

Issue: Group II Written Notice with suspension (inappropriate behavior); Hearing Date: 03/22/11; Decision Issued: 03/24/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9524; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9524

Hearing Date: March 22, 2011
Decision Issued: March 24, 2011

PROCEDURAL HISTORY

On October 19, 2010, Grievant was issued a Group II Written Notice of disciplinary action with suspension for placing his hand on the shirt collar of a subordinate employee.

On November 10, 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 he requested a hearing. On March 1, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 22, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representatives
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 Juvenile Justice employs Grievant as a Correction Lieutenant at one of its Facilities. The purpose of his position is:

To ensure the protection of the citizens of the Commonwealth through the effective supervision/security of juvenile offenders and implementation of treatment programs.

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

For several years Grievant and the Sergeant had a good working relationship and considered themselves to be friends. On September 8, 2010, Grievant called Sergeant P and the Sergeant to his office to show them how to conduct a proper drug test. Grievant was sitting in a chair and the Sergeant was standing across from him. Grievant spoke to them about the evidence he had collected in his office and asked the Sergeant if she wanted a knife. The Sergeant replied "No, I don't want a knife". Grievant bent over and pulled an evidence bag out of the trash bag and ripped it open. He pulled out a thin, black, long item which appeared to be part of a tattoo gun. Grievant poked the Sergeant in her leg with the needle in the gun. Grievant laughed. The Sergeant and Sergeant P left Grievant's office. The Sergeant went to the restroom and applied hand sanitizer to the area of her skin that had been punctured. She went to

the medical unit and asked the Nurse for some antibacterial items and asked what to do when someone gets poked with a used tattoo needle. The Nurse recommended that she get a tetanus shot and gave her a couple of pieces of gauze and hydrogen peroxide spray to apply to the affected area.

On September 8, 2010, the Sergeant informed the Captain that she was poked in the leg by Grievant with an object that Grievant pulled from an evidence bag. Grievant told the Captain that what the Sergeant said was true but they were playing around and having fun. The Captain wrote a memorandum to the Superintendent stating in part:

From all the information that has been reported in given to me, it is my conclusion that [Grievant's] behavior was unprofessional and unacceptable and his unprofessionalism did in fact cause injury to [the Sergeant], therefore [Grievant] should be held accountable using the Standards of Conduct.

At some point in time, the Sergeant met with the Human Resource Manager to scheduled an appointment for the Sergeant to be seen by the Workers Compensation physician for the Agency. The Sergeant had to undergo a medication regimen and a series of blood tests as a precautionary measure until March of 2011 to determine if she had contracted HIV or hepatitis from the puncture wound sustained on September 8, 2010.

Agency managers considered how to address Grievant's behavior and concluded that he should receive a Notice of Needs Improvements/Substandard Performance. On September 15, 2010, the Captain gave Grievant a Notice of Improvement Needed/Substandard Performance stating, in part:

On September 8, 2010, you poked another Supervisor in the leg with a contraband object from one of the evidence bags you were disposing of, which caused that Supervisor to have medical treatment

Improvement Plan:

[Grievant] will attend classes on Professionalism, Blood Borne Pathogens given at the [location] as soon as it is available.

[Grievant] will also be made aware that this is in fact a violation of the Employee Standards of Conduct 160.V.B.1.g¹ Inadequate or unsatisfactory work performance and 160.V.B.3.g Violating safety rules where there is a threat of physical harm. And that any future occurrence could result in disciplinary actions being invoked up to and including termination.

¹ It does not appear that the Agency cited the version of the Standards of Conduct in effect at the time of Grievant's misbehavior.

On September 20, 2010, Grievant sent the Sergeant an email stating:

I want to personally apologize to you for any discomfort or embarrassment that I may have caused you. The only reason that I haven't done this prior was because of the investigation. I didn't want to taint that in any way shape or form. Like I said I am very sorry for what happened.

The Sergeant replied:

I appreciate your apology and would like to talk to you in person next time I see you. I did not imagine that this would get so out of hand and I hope we will be able to conduct business in the future as two grown up professionals.

