

Issues: Group I Written Notice (Other Issue) and Retaliation; Hearing Date: 08/03/09; Decision Issued: 08/04/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9140; 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: 9140

Hearing Date: August 3, 2009
Decision Issued: August 4, 2009

PROCEDURAL HISTORY

On February 19, 2009, Grievant was issued a Group I Written Notice of disciplinary action for devoting too much time after normal work hours to an inmate in need of services.

On March 14, 2009, 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 July 13, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 3, 2009, a hearing was held at the Agency's regional office.¹

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

¹ Grievant asserted that she had not received adequate notice of the hearing. The Hearing Division staff called Grievant several times at her home telephone number but Grievant did not answer. Messages could not be left for Grievant because her answering machine was full. The Hearing Officer sent Grievant a letter asking her to contact the Hearing Officer to discuss prehearing procedures. On July 30, 2009, the Agency Representative sent Grievant an email advising her of the hearing time and referencing the Hearing Officer's letter asking that she contact the Hearing Officer. Grievant did not contact the Hearing Officer.

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?
5. Whether the Agency retaliated against Grievant?

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 Psychology Associate I at one of its facilities. The purpose of her position is:

To provide direct mental health services to inmates including inmate psychological assessment, evaluation, screening, tracking, monitoring, treatment, consultation, follow-up and liaison activities. To provide consultation and training in mental health issues to other staff as needed.

One of Grievant's duties is to provide "on-call assistance in emergency situations in the evenings and on weekends and holidays."²

² Agency Exhibit 6.

The Inmate was held in the segregation unit at the Facility because of his mental health condition which included self-injurious behavior. On approximately December 23, 2008, the Inmate was committed involuntarily by a local court judge to the DOC's Mental Health Facility devoted to inmates with serious mental health conditions. The Inmate remained at the Facility until he could be transferred sometime in early January 2009.

Grievant's Supervisor was away from the Facility while on vacation leaving Grievant responsible for on-call duties. Grievant provided services to the Inmate during her regular work hours from 8 a.m. until 4:30 p.m. She received several calls from the Facility staff reporting that the Inmate was engaging in unusual behavior. Grievant responded by coming into the Facility on several days from December 24, 2008 through January 4, 2009 for a total of 31 hours and 47 minutes to visit the Inmate. When Grievant visited the Facility, she was not able to immediately meet with the Inmate. The Inmate had to be removed from his cell in the segregation unit and escorted by a Sergeant to meet with Grievant. Sometimes Grievant would have to wait several minutes until a Sergeant was able to move the Inmate. Grievant's requests to see the Inmate created additional burden on security staff who had to leave other duties to escort the Inmate to Grievant and remain with Grievant during her interaction with the Inmate. One security officer complained to Grievant's Supervisor that Grievant was spending too much time with the Inmate.

Grievant's motive in visiting the Inmate was solely to provide treatment to benefit the Inmate. She believed she was acting in the Inmate's and the Agency's best interests.

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

"[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

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

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

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

⁶ 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's work performance was inadequate because she devoted too much time after regular work hours to providing attention and services to the Inmate. There are several factors supporting this conclusion. First, Grievant and other staff received training regarding the importance of not giving special treatment to particular inmates. An excessive amount of time spent on an inmate could constitute special treatment. Second, Grievant and other staff were taught that focusing on an inmate who is engaging in inappropriate behavior sometimes could cause that inmate to continue the behavior in order to receive additional attention. Other inmates notice the additional attention given to the inmate behaving badly and then engage in similar behavior in order to gain attention. Third, the evidence showed that the practice at the Facility was not to devote as much time as Grievant devoted to the Inmate. The Facility had housed inmates with more serious conditions than the Inmate's condition, yet on-call staff devoted significantly fewer hours to those inmates than Grievant devoted to the Inmate. Fourth, one of the measures of Grievant's work performance was, "coming into the facility on off-hours (occasionally and for short periods of time), etc."⁷ The Agency witnesses established that spending up to 31 hours and 47 minutes at the Facility after hours to see an Inmate was not occasionally and for a short period of time. No evidence was presented showing that the amount of time Grievant met with the Inmate was occasional or for short periods.

Grievant made numerous arguments as part of the Step Process and at the hearing in support of her position. Grievant, however, did not testify and did not present any evidence to support her position. There is no factual basis upon which the Hearing Officer can rule in Grievant's favor. For example, Grievant argued her Supervisor granted her permission to enter the Facility as Grievant felt necessary. The evidence showed that the Supervisor did not grant Grievant unlimited discretion to enter the Facility.

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

⁷ Agency Exhibit 6.

⁸ *Va. Code § 2.2-3005.*

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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁹ (2) suffered a materially adverse action¹⁰; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹¹

If the Hearing Officer assumes for the sake of argument that Grievant engaged in a protected activity, no evidence was presented showing that the Agency's disciplinary action was taken in retaliation for that protected activity. The Agency did not discipline Grievant as a pretext to retaliation.

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:

⁹ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁰ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹¹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.¹²

[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

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.