

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 01/22/09;
Decision Issued: 04/07/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9003; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request
received 04/27/09; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9003

Hearing Date: January 22, 2009
Decision Issued: April 7, 2009

PROCEDURAL HISTORY

On June 16, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to comply with established written policy.

On June 29, 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 December 8, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 22, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Power Plant Operations Lead Worker at one of its Facilities. The purpose of his position is to "[s]upervise the operation of the power plant"¹ Inmate workers report to Grievant for their work assignments and direction. He has been employed by the Agency for approximately 15 years. Grievant had active prior disciplinary action. On October 30, 2007, Grievant received a Group III Written Notice for being away from his assigned duty.²

The Inmate had been incarcerated for approximately two years. He was a Level I inmate meaning he presented a lower security threat than inmates with higher levels. The Inmate worked at the Power Plant. The Power Plant is located outside of the Facility's fences. There is no fence or other security system preventing individuals from entering or exiting the Power Plant.

The Inmate and his Wife planned for her to meet him at the Power Plant. They discussed the matter during a telephone call recorded by the Agency.³ The Wife was to wear clothing consistent with the uniforms worn by maintenance workers and drive a

¹ Agency Exhibit 4.

² Agency Exhibit 6.

³ The Agency reviewed the recorded conversation on February 25, 2008, after the incident giving rise to disciplinary action.

vehicle and park it next to the Power Plant. The Wife was to arrive shortly after 11:30 p.m.

Grievant's work shift began at 4 p.m. and was scheduled to end at midnight on February 16, 2008. Grievant worked beyond midnight because his replacement did not appear as scheduled.

On February 16, 2008, the Inmate entered an Agency vehicle and was transported to the Power Plant. The Inmate left the vehicle and entered the Power Plant through the front door at approximately 11:35 p.m. As he was entering the Power Plant, other inmates were leaving the Power Plant and getting into the vehicle to be transported elsewhere. Grievant's Wife arrived at the Power Plant sometime after 11:30 p.m. The Inmate located the Wife outside of the Power Plant and brought her in through a side door into the Main Plant area. A restroom is located within a few feet of Grievant's office. Grievant's office has windows to enable him to see outward. The Inmate waited until Grievant was not looking and took his Wife into the restroom. The Inmate and the Wife had sexual intercourse inside the restroom. A few minutes later when Grievant was not looking, the Wife left the restroom and exited through the side door. She then left the Power Plant at approximately 11:45 p.m. The Inmate returned to work. Grievant did not see the Wife enter or leave the Power Plant. The Inmate and his Wife had telephone calls in which the Wife revealed she thought she had become pregnant as a result of her visit to the Power Plant.⁴ The Agency later initiated charges against the Inmate.

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."⁵ 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."⁶ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁷

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁸ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that

⁴ The Wife also wrote the Inmate a letter and discussed that she was pregnant and he was the father.

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

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁷ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁸ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for supervising the Inmate. This would include making sure that the Inmate had begun his work and was engaged in his work. In this case, there is no evidence that Grievant provided any supervision of the Inmate. It is not clear that Grievant knew whether the Inmate had begun his work or where the Inmate was supposed to be working. The evidence suggests Grievant paid little attention to the Inmate. The Inmate planned the time his Wife would appear at the Power Plant to coincide with Grievant's shift rather than the shift of the supervisor following Grievant who was scheduled to begin working at midnight. The Inmate chose Grievant because he was far more predictable than the oncoming supervisor. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

The Agency contends Grievant should receive a Group II Written Notice for failure to follow written policy as expressed in a September 4, 2007 memorandum. This memorandum states, in part, "[p]lease be advised that at no time are offenders to be left without supervision at the Power Plant." Grievant construed this memorandum as preventing him from leaving the Power Plant during his breaks thereby leaving inmates alone. Grievant presented evidence showing that several years ago, maintenance supervisors would leave the Power Plant and the Facility grounds during their meal or other breaks. Offenders were left alone for short periods of time. When the Agency realized this practice was occurring, the Assistant Warden issued the September 4, 2007 memorandum preventing maintenance supervisors from leaving the workplace during breaks. The Agency now argues that the memorandum provided an instruction that maintenance supervisors should provide continuous supervision of offenders. When the evidence is viewed as a whole, it is clear that Grievant's interpretation of the memorandum is correct. Grievant was in compliance with the requirements of the September 4, 2007 memorandum because he was present at the Power Plant while offenders were there. The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow established written policy.

Grievant contends the disciplinary action should be mitigated. *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...."⁹ 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

⁹ *Va. Code § 2.2-3005.*

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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice for inadequate or unsatisfactory job performance.

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
600 East Main St. STE 301
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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.