

Issues: Group II Written Notice (failure to follow policy), Suspension, and Separation from State; Hearing Date: 04/03/08; Decision Issued: 04/04/08; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 8809; Outcome: Partial Relief;
Administrative Review: DHRM Ruling Request received 04/28/08; DHRM Ruling issued 06/12/08; Outcome: Request Untimely.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8809

Hearing Date: April 3, 2008
Decision Issued: April 4, 2008

PROCEDURAL HISTORY

On December 7, 2007, Grievant was issued a Group II Written Notice of disciplinary action with a 10 workday suspension for giving materials to an inmate without permission. The Agency removed Grievant from employment because the Warden of a Correctional Facility barred Grievant from entering that Facility.

On December 18, 2007, 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 he requested a hearing. On February 21, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 3, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

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 Correctional Education employed Grievant is a Lead Teacher at one of its schools located within the Department of Corrections. The purpose of this position was to:

provide effective Career and Technical Education instruction regarding Computer Literacy and in the theory of the Small Engine Repair trade areas; to assist assigned students to complete the required competencies to acquire a basic understanding of computer literacy and the theory for that trade area; demonstrate effective classroom or lab management; ensure that the lab is operated in compliance with all aspects of safety management; and to maintain accurate and current student records for a science student.¹

He had been employed by the Agency for approximately 28 years until his removal. He received an overall rating of "Strong Contributor" in his most recent evaluation.² No

¹ Grievant Exhibit 4A.

² Grievant Exhibit 4A.

evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Inmate worked as a tutor for Grievant. The Inmate wished to obtain an instructional book entitled "Comic Book Studio" which consisted of a 72 page instruction book, sketching paper, pencil, sharpener, colored pencils, ink pen, triangle, blank comic book, and portfolio.³ The Inmate presented Grievant with a form entitled "Personal Property Request Form". The instructions to the inmate for this form stated:

Regulated items purchased from the commissary and all items purchased from the approved mail order vendor must have prior approval from the Personal Property Supervisor/Officer and must be added to your personal property inventory. Submit this completed form along with any order blanks, a cash withdrawal form and he self-addressed stamped envelope to the Personal Property Supervisors/Officer. All mail-order purchases must be prepaid from your trust fund account.

The Inmate wrote down the description of the items that he wished to purchase and their cost. One of those items was the Comic Book Studio for a cost of six dollars. He indicated that he would purchase the item from the Department of Correctional Education located at the Facility.

The form had check blocks indicating approval or disapproval of the request and a space for the date and signature of the Chief of Security. The Chief of Security did not sign or approve the Inmate's Personal Property Request Form.

The form had a section entitled "Date Issued to Inmate". Grievant wrote in the date "2/5/07" and initialed the form. Grievant gave the Inmate the Comic Book Studio. Although the Inmate was not enrolled in a comic book drafting course or art course, Grievant gave him the book because the book was educational in nature.

As part of an Agency investigation, the Comic Book Studio was discovered among the Inmate's personal property. The Agency became concerned because the plastic triangle inside the book could be converted by an inmate into a weapon. The Agency completed its investigation. The DOC was also conducting an investigation of Grievant.

On November 20, 2007, the Warden sent the Director of Legal and Internal Affairs stating:

³ The book was already inside and owned by the Agency. No evidence was presented suggesting the book was the personal property of Grievant or that Grievant brought the book into the Facility in order to give it to the Inmate.

[The Facility] requested an investigation of DCE employee [Grievant] in September 2007. While the investigation was being conducted by your office, [Grievant] was barred from [the Facility].

As a result of the findings of your investigation, [Grievant] is permanently barred from [the Facility].⁴

On December 14, 2007, the Warden sent the Director of Legal and Internal Affairs a letter stating:

[The Facility] conducted an investigation involving DCE employee [Grievant]. [Grievant] was barred from [the Facility] effective September 2007, pending the outcome of the investigation by the Office of Internal Affairs. The investigation is complete.

[Grievant] was found guilty of wrong doing. This is in addition to your investigation which found [Grievant] violated DOC's security requirements.

As a result of the findings of **both** investigations, [Grievant] is permanently barred from [the Facility].⁵ (Emphasis added).

On December 21, 2007, the Director of Human Resources sent Grievant a letter stating:

I am writing to inform you that effective December 21, 2007, you are being terminated from employment with the Virginia Department of Correctional Education. You are being terminated upon the provisions of Policy 1.60, Standards of Conduct, Inability to meet working conditions of employment.⁶

Grievant requested that the Agency contact the Warden and ask the Warden to reconsider his decision regarding Grievant. On January 10, 2008, the Assistant Superintendent wrote the Warden a letter stating, "I ... ask you to reconsider [Grievant] being barred from [the Facility]."⁷ The Warden responded:

The decision to refuse [Grievant] entrance to [the Facility] was made as a result of the findings from investigations from the offices of internal affairs of DOC and DCE. [Grievant's] actions violated policy and jeopardized the

⁴ Agency Exhibit 5.

