

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 07/07/10;
Decision Issued: 07/08/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9349; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9349

Hearing Date: July 7, 2010
Decision Issued: July 8, 2010

PROCEDURAL HISTORY

On November 6, 2009, Grievant was issued a Group I Written Notice of disciplinary action for being rude, insubordinate and unprofessional.

On December 4, 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 June 14, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 7, 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 Officer at one of its Facilities. She has been employed by the Agency for approximately 14 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 30, 2009 at approximately 5:47 a.m., Grievant reported to work late for her shift briefing.¹ The Captain instructed Grievant to get a tardy slip. Grievant replied, "You get it." The Captain instructed Grievant again to get a tardy slip. Grievant gave the same reply. The Captain asked if Grievant was all right. Grievant replied "Are YOU all right?" The Captain then asked Grievant to leave the briefing room until the Captain was done. Grievant said, "No." The Captain told Grievant to leave three times before she finally swung her hands in the air and "stomped out" of the room.

After the briefing, Grievant walked up to the Captain and said loudly that she just wanted to go to her hall. The Captain instructed Grievant to come inside the Watch Office and Grievant yelled, "Just do what you got to do!" Grievant then told the Captain she was "stressed" over some personal issues and accused the Captain of knowing what Grievant was talking about. The Major was called at home due to Grievant's behavior. The Major spoke with Grievant by telephone and told Grievant to calm down.

¹ The shift briefing was scheduled to begin at 5:45 a.m. Grievant knew that the start time of the briefing was inflexible because of the amount of information that needed to be conveyed to security staff within a few minutes time. Shift managers issued tardy slips to employees who reported to the briefing late.

The Major arrived to the Facility shortly thereafter to talk to Grievant. The Major determined that it was in the best interests of the Agency that Grievant take the remainder of the week away from work due to her personal situation.²

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

The Department of Corrections is a paramilitary organization where employees hold rank and are expected to follow the orders of supervisors. Rejecting a supervisor's authority of command constitutes insubordination. Insubordination is similar to failure to follow a supervisor's instructions and is a Group II offense. The Captain held a higher rank and position than Grievant and Grievant knew that she was obligated to comply with the instructions of the Captain. Grievant blatantly rejected the instructions of the Captain in a manner as to show a disregard of the Captain's rank and authority. Grievant was insubordinate thereby justifying the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice for disruptive behavior. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that her behavior on September 30, 2009 was provoked by the Captain. Grievant argued that on September 30, 2009, the Captain said in front of numerous employees and in a very hostile, intimidating, rude, sarcastic manner to get her tardy slip. Grievant argued that the proper procedure was for the Captain to give her the tardy slip after the briefing and outside the view of other employees.

The evidence showed that the Captain's practice had been to give tardy slips to employees after the morning briefing and outside the view of other employees. Several staff complained about this practice because it created concern that some employees who were tardy were not actually receiving tardy slips. Approximately 2 weeks prior to September 30, 2009, the Major changed the Agency's practice so that an employee who entered the briefing late would receive the tardy slip immediately and in the view of

² The evidence regarding Grievant's "personal concerns" was not presented during the hearing.

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).

other employees. Employees were advised of the change as part of their shift briefings. Based on the evidence presented, it is clear that the Agency did not single out Grievant to receive a tardy slip in front of other employees. Grievant did not realize that the practice had changed. To the extent Grievant was provoked on September 30, 2009, it was because of Grievant's unfamiliarity with the new practice and not because of any improper behavior by the Captain. If the Grievant believed that the Captain's behavior was inappropriate, a remedy would have been to express your concerns to the Major who supervised the Captain. Instead, Grievant displayed insubordinate behavior towards a Captain. Although Grievant's perception of the events of September 30, 2009 may explain why she behaved the way she did, that perception does not excuse her behavior.

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..."⁶ 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.

⁶ *Va. Code § 2.2-3005.*

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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.