

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 04/13/09;
Decision Issued: 04/15/09; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case
No. 9048; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9048

Hearing Date: April 13, 2009
Decision Issued: April 15, 2009

PROCEDURAL HISTORY

On December 2, 2008, Grievant was issued a Group I Written Notice of disciplinary action. The offense was unsatisfactory performance related to inappropriate contact on November 18, 2008, with an offender (and his family) who was not on his assigned caseload.

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 March 23, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on March 27, 2008. The hearing was scheduled at the first date available between the parties and the hearing officer, April 13, 2009. The grievance hearing was held on April 13, 2009, at the Agency's regional office.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant his documents that were admitted, over objection by the Agency to documents created after the offense. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Two Witnesses for Grievant including Grievant
Representative for Agency
Advocate for Agency
One Witness for Agency including Representative

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?

The Grievant requests rescission of the Group I Written Notice or reduction to informal discipline.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group III offenses to include fraternization or non-professional relationships with offenders and violations of DOC Operating Procedure 130.1. The procedure defines Group I offenses to include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force. Group I offenses specifically include unsatisfactory job performance. Group II offenses are more severe in nature and specifically include failure to comply with applicable established written policy. Agency Exh. 5.

The Agency's Operating Procedure No. 130.1, Rules of Conduct Governing Employee Relationships with Offenders, defines fraternization as

The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.

Agency Exh. 4. The same procedure prohibits fraternization, improprieties or the appearance of improprieties, or special privileges or favors not available to all persons similarly supervised, except through official channels.

The Offense

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as an inmate counselor at one of its facilities for approximately six months before the offense. Prior to that time, the Grievant served as a corrections officer. No other disciplinary actions or active written notices were identified as part of the Grievant's employment record.

The Agency's witness, an assistant warden, testified that from an internal investigation he learned of unauthorized contact by the Grievant with an offender and the offender's family. The offender was not among those assigned to the Grievant's caseload.

The offender contacted the Grievant to complain about being placed in special (restricted) housing. The Agency had received notification that the offender may have been contemplating escaping from the institution, so the offender was placed in special housing pending an internal investigation. The Grievant, after hearing a complaint from this offender, who was not among the Grievant's assigned caseload, had several telephone conversations with the offender's wife about the matter. On the day in question, the telephone records showed that the Grievant made three telephone calls to the offender's wife, and the length of the calls ranged from nine to twenty-eight minutes each. Additionally, the Grievant candidly admitted that there were other

calls he received from the offender's wife. The Grievant testified that the offender's wife was complaining to him of getting the "run-around" and questioning the chain of command. The Grievant testified that he believed the Agency's handling of the situation was unfair to the offender. The Grievant testified that the calls were relatively lengthy because the offender's wife was talkative, and he did not want to be rude to her.

The assistant warden testified that the Grievant seemed sincerely remorseful for having violated policy, and that he recommended a disciplinary sanction less than a Group III that he felt could be justified.

Although he was aware of the applicable policies, the Grievant testified that he did not consider his actions to be a violation of applicable policy at the time he made the contact, but he does now (after going through the disciplinary process) understand that he violated applicable policy. The Grievant, however, contends that the Group I Written Notice is too severe for the violation, and that it unduly affects his career path during the two-year active life of the written notice.

I find that the Grievant's conduct in pursuing the communication with the offender and his family exceeded his assigned caseload without proper notice or permission. I find that the conduct, while not malevolent, violated the applicable policy and constituted, at least, the appearance of impropriety of providing a special privilege to the offender and his family. As the assistant warden testified, this invites other inmates to expect or demand similar treatment or favors and adversely affects the security of the institution.

Following the offense, the Grievant transferred to another facility. The Grievant's supervisor at the new facility testified that the assistant warden referenced above specifically discussed with her the Grievant's offense and cautioned against further transgressions. The Grievant characterized the assistant warden's conduct as tantamount to creating a hostile work environment. However, the Grievant testified that he did not experience a hostile work environment prior to the discipline for this offense. The assistant warden credibly testified that he favored the more lenient discipline of a Group I Written Notice or even a Notice of Substandard Performance. Thus, I find no relevance for the present grievance of alleged conduct occurring afterward, and I make no findings regarding it.

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance.

The Grievant submits that mitigating factors of otherwise commendable performance and his tenure of good standing should mitigate the discipline to a less severe level.

The Agency witness testified that the offense could have been considered a Group III, and that the Agency already mitigated the discipline down to a Group I, after considering the Grievant's relatively short tenure as an inmate counselor and the value and promise the Grievant showed as a counselor.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). EDR's Hearing Rules provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or ... an employee's long service, or otherwise satisfactory work performance." 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.

Hearing Rules § VI.B.1 (alteration in original). Therefore, if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B.¹

In this case, the first two elements have been met. Regarding the third, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. While there is no indication that the Grievant's violation of policy had any malevolent intent, in this case, the Agency's action in assessing a Group I offense is within the bounds of specific policy.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

¹ Cf. *Davis v. Dept. of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal

with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer