against Grievant. The Lieutenant told Grievant not to go to the Resident's building that evening.

The Lieutenant returned to the Resident's room to serve a charge on the Resident. The Lieutenant instructed the Resident turnover his mattresses. The Lieutenant looked for Grievant's papers but could not find them. The Lieutenant left the Resident's room.

On May 2, 2007 at approximately 6:40 a.m. Grievant learned from another juvenile correctional officer that the Resident had Grievant's notes. Grievant reported this information to the Lieutenant. The Lieutenant told Grievant to locate three officers and have them search the Resident's room. The Lieutenant told Grievant not to go into the Resident's building during the search.³ Sergeant H overheard the Lieutenant's instruction that Grievant was not to enter the Resident's building.

Grievant selected the three officers and they went to the Resident's room. Grievant entered the Resident's room and participated in the search. They were unable to locate Grievant's missing notes.

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

Group II Written Notice for Failure to Properly Serve a Disciplinary Charge.

The Agency issued Grievant a Group II Written Notice alleging that on, "5/1/07 you failed to properly serve a disciplinary charge to a resident as defined by establish policy and procedure." The Agency presented Institutional Operating Procedure 108, *Ward Discipline Procedure*. Section 108-4.8 is entitled "Charging a Ward" and states:

1. If the determination was made to charge the Ward, the Sergeant shall complete and read the charge section of the [Discipline Report] to the ward.

³ Although Sergeant H was not Grievant's supervisor, he advised Grievant not to go to the building where the Resident's room was located.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

- The ward shall be charged and given a copy of the [Disciplined Report] within 24 hours of the alleged incident.
2. Upon the notice of the charge, the Sergeant shall determine if the ward will be placed in pre-hearing detention or shall have privileges suspended until a finding is rendered at the hearing. Any time served shall be credited in the disposition of the offense.
 3. The Shift Commander or designee shall advise the ward that he/she may plead guilty and waive the right to a hearing and any further review by admitting the rule violation. The Shift Commander/Designee will determine the sanctions to be given and advise the ward what the sanctions will be if he/she so pleads.
 - If the ward admits his guilt and waives the right to a hearing, he/she shall sign the form admitting his/her guilt and waive the right to a hearing, acknowledging acceptance of the sanctions.
 - If the ward does not waive the right to a hearing, the [Discipline Report] shall be forwarded to the Hearing Officer to schedule a hearing.
 - If the ward pleads guilty and waives the right to a hearing, he forfeits the right to appeal.⁵

The Agency has not presented sufficient evidence to show that Grievant failed to properly serve the Nurse's original charge on the Resident.⁶ The Group II Written Notice must be reversed.

A second policy governed Grievant's interaction with the Resident when the resident ripped up the Nurse's original charge. For example, Institutional Operating Procedure 100-4.1 provides that:

Staff who observe or become aware of an incident that occurs at [Facility] shall immediately notify the Sergeant for that particular area of the facility and complete an Institutional Incident Report (Attachment 1).

1. The Institutional Incident Report (IIR) shall be completed on a shift during which the incident occurred or was reported.

⁵ Hearing Officer Exhibit 1. The Agency presented IOP 108 for a period effective after the date of the offense. The Hearing Officer obtained from the Agency IOP 108 which was in effect on the day of the offense.

⁶ IOP 108-4.6 requires staff who observe an offense by a ward to complete a Discipline Report (not to be confused with an Institutional Incident Report required under IOP 100.) Grievant drafted a Discipline Report describing the Resident ripping up the Nurse's original charge.

2. Incident Reports shall be completed in black ink, legibly and be specific regarding descriptions of incidents (who, what, when, where, how).
3. Incident Reports shall be submitted to the Sergeant prior to the reporting staff departing the facility for the day.

Grievant observed the Resident ripping up a disciplinary charge drafted by the Nurse. The Resident committed an offense by destroying the Nurse's charge.⁷ Grievant was obligated by the Agency's policy to draft an incident report. He did not do so thereby acting contrary to Agency policy. Grievant's failure to comply with Institutional Operating Procedure 100-4.1 is irrelevant because the Agency did not issue Grievant a Written Notice for failure to comply with this policy. The Written Notice clearly refers to a failure to properly serve a disciplinary charge and not for failure to write an Institutional Incident Report.

Group II Written Notice for Failure to Write an Incident Report and Call for Assistance.

"Failure to ... comply with established written policy" is a Group II offense. The Agency contends Grievant failed to write an incident report regarding his scuffle with the Resident which resulted in a button on his shirt being ripped off. This allegation is unsupported by the evidence. Agency Exhibit 4 shows the incident report Grievant wrote at 7:36 p.m. on May 1, 2007 shortly after the conflict with the Resident.⁸ The Agency contends Grievant failed to call for assistance during the scuffle with the Resident. This allegation is unsupported by the evidence. There was no need for Grievant to call for assistance. Sergeant F provided the necessary assistance to separate Grievant and the Resident and the matter was resolved without the need for additional assistance. The Agency contends Grievant failed to timely report the incident. This argument is unsupported by the evidence. Within an hour of the scuffle, Grievant and Sergeant F informed the Lieutenant of what had happened.⁹ Accordingly, the Group II Written Notice with suspension must be reversed.

Group I Written Notice for Unprofessional and Disruptive Behavior

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work 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 accompanied Sergeant F with the Lieutenant's authorization in order to observe Sergeant F serving the charge against the Resident. By grabbing contraband, Grievant interrupted the serving of the charge and ultimately prevented it from being

⁷ Neither party disputes that the Resident committed an offense by ripping up the charge.

⁸ Grievant wrote in the report, "he grab[ed] my shirt and started to rip the buttons off it."

⁹ The Lieutenant's signature appears on Grievant's Institutional Incident Report.

served at that time. Grievant could have waited until the charge was served and then taken the contraband. Grievant's work performance was unsatisfactory thereby justifying the issuance of a Group I Written Notice.

Group II Written Notice for Failure to Follow a Supervisor's instructions.

"Failure to follow a supervisor's instructions" is a Group II offense. On May 2, 2007, Grievant's supervisor, the Lieutenant, instructed Grievant not to enter the Resident's building. During the search of the Resident's room, Grievant entered the Resident's building and room thereby acting contrary to the Lieutenant's instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Accumulation of Disciplinary Action

Accumulation of a second active Group II Written Notice "normally should result in discharge." Upon the conclusion of this grievance hearing, Grievant does not have two Group II Written Notices and, thus, there is no basis to demote him or reduce his salary.

Mitigation

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..."¹⁰ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary actions that have not been reversed.

Procedural Due Process

Grievant argued that the Agency failed to produce and failed to consider all of the necessary documents and arguments as part of the step process. The Hearing Officer finds this argument to be moot. Grievant had the opportunity to obtain documents as

¹⁰ Va. Code § 2.2-3005.

part of the Hearing Process and present those documents and any related arguments to the Hearing Officer during the hearing.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice for failure to properly serve a disciplinary charge is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension for failure to write an incident report and call for assistance is **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue. The Agency's issuance to the Grievant of a Group I Written notice of disciplinary action for unprofessional and disruptive behavior is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice for failure to follow a supervisor's instructions is **upheld**.

Grievant's demotion and salary reduction is **rescinded**. The Agency is ordered to **reinstate** Grievant to his former position, or if occupied, to an objectively similar position. Grievant is awarded full **back pay** with respect to the disciplinary pay reduction. Grievant's full **benefits** and **seniority** are restored.

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.¹¹

[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

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8723-R

Reconsideration Decision Issued: December 10, 2007

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

The Agency issued Grievant four written notices that were heard together by the Hearing Officer on October 31, 2007. The Hearing Officer reversed the first two written notices and upheld the remaining two notices.

The first written notice was a Group II Written Notice for:

On 5/1/07 you failed to properly serve a disciplinary charge to a resident as defined by established policy and procedure.

