

Issue: Group III Written Notice with Termination (providing false statements to Investigator); Hearing Date: 12/01/09; Decision Issued: 12/02/09; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9229; 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: 9229**

Hearing Date: December 1, 2009  
Decision Issued: December 2, 2009

**PROCEDURAL HISTORY**

On August 21, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to report receipt of a \$20 bill from a resident, and giving false and misleading information.

On October 31, 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 November 16, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 1, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency 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?

### **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:

Residents at the Facility are not permitted to carry money with them. Money held by a resident would be considered contraband.

Grievant worked in a housing unit supervising residents. On May 14, 2009, the Resident provided Grievant with a \$20 bill and asked that she provide him with change for the money. Grievant kept the money and did not provide change to the Resident. In the morning of May 15, 2009, the Resident approached Grievant and asked for the change for his \$20 bill. Grievant told him she would provide change. In the afternoon of May 15, 2009, the Resident found an envelope in his room containing four five dollar Monopoly money bills. The Resident became angry that his money had not been returned. Later in the day, when the Resident returned from the Dining Hall to his room, he refused to go into his room because Grievant had not returned his money. Grievant notified the Sergeant. When the Sergeant came to the housing unit, Grievant told her that she may have seen the Resident with money but she was not sure. The Sergeant asked the Resident why he did not enter his room when instructed. The Resident responded that "staff [are] playing me." The Resident was escorted to the Behavioral Management Unit and a search was conducted in his room. Later in the afternoon, the Assistant Superintendent spoke with the Resident and asked him what happened earlier that day. The Resident told the Assistant Superintendent about the \$20 bill and his interaction with Grievant. When the Assistant Superintendent told the Resident that a search of his room had not revealed the Monopoly money, the Resident reached into his pocket and pulled out an envelope with his name on it and inside were four five

dollar Monopoly money bills. The Assistant Superintendent reported the matter to the Agency's Office of Inspector General.

On May 28, 2009, the Special Agent interviewed staff including Grievant. At the beginning of the interview Grievant denied receiving a \$20 bill from the Resident. She said the Resident was waving a \$20 bill in the window of his room door. She said that the Resident asked her to provide him with change for the \$20 bill but she refused. She told the Special Agent that she told the Resident she would not bring him change for the \$20 bill because she did not provide the residents with anything that was unauthorized.

Grievant told the Special Agent that she spoke with the Resident again while they were out on the floor of the housing unit. She said that the Resident asked her to make change for a \$20 bill and handed her the \$20 bill. She said that she returned the \$20 bill to him. Grievant told the Resident that she would not bring him change for the \$20 bill. Later in the interview, Grievant told the Special Agent that she received the \$20 bill from the Resident while they were on the floor in the housing unit. She further stated that after she received a \$20 bill, she told the Resident that she would bring him change. Grievant indicated at that point she walked into the control room and after being in the control room for a period of time she returned the \$20 bill to the Resident. Next she told the Special Agent that she received a \$20 bill from the Resident while they were on the floor of the housing unit. After receiving the \$20 bill, Grievant told the Resident that she would bring him change. Grievant held onto the \$20 bill for approximately 8 hours. She placed the \$20 bill in an envelope with four five dollar Monopoly money bills and then placed the envelope in the Resident's room.

### **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>1</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."

DHRM Policy 1.60 lists numerous examples of offenses. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

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

In the Agency's judgment, Grievant should receive a Group III Written Notice with removal. This judgment is supported by the evidence. The Resident was not authorized to have a \$20 bill. He was in possession of contraband. The possession of contraband often leads to conflict among residents according to Agency managers. Once Grievant obtained a \$20 bill from the Resident she should have reported that matter to her Supervisor. Instead she falsely informed the Sergeant that she may have seen the Resident with a \$20 bill. When the Special Agent interviewed Grievant regarding the incident, she was obligated to speak truthfully with the Special Agent. Institutional Operating Procedure 1106-4.7 obligated Grievant to "cooperate with official investigations and avoid giving false or misleading information." Grievant was untruthful to the Special Agent. First, she told the Special agent she did not receive a \$20 bill from the Resident. Second, she told the Special Agent that she received a \$20 bill from the Resident and then returned it to him. Third, she told the Special Agent that she received a \$20 bill, told the Resident that she would make change for it, held the \$20 bill for a period of time and then returned it to the Resident. Fourth, she told the Special Agent that she received a \$20 bill from the Resident, was in possession of the bill for approximately 8 hours, placed the \$20 bill in an envelope with four five dollar Monopoly money bills, and placed the envelope in the Resident's room. The Agency's judgment that making false statements to an investigator is a Group III offense is consistent with DHRM Policy 1.60 which lists falsification of documents as a Group III offense. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Noticed, the Agency may remove Grievant from employment.

*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>2</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 III Written Notice of disciplinary action with removal is **upheld**.

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<sup>2</sup> *Va. Code § 2.2-3005.*

## 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 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>3</sup>

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<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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