

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 12/20/10;  
Decision Issued: 12/22/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9425; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9425**

Hearing Date: December 20, 2010  
Decision Issued: December 22, 2010

**PROCEDURAL HISTORY**

On June 8, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On June 30, 2010, 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 22, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 20, 2010, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
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 employs Grievant as a Corrections Officer at one of its Facilities. She has been employed by the Agency for approximately 30 years. The purpose of her position is:

Maintains security, custody, and control over offenders at the institution and while in transport by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises offenders' daily activities and observes and records their behavior and movement to ensure their safe and secure confinement.<sup>1</sup>

No evidence of prior active disciplinary action was introduced during the hearing.

On May 19, 2010, Grievant brought a pink ink pen to work. She announced in muster to her coworkers that the pen was important to her for sentimental reasons and that no one should take it from her.

Grievant walked to the nurse's station to get medication to relieve a headache. She put the pen down and returned to the front entry post where she was scheduled to work for the day. She forgot to take the pen with her and forgot that she had left the pen at the nurse's station.

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<sup>1</sup> Agency Exhibit 4.

While working at the front entry post, Grievant realized she did not have her ink pen. She suspected that the Offender had taken the pen because she remembered that he was near her desk and could have taken it. She asked him if he had taken her pen and he denied taking the pen. The Offender entered the dorm. Grievant followed him and continued to accuse him of taking the pen. She told the Offender to empty his pockets and the Offender responded by using profanity. She told the Offender that he could let the pen drop by her desk and all would be forgiven. The Offender angrily denied taking the pen and cursed at Grievant. Grievant wanted to see if the pen reappeared at her desk but it did not. She returned to the dorm to confront the Offender. She again accused him of taking her pen and told the Offender to open the door to his locker. He replied "no." Grievant called on her radio for Officer C to come and give her assistance. Officer C had left the Facility and could not respond to Grievant's radio call. The Offender complied with Grievant's request and opened one side of his locker. No pen was found but Grievant observed that the Offender had food items he had taken without permission from the kitchen. She confiscated the food items.

Grievant showed the food items to the Lieutenant. The Lieutenant told Grievant to get the Offender and bring him to speak with the Lieutenant. Grievant informed the Offender to report to the Lieutenant. As he was walking towards the Control Room, Grievant pointed her finger at the Offender and again accused him of taking her pen.

After being repeatedly accused by Grievant of taking Grievant's pen, the Offender became agitated and cursed. The Lieutenant tried to calm down the Offender but he would not remain calm. The Lieutenant placed the Offender in handcuffs and escorted the Offender to the Major's office. The Major tried to calm down the Offender but he became more agitated and aggressive saying that Grievant kept accusing him of taking her pen and that he did not steal it.

While the Offender was with the Lieutenant and Major, the Nurse told Grievant she found a pen. The pen belonged to Grievant and it was the pen Grievant had accused the Offender of stealing. The Nurse returned the pen to Grievant. During the Major's conversation with the Offender, Grievant came into the Major's office and said that she had found her pen. This upset the Offender even more because it confirmed that he had been falsely accused. Because of the Offender's behavior, he was placed in segregation.

## **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."<sup>2</sup> Group II offenses "include acts and behavior that are more severe in

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

"[I]nadequate or unsatisfactory job performance" is a Group I offense. Grievant's work performance on May 19, 2010 was unsatisfactory for several reasons. First, Grievant falsely accused the Offender of taking her pen causing the Offender to become agitated and angry towards her. Second, rather than calling the Lieutenant and letting the Lieutenant have someone else investigate the matter, Grievant chose to locate the ink pen because it had sentimental value to her. Grievant was unable to perform her other duties at the front entry post while she was focused on the Offender. Third, Grievant conducted a search of the Offender's locker without having a second officer present. DOC Operating Procedure 445.2 governs Facility Searches and Inspections. Section V(A)(4)(a) states that "[d]ormitories in areas outside offender cells shall be searched in similar manner to that described for a cell." Section V(A)(1) addresses cell searches and provides that "[s]earches shall be conducted by two corrections officers or a corrections officer and another DOC employee." Fourth, Grievant so upset the Offender that the Lieutenant and the Major had to try to calm down the Offender. They were distracted from their other duties as they attempted to reason with the Offender and ultimately placed him in segregation.

Grievant argued that she attempted to conduct a search with two officers present but that the officer she called had already left the facility. Although Grievant has established that she attempted to contact another officer to provide assistance, she was not authorized to disregard the policy merely because she attempted to contact the second officer and he was unavailable. Grievant should have refrained from conducting the search or attempted to contact the Lieutenant or another officer who was present at the facility to assist her.

Grievant argued that other employees had engaged in similar behavior but had not been disciplined. No credible evidence was presented to support this allegation.

Grievant argued that she was permitted to leave her post because Agency managers had not clarified that she was supposed to remain at her post. The evidence showed that Agency managers permitted employees working the front entry post to leave that post and enter the dorm. Even though Grievant was permitted to enter the dorm with the Offender, she should not have done so. The Offender denied taking her pen and she had no evidence or legitimate reason to believe that he had taken her pen. By conducting her own investigation, she was not at the front entry post and performing the duties expected of an employee holding that post.

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

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>5</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 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 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

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<sup>5</sup> Va. Code § 2.2-3005.

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>6</sup>

[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

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