Grievant replied:

Girl, I hope we are still friends! Never mind business!

The Sergeant responded:

Sure. I don't see why not?!?

Grievant concluded that the Sergeant's concerns about him had been resolved and that their relationship was restored.

The Agency has a practice referred to as "tapping out" where a supervisor taps out a subordinate when that subordinate is engaged in a conversation with a resident that is escalating. For example, if it appears to the superior that the interaction between the subordinate and the resident is not productive, the Superior will tap out the subordinate and effectively dismiss the subordinate from the interaction. On October 1, 2010, the Sergeant was having an interaction with a resident that became heated. Lieutenant A tapped out the Sergeant. The Sergeant did not agree with the decision. Several hours later the Sergeant discussed the incident with Grievant. Grievant told her that he did not know the answer to her questions and that she should address the matter with Lieutenant A. He reminded her that she was Sergeant. A short time later, the Sergeant took a break and went outside in the parking lot. She was speaking with the Juvenile Correctional Officer about the tapping out incident. Grievant joined them. The Sergeant stated the concerns she had expressed earlier. Grievant restated his earlier comments about her having authority as a Sergeant. Grievant concluded that the Sergeant continued to fail to understand his comments about her authority. When employees are promoted to the rank of Sergeant, they are "pinned" with bars that are worn on the shirt collars of their uniforms. Grievant stepped towards the Sergeant and touched her shirt collar. He lifted the collar up and tugged on it saying "you are the Sergeant."

The Sergeant complained to Agency managers regarding Grievant's touching her collar. She believed that he had invaded her personal space. His actions on October 1, 2010 along with his actions on September 8, 2010 rendered her unable to work with him.

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."² 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."

The Agency contends that on October 1, 2010 Grievant engaged in unprofessional behavior. The Agency contends that based upon his prior inappropriate behavior with the Sergeant on September 8, 2010, he should have known not to touch her on October 1, 2010. The Agency's argument fails.

The evidence showed that Grievant's behavior of lifting the Sergeant's collar and tugging it was the means by which Grievant believed he was communicating to the Sergeant that her rank granted her authority to resolve her concerns. The Agency did not have an absolute rule prohibiting employees from touching one another. For example, employees, on occasion, would shake hands, shake hands with a half hug, or pat one another on the back as a show of support. One Agency employee testified that during his three years with the Facility he had observed approximately four to six incidences of a supervisor touching the collar of a subordinate. Grievant's behavior was not in itself unprofessional and it was not inconsistent with the practice at the Facility.

The Agency failed to properly respond to Grievant's misbehavior on September 8, 2010. As a result, the Agency did not adequately inform Grievant that he was not to touch the Sergeant. Grievant's behavior on September 8, 2010 would have been sufficient support the issuance of a Written Notice for workplace violence. The Agency could have suspended or possibly removed Grievant from employment. Instead, the Agency gave Grievant a Notice of Improvement Needed/Substandard Performance. The Agency's mild response was not in itself sufficient to inform Grievant of the severity of his behavior such that he would independently realize he should avoid the Sergeant. The Agency took no action to separate Grievant from the Sergeant. Doing so would have had the effect of informing Grievant that the Agency was concerned about his future interactions with the Sergeant. The Agency did not expressly inform Grievant to avoid future contact with the Sergeant when he worked with her. When Grievant was counseled and given the Notice of Improvement Needed/Substandard Performance, he

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

was informed to be professional with the Sergeant. He was not informed of what constituted professional or unprofessional behavior with respect to future interactions with the Sergeant.

The Agency's evidence showed that if Grievant had not touched the Sergeant's shirt collar, the Agency would not have taken any disciplinary action against Grievant for his behavior on September 8, 2010. The Agency cannot now add Grievant's behavior on September 8, 2010 to the behavior he showed on October 1, 2010 to support a Group II Written Notice. Grievant's behavior on October 1, 2010, standing alone, does not support the issuance of a Written Notice.

The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action with suspension against Grievant. Accordingly, the Agency's action must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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.³

[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

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