

Issues: Group III Written Notice with demotion and pay reduction (undermining agency's effectiveness); Hearing Date: 09/10/09; Decision Issued: 09/11/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9175; 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: 9175

Hearing Date: September 10, 2009
Decision Issued: September 11, 2009

PROCEDURAL HISTORY

On May 11, 2009, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction for listing her occupation on a MySpace page as "punishing inmates!":

On May 26, 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 August 24, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 10, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 employed Grievant as a Hearings Officer at one of its Facilities. She held the rank of Sergeant. Grievant was demoted to the position of Corrections Officer and received a disciplinary pay reduction.

As a hearings officer, Grievant was responsible for determining whether to uphold or reverse charges made by corrections officers against inmates. For example, if an inmate violated a Facility rule, a corrections officer could charge the inmate and attempt to impose a consequence on the inmate. The hearings officer would be responsible for listening to the evidence against the inmate and determining the inmate's guilt or innocence and the appropriateness of the penalty imposed under that charge. Depending on the charge, an inmate in general population could be placed in a segregation unit further restricting his movement within the Facility.

Agency employees including Grievant are instructed beginning with their training at the Academy that courts punish inmates but the Agency only implements inmate sentences.

Grievant created a web page on MySpace.com. She listed details about herself including providing a picture showing her face, listing her first and last name, stating her gender, race, and county of residence. She listed her occupation as "punishing inmates!"

An unknown woman contacted the Regional Director and claimed to be a friend of an inmate at the Facility. The woman suggested an employee “had it in for her friend” because the employee had listed her occupation on a MySpace webpage as punishing inmates. The Agency investigated the matter and concluded Grievant was the employee who listed her occupation on MySpace as punishing inmates. The Agency also investigated whether Grievant’s decisions were actually biased against inmates and concluded that her decisions were not biased. Grievant’s work performance was otherwise satisfactory to the Agency.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

Grievant’s duties were governed under Operating Procedure 861.1, Offender Discipline, Division of Operations. A hearings officer is defined as:

The employee who is the sole fact finder in a disciplinary hearing and decides guilt or innocence of the accused offender and imposes an appropriate penalty.

A hearings officer:

Shall remain objective and render a fair and just decision based solely on the facts presented at the hearing. ***

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

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

Shall make a fair decision of innocence or guilt – The decision shall be based solely on evidence presented at the hearing, with sufficient evidence presented at the hearing to support a finding of guilt. This decision should be clearly stated in the hearing and in the presence of the accused offender before the hearing is concluded.

The Agency contends that Grievant undermined her effectiveness and the Agency's effectiveness by describing her occupation as "punishing inmates!" and that Grievant should receive a Group III Written Notice with demotion. The Agency's conclusion is supported by the evidence and must be upheld. By listing her occupation as "punishing inmates!," Grievant destroyed her reputation as being an objective and impartial decision-maker. Someone reading Grievant's webpage would likely conclude Grievant considered her job to be siding with the Agency's security staff regardless of the facts of a case. One could easily conclude Grievant was biased against inmates rather than seeking to make a fair decision of innocence or guilt based on the evidence at the hearing. Inmates may not have had access to Grievant's webpage, but friends and family of inmates could have located Grievant's webpage and informed the inmates of what Grievant had written. The evidence showed that the Agency expected Grievant to render fair decisions and also maintain the appearance of fairness in order to ensure the effectiveness of the Agency's inmate disciplinary process. Grievant's behavior rendered her unable to effectively adjudicate inmate appeals. The Agency's issuance of a Group III Written Notice must be upheld. Upon the issuance of a Group III Written Notice, the Agency may demote and impose a disciplinary pay reduction. In this case, the Agency's demotion of Grievant with disciplinary pay reduction must be upheld.

Grievant argues that she did not break any specific policy. DOC Policy 135.1 places employees on notice that not every offense is specifically listed in the Standards of Conduct and that employees may be disciplined for offenses not specifically enumerated in policy.

Grievant contends that her decisions were actually objective and fair and that she was not biased against inmates. The evidence supports this conclusion; however, the evidence also shows that Grievant destroyed the perception that she was fair and objective by engaging in behavior that would make a reasonable person believe she was biased against inmates. Grievant's action rendered her unable to effectively perform her job duties because being perceived as fair was as important as actually being fair.

Grievant argued the Agency did not properly investigate the matter. Whether the Agency properly investigated the allegation is irrelevant. The question is whether the Agency has presented sufficient facts at the hearing in order to sustain its burden of proof. It has done so in this case.

Grievant argues she did not identify her employer or otherwise associate herself with the Agency. This argument fails. Grievant provided sufficient evidence about herself including her picture, name, residence, and gender that it would not be difficult

for an inmate's family member or other person who knew Grievant worked the Facility to associate Grievant with he webpage.

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction 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

⁴ Va. Code § 2.2-3005.

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.