

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 03/22/10; Decision Issued: 03/23/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9278; Outcome: No Relief - Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9278

Hearing Date: March 22, 2010
Decision Issued: March 23, 2010

PROCEDURAL HISTORY

On October 11, 2009, Grievant was issued a Group I Written Notice of disciplinary action for failing to assist another employee involved in a struggle with an inmate.

On November 7, 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 March 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 22, 2010, a hearing was held at the Agency's regional office. Grievant did not participate in the hearing. Her request for a continuance was denied for the reasons stated during the hearing.

APPEARANCES

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 Corrections employs Grievant as a Corrections Officer at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 13, 2009, the Inmate was not properly dressed to enter a particular area of the Facility. The Lieutenant instructed the Inmate to return to his cell and put on the proper clothing. The Inmate began arguing with the Lieutenant. The Inmate pointed his finger at the Lieutenant and then used it to tip the brim of the Lieutenant's hat up and backwards. The Lieutenant instructed the Inmate to turn around and be restrained so that the Lieutenant could take the Inmate to a holding cell. The Inmate refused and as the Lieutenant attempted to restrain the Inmate, a physical altercation began. The Lieutenant attempted to restrain the Inmate who was resisting and fighting with him. Grievant was standing a few feet from the Lieutenant when the altercation began. The struggle lasted two or three minutes. During that time Grievant watched the Lieutenant and the Inmate but did nothing to intercede and provide assistance to the Lieutenant. Grievant's failure to assist the Lieutenant increased the risk that the Inmate might injure the Lieutenant.

Grievant received training at the Academy and on at least an annual basis regarding the Agency's Use of Force policy. Grievant received training to inform her that part of her job as a Corrections Officer required her to provide assistance to other security officers involved in physical conflicts with inmates.

An In-Service training outline for a training session attended by Grievant provides:

Employees have the right to protect themselves and the responsibility to protect offenders, other employees, and members of the community who are threatened by the actions of any incarcerated offender. ***

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

DOC Operating Procedure 420.1 governs “Use of Force”. Section IV(A)(1) provides:

Employees have a responsibility, consistent with their self-protection, to **protect** offenders, **other employees**, and members of the community who are threatened by the actions of any incarcerated offender. Facility employees are also required to prevent escapes, **maintain order**, and control within the facility, and protect state property. (Emphasis added)

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁴ Grievant failed to comply with the Agency’s Use of Force Policy because she failed to provide assistance to the Lieutenant thereby justifying the issuance of a Group II Written Notice. Grievant had adequate training regarding the policy and should have known of her obligation to protect another employee and maintain order once the Inmate began fighting with the Lieutenant. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice.

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

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).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

“in accordance with rules established by the Department of Employment Dispute Resolution....”⁵ 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 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:

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:

⁵ Va. Code § 2.2-3005.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.