

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 04/03/09; Decision Issued: 04/06/09; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9038; 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: 9038**

Hearing Date: April 3, 2009  
Decision Issued: April 6, 2009

**PROCEDURAL HISTORY**

On August 12, 2008, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for leaving a resident unsupervised in a unit and after discovering that the resident had been left unsupervised, failing to timely notify the Shift Commander.

On September 2, 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 February 25, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 3, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
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 Juvenile Justice employs Grievant as a Juvenile Correctional Officer. He was "on loan" from Facility B to Facility D.

On June 28, 2008, Grievant and Officer S were in charge of supervising the residents<sup>1</sup> in Unit 13. The residents were scheduled to attend breakfast in the Dining Hall located in another building approximately 50 yards away. Grievant and Officer S counted the number of residents while they were inside Unit 13. They counted 18 residents. They took the residents outside of Unit 13. One of the residents did not exit the building. He remained inside and fell asleep on a couch. Grievant and Officer S did not realize they had left one of the residents inside Unit 13. Grievant and Officer S escorted 17 residents to the Dining Hall. After the residents finished eating, Grievant and Officer S assembled the residents outside of the Dining Hall and counted them. Grievant counted 17 residents and realized one was missing. He went inside the Dining Hall to see if the missing resident was inside the Dining Hall. Although Sergeant R was inside the Dining Hall, Grievant did not mention to Sergeant R that a resident was missing. Grievant and Officer S escorted the 17 residents back to Unit 13.<sup>2</sup> When they arrived they discovered the missing resident. The amount of time from when Grievant,

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<sup>1</sup> The Agency also refers to residents as wards.

<sup>2</sup> Walking from Unit 13 to the Dining Hall requires approximately 5 minutes.

Officer S, and the 17 residents left Unit 13 and when they returned to Unit 13 was over 30 minutes. Officer S called the Dining Hall telephone number and spoke with Sergeant R about whether to permit the resident who remained behind to go to the Dining Hall for breakfast or have a tray brought from the Dining Hall. That telephone call was the first time Sergeant R learned of the incident.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>3</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to follow established written policy is a Group II offense.<sup>4</sup> Institutional Operating Procedure 212 governs the supervision of wards during group movement. Section 212-4.1(4) provides that, “Wards shall be counted before exiting any building or area and again upon arrival at the destination ....”<sup>5</sup> Grievant counted the residents when they were inside Unit 13. He did not count them again once they left Unit 13 and before they entered the destination at the Dining Hall. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow established written policy.<sup>6</sup> Upon the issuance of a Group II Written Notice, an Agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s suspension for five workdays must be upheld.

Grievant argues that he was not present when Officer S escorted the residents from Unit 13 to the Dining Hall. He contends he was taking trash to the dumpster and, thus, he was not in a position to count the residents. He contends he should not be disciplined for failing to count the residents outside of Unit 13. Grievant’s assertion is not supported by the evidence. Officer S testified that Grievant was present outside of Unit 13 and that Grievant helped Officer S escort the residents from Unit 13 to the Dining Hall. Officer S’s testimony was credible. Grievant drafted an initial incident report on June 28, 2008 suggesting he did not take a head count when the residents were outside of Unit 13 and that he proceeded with the residents to the Dining Hall.

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> See Attachment A to DHRM Policy. 1.60.

<sup>5</sup> Instead of counting the residents prior to entering the destination building, the Agency permits employees to count them once they first exit the building at the point of departure.

<sup>6</sup> The Agency also alleged Grievant failed to immediately notify a supervisor that a resident was missing. The Agency argues that in its judgement, this should be a Group II offense because a missing resident could have escaped or been in jeopardy. The Agency’s judgement is supported by the evidence.

Grievant's initial incident report does not mention his claim of being distracted by trash removal. Accordingly, the evidence is sufficient to conclude that Grievant failed to conduct a head count when he was outside of Unit 13 with the residents prior to their entry into the Dining Hall.

Grievant contends the Agency issued the disciplinary notice with unnecessary delay. The Agency began its due process by staff at Facility H. Because Grievant was "on loan" from Facility B, the Agency decided to stop due process by Facility H staff and begin due process by staff from Facility B. This resulted in a delay. This delay was not a violation of any State policy and does not affect the outcome of this case.

*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..."<sup>7</sup> 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 II Written Notice of disciplinary action with suspension 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

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<sup>7</sup> *Va. Code § 2.2-3005.*

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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>8</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.