

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 08/26/08; Decision Issued: 11/10/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8887; 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: 8887

Hearing Date: August 26, 2008
Decision Issued: November 10, 2008

PROCEDURAL HISTORY

On March 5, 2008, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On March 10, 2008, 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 June 25, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 26, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 Corrections employs Grievant as a Counselor II at one of its Facilities. The purpose of this position is:

Provides case management services as well as conducts counseling sessions, assesses individual program needs, evaluates inmate's progress, and maintains associated documentation.¹

Grievant began working for the Agency in October 2001. Other than the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Inmates may leave the Facility to attend funerals only with the Agency's approval. One of Grievant's responsibilities is to review the requests of inmates to attend funerals and make a recommendation to the Warden. Grievant's recommendations are supposed to be made by Grievant after he has considered all relevant information about an inmate.

The Institution maintains several files on the Inmate. One of those files is a paper file containing all of the Institutions records regarding the Inmate. When the file is opened there are pages on the left and right side of the file. On one side of the file is a

¹ Agency Exhibit 3.

red card with the words "Escape Risk" written on the card. The red card was placed in the Inmate's file on November 6, 2006.

A request came to the Institution to permit the Inmate to attend a funeral. Grievant obtained what he believed was the correct form to complete. He completed the form. When the Assistant Warden received the form, he realized the form was incorrect and returned it to Grievant. Grievant obtained the correct form and completed the form. As part of the process of completing the form, Grievant reviewed the Inmate's file. He opened the file, but failed to notice the red card indicating that the Inmate was an escape risk. Grievant recommended that the Agency authorize the Inmate to leave the Facility and attend the funeral. Grievant did not mention the red card indicating the Inmate was an escape risk or why the red card should be disregarded.

Grievant's recommendation was sent to the Warden along with the Inmate's file. The Warden opened the file and noticed that there was a red card inside indicating the Inmate was an escape risk. After considering the red card, the Warden concluded Inmate's request should be denied.

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

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁵ In order to prove inadequate or unsatisfactory job 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 opened the Inmate's paper file but failed to observe the red card indicating the Inmate was an escape risk. Had Grievant examined the file closely, he would have observed the red card. By failing to observe the red card, Grievant was not able to make a recommendation to the Warden based on all of the information available to him for consideration.

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).

⁵ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

Grievant argues that the Inmate was not actually a flight risk because the Inmate's prior escape attempt occurred 23 years ago. The Inmate had been permitted to attend a prior funeral without attempting to escape. Grievant's argument fails. Whether or not the Inmate was a flight risk is irrelevant. Grievant's error was not what he recommended, but rather it was that his recommendation was not based on all the relevant information available to him.

Grievant argues that the Institution's electronic file regarding the Inmate did not contain a notation that the Inmate was an escape risk. This fact is irrelevant. Grievant reviewed the Institution's electronic file but he also reviewed the Institution's paper file regarding the Inmate. Had Grievant properly reviewed the paper file, he would have been able to make a full informed recommendation.

Grievant argues that he complied with the Agency's procedures as he had been trained by prior staff. Grievant has not been disciplined for failing to follow a specific procedure. Grievant was disciplined for failing to properly execute the procedure he followed. Grievant knew of the existence of red cards in inmates' files and knew to look for such a card. Different training would not have prevented the error made by Grievant.

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 because he contends the Agency did not engage in progressive discipline by simply issuing him a written counseling. Grievant's argument fails. The Agency is not obligated under the Standards of Conduct to engage in progressive discipline. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁶ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I 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:

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.