⁵ Agency Exhibit 6.

⁶ Agency Exhibit 7.

⁷ Agency Exhibit 5.

safety of staff and inmates. Therefore, my decision banning him from this facility stands.

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.”⁸ 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.”

The Agency contends Grievant acted contrary to *Va. Code § 18.2-474* which provides:

No person shall willfully in any manner deliver, or attempt to deliver, to any prisoner confined under authority of the Commonwealth of Virginia, or of any political subdivision thereof, any article of any nature whatsoever, without first securing the permission of the person in whose charge such prisoner is, and who may in his discretion grant or refuse permission. Any person violating this section shall be guilty of a Class 1 misdemeanor.

Grievant did not act contrary to this section of the *Code of Virginia*. He did not display the criminal intent necessary to conclude he engaged in a criminal act. He did not “deliver” the Comic Book Studio to the Inmate. Grievant permitted the Inmate to remove the Comic Book Studio in what Grievant considered to be the ordinary course of business.

The Agency contends Grievant failed to comply with DOC Operating Procedure 802.1, Offender Property. This policy cannot be enforced against Grievant. Grievant is alleged to have violated a DOC policy, not a DCE policy.⁹ He did not receive training on the application of DOC Operating Procedure 802.1. He did not have direct knowledge of how the Agency or DOC interpreted that policy. The Agency contends Grievant violated section VI(A)(2) of the policy which states, “[p]rior written approval from the Facility Unit Head or designee is required for all mail order purchases.” This section does not apply to Grievant. The Comic Book Studio was not a mail order purchase. Section VI(C)(1) addresses the Personal Property Request Form. This section states:

⁸ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁹ Under the Memorandum of Agreement between DOC and DCE, DCE employees are obligated to comply with the applicable provisions of the DOC Institutional Security Operations and relevant Facility Operating Procedures.

An offender must submit a Personal Property Request Form (see Attachment #4) to obtain approval of the Facility Unit Head or designee, prior to ordering or subscribing to any item by mail, or to purchasing regulated items from the facility commissary.

This section shows that the use of the Personal Property Request Form is intended to govern items received by mail or items purchased from the Facility commissary. The Comic Book Studio was already located within the Facility. The Inmate did not receive the book by mail order or through the Facility commissary. Within the context of DOC Operating Procedure 802.1, the Personal Property Request Form did not apply to the transfer of the Comic Book Studio to the Inmate. This conclusion is consistent with the instructions found on the Personal Property Request Form which state:

Regulated items **purchased from the commissary** and all items **purchased from the approved mail order vendor** must have prior approval from the Personal Property Supervisor/Officer and must be added to your personal property inventory. (Emphasis added).

In short, Grievant did not act contrary to DOC Operating Procedure 802.1. There is no basis to take disciplinary action against Grievant.

DHRM Policy 1.60 provides:

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include:

1. loss of driver's license that is required for performance of the job;
2. incarceration for an extended period;
3. loss of license or certification required for the job; or
4. conviction of a misdemeanor crime of domestic violence for employees whose jobs require: (a) carrying a firearm; or (b) authorization to carry a firearm.

NOTE: A "misdemeanor crime of domestic violence" means an offense that: (1) is a misdemeanor under federal or state law; and (2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. (See Title 18, U.S. Code, section 922(g)(9).

DCE conducts schools inside of the facilities of DOC. These two agencies entered into a Memorandum of Agreement outlining their respective responsibilities. Section III(A)(4) provides:

When a DCE employee has been found in violation of misconduct as defined by either a DCE or DOC departmental policy and barred from a DOC facility, the same employee may not be transferred to any other DOC facility for employment.

Because Grievant was barred from the Facility where he formerly worked, he was no longer able to meet the work condition of entering into DOC facilities to teach DOC inmates.¹⁰ DHRM Policy 1.60 authorizes Grievant's removal from employment. The Agency provided Grievant with the opportunity to respond and it removed him from employment pursuant to a written letter and not pursuant to a Written Notice. The Agency was not able to transfer Grievant to a facility within the Department of Juvenile Justice or within the Agency's central offices due to budget cuts and the inability to fill vacant positions. The Agency's removal of Grievant from employment must be upheld.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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.

Grievant's removal from employment based on the inability to meet the working conditions of his employment 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:

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.

¹⁰ There does not appear to be any basis for redress for Grievant to challenge the DOC Warden's decision to bar Grievant from the Facility. DCE does not have the authority to overturn the Warden's decision. DOC is not a party to this grievance and the Hearing Officer does not have the authority to address the merits of DOC's investigation.

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.