

Issue: Group I Written Notice (Unsatisfactory Performance); Hearing Date: 07/30/08;
Decision Issued: 10/15/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8889; 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: 8889

Hearing Date: July 30, 2008
Decision Issued: October 15, 2008

PROCEDURAL HISTORY

On January 24, 2008, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On February 22, 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 she requested a hearing. On June 25, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 30, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
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 Corrections Sergeant at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Mail sent from attorneys to inmates is referred to as "legal mail" and must be handled using procedures intended to protect the confidentiality of the correspondence but ensure that contraband is not permitted inside the Facility. The Facility adopted Local Operating Procedure 440.1 to address legal mail. On July 3, 2007, Grievant received an email from the Major advising her that, "Housing Supervisors are still responsible for picking up the legal mail per memo reference legal mail"¹

Grievant's Post Orders provided that:

Special attention should be given to staff compliance with policies/procedures, detection of breaches/weaknesses in the physical structure and operating procedures, with emphasis placed on detection and prohibition of contraband²

¹ Agency Exhibit 5.

² Agency Exhibit 6.

Contraband includes property not specifically authorized for an inmate to possess. Inmates are not permitted to possess pornographic magazines.

The Agency received information about possible contraband being sent into the Facility through the legal mail process. On January 15, 2008, the Facility's mailroom staff received a package with what appeared to be an address of an attorney. Agency staff were suspicious because the return address showed a misspelling of the word "attorney". Agency staff opened the package and observed nine pornographic magazines. The package also contained other papers that Agency staff described as "transcripts". The Major decided to remove four of the magazines, leave five magazines inside the package with the other paperwork, and then reseal the package. He decided to let the package containing five pornographic magazines proceed through the mail system to the Offender to see whether security staff were able to detect the contraband and prevent the Offender from receiving it.

Grievant received the package at the Facility's post office. She understood that the package contained legal mail for the Offender. She summoned the Offender to the office in the Housing Unit. The Offender arrived without his identification card so Grievant instructed the Offender to return to his cell to obtain his identification card. The Offender did so and returned to the office. In order to walk from his cell to the office, the Offender had to pass through a sally port gate controlled by a Corrections Officer located in the control booth. Grievant attempted to open the box with the Offender right in front of her. The box did not open easily. The Offenders said "Let me get that before you break your nail." The Offender grabbed the package out of Grievant's hands and ripped it open. Grievant told the Offender to give her the package but he refused. The Offender pulled out the magazines and exited the office with the contraband. He quickly passed the magazines to another offender standing on the other side of a barred wall. That offender quickly left the area with the contraband.

The magazines were later recovered by the Offender and given to the Assistant Warden after the Assistant Warden informed the Offender he would be placed in a segregation cell for lengthy period of time if the magazines were not returned.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

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

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

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁶ 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.

Local Operating Procedure 440.1 governs Facility Mailroom Procedures. This policy states:

All incoming offender legal mail and special purpose mail should be opened in the presence of the offender to whom it is addressed. The search should be conducted in a manner that prohibits the offender from seizing any contraband that may be concealed in the correspondence. The letter, envelope, and all contents should be searched. If no contraband is found, the envelope and all contents should be given to the offender.

If contraband is found in the legal mail, the contraband must be confiscated by the supervisor. A photocopy of the envelope shall be made to include the return address. The contraband shall be handled in accordance with policy.

Grievant was obligated to search the postal express box in a manner that would prohibit the offender from seizing any contraband inside the box. Grievant allowed the Offender to get close enough to her that he was able to grab the contents of the box, remove the contraband magazines and give them to another inmate.⁷ By permitting the Offender to obtain the postal express box, Grievant acted contrary to Local Operating Procedure 440.1. Her work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant contends she did not intend to permit the offender to obtain the postal express box. If the Agency had issued Grievant a Group II Written Notice for failure to follow established written policy, then Grievant’s intent would be of greater significance. Instead, the Agency issued Grievant a Group I Written Notice for inadequate or unsatisfactory job performance. It is not necessary for the Agency to show that Grievant intended to engage in inappropriate behavior in order to establish a Group I offense. All that the Agency must show is an obligation to perform work in accordance

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

⁷ Grievant could have insisted that the inmate stand a sufficient distance from her to enable her open the package without the Offender being able to so easily grab it from her. Having the Offender stand a sufficient distance from her would have enabled Grievant to react to protect the package in the event the Offender advanced towards her to attempt to take the package.

with certain defined expectations and an employee's failure to perform that work. In this case, the Agency has met that burden of proof.

Grievant argues that because the package contained contraband, the Major should not have permitted it to be delivered to the Housing Unit. This argument fails. The Major testified that he had the authority to conduct tests of the Facility's security systems and procedures. He routinely conducted tests at the facility as part of his customary work duties. There is no reason for the Hearing Officer to believe that Grievant was improperly singled out from other Facility staff to be the subject of a security test.

Grievant argued she was subject to a hostile work environment. No credible evidence was presented to suggest that the Agency had discriminated against her based on a protected status.

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...."⁸ 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 action.

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:

⁸ *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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.