

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 04/13/09;
Decision Issued: 04/14/09; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9041; 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: 9041

Hearing Date: April 13, 2009

Decision Issued: April 14, 2009

PROCEDURAL HISTORY

On June 25, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow written policy.

On July 14, 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 March 9, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 13, 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 Senior at one of its Facilities.

On June 11, 2008, Grievant was escorting a group of residents from the dining hall to the courtyard of Delta Building. Upon reaching the courtyard, Grievant entered the Delta Building with two residents and left the remaining residents of her group unsupervised. She could not see or hear the remaining residents while she was inside the Delta Building. One of the residents remaining in the courtyard punched another resident causing him to bleed from his eye. The Agency had to take the injured resident to a hospital for treatment.

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."¹ 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."

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Agency Procedure 212 governs “Movement and Supervision of Residents.” Section 212-4.2 provides, “[a]ll staff are responsible for maintaining sight and sound supervision of assigned (and physically present) residents, inside and outside the building, at all times.”

Failure to follow written policy is a Group II offense.² Grievant left several residents unsupervised. While they were outside of her supervision, two residents fought resulting in injury to one of the residents. Grievant acted contrary to Agency Policy 212-4.2 because she did not maintain sight and sound supervision of residents for whom she was assigned responsibility. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argues that the Written Notice should be rescinded because she was already disciplined for the incident. Grievant argues that when the Agency issued her a Notice of Improvement Needed/Substandard Performance that the Agency could not take further disciplinary action. Grievant’s argument fails. DHRM Policy 1.40 acknowledges that agencies may issue both a Notice of Improvement Needed/Substandard Performance and a Written Notice.³ This policy provides:

Receipt of a Notice of Improvement Needed/Substandard Performance form may also result in issuance of a Written Notice under Policy 1.60 Standards of Conduct.

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....”⁴ 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.

² See Attachment A of DHRM Policy 1.60.

³ During the Step Process, the Agency rescinded the Notice of Improvement Needed/Substandard Performance.

⁴ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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
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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.