The Agency’s evidence and argument showed that this written notice related to the facts that occurred at approximately 7 a.m. on May 1, 2007.¹² At approximately 7 a.m., Grievant attempted to serve on the Resident a disciplinary charge written by the Nurse. The Resident tore up the disciplinary charge. In response to the Resident’s act of tearing up the Nurse’s charge, Grievant wrote a Disciplinary Report with the objective of disciplining the Resident. In addition, Grievant was obligated to write an Institutional Incident Report regarding the Resident’s behavior, but Grievant failed to do so. If the Agency has correctly drafted the Written Notice to allege that Grievant failed to write an Institutional Incident Report as required by policy, the Agency’s discipline could have

¹² The original hearing decision incorrectly describes those events as occurring at 6:30 p.m. on May 1, 2007. The correct time would have been earlier that morning.

been sustained.¹³ Instead, the Agency drafted a Written Notice alleging Grievant failed to properly serve the Nurse's charge on the Resident. No credible evidence was presented to show that Grievant failed to properly serve the Nurse's charge on the Resident. Thus, the first Group II Written Notice was reversed.

The second written notice was a Group II Written Notice with suspension for:

On 5/1/07 an incident took place which involved you and a resident, the situation became disruptive and required assistance. You failed to write an incident report, call for assistance or report the incident in a timely manner as required by established policy and procedure.

The facts giving rise to this written notice occurred sometime between 6:30 p.m. and 8 p.m. on May 1, 2007. The Agency's evidence and argument showed that this incident occurred when Grievant and the Resident scuffled with the result being that Grievant's shirt was torn and a button was missing. The Agency's exhibits showed that Grievant drafted an Institutional Incident Report regarding the scuffle. The scuffle was resolved quickly and it was not necessary for Grievant to have called for assistance from other security staff. Thus, the second Group II Written Notice was reversed.

Upon reconsideration, the Agency argues that the Written Notice with suspension alleging Grievant failed to write an incident report related to the events in the morning of May 1, 2007 (when the Resident tore up the Nurse's charge) and not to the events in the evening of May 1, 2007 (when the scuffle between Grievant and the Resident occurred). This clearly was not the argument and evidence presented to the Hearing Officer at the hearing. Nothing in the Written Notice with suspension suggests it related to both the events of the morning and the events of the evening of May 1, 2007. The Written Notice with suspension alleges Grievant failed to "call for assistance". The need to call for assistance could only have occurred in the evening of May 1, 2007. During the morning of May 1, 2007, Grievant presented the charge to the Resident but did not engage in any conflict with the Resident that would have resulted in Grievant needing to call for assistance.¹⁴ In the evening of May 1, 2007, Grievant scuffled with the Resident and the Lieutenant later asked why Grievant did not call for assistance. The Agency's argument at the hearing was that Grievant should have called for assistance because there was a scuffle. The Written Notice with suspension clearly relates to the events of the evening of May 1, 2007 and not to the events of that morning.

¹³ The Agency's allegation that Grievant failed to properly serve the written notice was not a "lesser included charge" of an allegation that Grievant failed to write an institutional incident report. These reports were governed by separate policy considerations and are materially different obligations. Grievant's failure to write an institutional incident report cannot be deemed to have been a failure to serve a disciplinary report.

¹⁴ Although the Resident told other staff that Grievant had assaulted him that morning, there is no credible evidence to believe the Resident's assertion was true. Grievant did not learn of the Resident's allegation against him until later in the evening of May 1, 2007 when he was informed of the allegation by the Lieutenant.

Agencies are in control of how written notices are drafted. To the extent a written notice is ambiguous, that ambiguity must be construed against the agency writing the notice. In this case, the Agency did not clearly identify that the Written Notice with suspension related in part to the events of 7 a.m. on May 1, 2007 and also the events between 6:30 p.m. and 8 p.m. on May 1, 2007. The Agency's argument is not supported by the evidence and the hearing decision cannot be revised. The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied**.

APPEAL RIGHTS

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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer