

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 06/04/10; Decision Issued: 06/07/10; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 9323; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9323

Hearing Date: June 4, 2010
Decision Issued: June 7, 2010

PROCEDURAL HISTORY

On November 17, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions/policy.

On December 15, 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 May 4, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 4, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
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 Lieutenant at one of its Facilities. Grievant had a prior active Group I Written Notice.

On October 26, 2009, the Captain received reliable information from an offender that the offenders on a particular work crew were bringing vending food items inside trash bags back to their assigned dormitories and selling them to other offenders.

On October 29, 2009, Grievant was responsible for supervising offenders in the visitation area. Vending machines were located in the visitation area. The individual responsible for refilling the vending machines had removed old food items and thrown them into the trash bins. Several inmates under Grievant's supervision removed the discarded food items and put them into trash bags. When it was time for the inmates to return to the secured perimeter of the Facility, they took the trash bags with them with the objective of taking the food items into the Institution. The Captain had asked the Sergeant to be on the lookout for the inmates as they walked from the visitation area through a series of gates towards their assigned dormitories. When the inmates passed close to the yard office, the Sergeant notified the Captain. The inmates were instructed to report to the yard office. The inmates and their trash bags were searched. Grievant was present during the search. Inside the trash bags were found numerous vending machine food items and condiments. In addition, food items from a left over state lunch were found. These items were contraband because the inmates were not authorized to possess them or take them into the secured area of the Facility. Grievant was surprised

that the inmates possessed contraband. She told Lieutenant K, "they clean up around the machines and find money. I buy them drinks, chips, and stuff with the money."

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

"[F]ailure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁴ Grievant's Post Order required that she "Shakedown the entire Visiting Area at the end of visiting hours." The Post Order also stated that Grievant "Must be thoroughly familiar with OP 445.1". Operating Procedure 445.1 "governs the methods of detecting contraband to searches of employees, visitors, and offenders at facilities operated by the Virginia Department of Corrections". Frisk searches are authorized as a method to detect contraband on persons. According to this policy:

- b. Each visiting area shall be searched and inspected thoroughly for the detection of contraband following each visiting day.
- c. All garbage or trash collection from a visiting area shall be conducted by employees and shall be disposed of outside the security perimeter."

Grievant was responsible for monitoring the inmates in the visiting area and searching them prior to their leaving the visiting area to return to the dormitories. Grievant failed to properly monitor the inmates, because the inmates walked away from her and were out of her line of sight at the time they were observed by the Sergeant. Grievant failed to observe that the inmates were carrying trash bags towards the secured perimeter and towards their dormitories. Grievant's actions were inconsistent with her responsibilities under Operating Procedure 445.1 thereby justifying the issuance of a Group II Written Notice.

Grievant argued that the Captain should have told her that he was watching the offenders so that she could be involved in identifying those offenders who engaged in

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).

inappropriate behavior. The Captain explained that he did not tell Grievant because he did not want her to behave any differently than she otherwise would. The Captain feared that any change in Grievant's behavior might enable the inmates to realize that they were being scrutinized. The Captain's explanation is reasonable. The decision whether to inform Grievant of the allegations was within the Captain's managerial discretion. The Captain did not violate any policy by exercising his discretion.

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...."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.

Grievant argued that the Agency inconsistently disciplined its employees. She pointed out that an employee fell asleep at her post but was not disciplined. The Employee only received a counseling memorandum. The Agency responded that the employee was not asleep but at most inattentive on post and that the reason the employee was inattentive was because of a medical condition and medication taken for that condition. Grievant was not charged with sleeping on her post. Grievant was not similarly situated to the employee who was inattentive. Grievant also argued that an employee who improperly handled a State vehicle did not receive disciplinary action. Grievant was not charged with improperly driving a State vehicle. She was not similarly situated with that employee. The evidence is insufficient to conclude that the Agency inconsistently disciplined its employees by singling out Grievant for discipline. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant suggested that the Agency may have taken action against her because of her race. No credible evidence was presented to support this allegation. Based on the evidence presented, it is clear that the Agency's action against Grievant was based on her behavior and nothing more.

DECISION

⁵ *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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:

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

⁶ 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

Carl Wilson Schmidt, Esq.
Hearing Officer