

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 05/17/11; Decision Issued: 05/23/11; Agency: DJJ; AHO: William S. Davidson, Esq.; Case No. 9565; Outcome: Partial Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9565

Hearing Dates: May 17, 2011
Decision Issued: May 23, 2011

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on November 1, 2010 for:

On 8/19/10, a resident blocked the closure of a tray slot with a towel. You opened the resident's room without proper authorization, restrained the resident and failed to ensure that restraint forms and incident reports were completed by all staff involved in violation of IOP 219 and a Directive issued by the Assistant Deputy Director which was reviewed with you in a supervisor's meeting on December 17, 2009. This directive requires that prior to opening a resident's door to deal with food tray slots being propped open, permission is to be obtained from Central Office.¹

Pursuant to the Group II Written Notice, the Grievant was suspended from work for five (5) days with commensurate reduction in pay.² On November 15, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.³ On April 19, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 17, 2011, a hearing was held at the Agency's location.

APPEARANCES

Advocate for the Agency
Grievant
Witnesses

ISSUE

1. Did the Grievant violate IOP Policy Number 219?
2. Did the Grievant, in opening a resident's door, violate a Directive issued by the Assistant Deputy Director on December 17, 2009?
3. Did the Grievant fail to complete all necessary restraint forms and incident reports?

¹ Agency Exhibit 1, Tab 2, Page 8

² Agency Exhibit 1, Tab 2, Page 8

³ Agency Exhibit 1, Tab 2, Page 2

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

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 Agency provided the Hearing Officer with a notebook containing ten (10) tabbed sections. The Grievant objected to Tab 8, Page 6 and the Hearing Officer overruled that objection. Accordingly, the Agency notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing eleven (11) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

On December 17, 2009, a Security Supervisor's meeting was held at the Agency location. Typically this meeting is attended by the Warden and all Security Officers through the rank of Sergeant.⁷ Typed Minutes were prepared for that meeting and those Minutes set forth the names of those who were present.⁸ The Minutes indicated that the Grievant was present at this meeting.

The Major who is Chief of Security for this location testified before the Hearing Officer. He testified that he did not remember if he had excused the Grievant from attending this meeting. It is the ordinary practice of this Agency to have a sign-in sheet for all people who attend meetings of this nature. In this case, the sign-in sheet has been misplaced and there is nothing to verify who actually attended the hearing. The Major who signed off on the Minutes testified that he cannot remember whether the Grievant was present and the Grievant specifically has denied being present.

At this meeting, a policy of the Agency was changed. The new policy regarding the tray slots to the doors for each resident's room was as follows:

Tray slots- if it's not interfering with routine business do not open the door. Intervene only if it interferes with major business. If we have to go in the room, we have to get approval from central office.⁹

The Chief of Security further testified that in the normal course of business, changes of this type would have been covered at muster. The Agency introduced no direct oral evidence that this policy change was covered in a subsequent muster, nor did it introduce any evidence that this policy change was posted, recorded in a log book or recorded in any other central location where it could be read at a later date.

The Agency seems to rely on its investigative reports and interviews with the Lieutenant who was in charge on August 19, 2010, when the incident in question took place. The Special Agent who investigated this matter filed a report on September 29, 2010.¹⁰ In this report, he quotes the Lieutenant as follows:

Lieutenant S indicated that he was aware of the permission needed but that going through Central Office for permission, "it is not practiced."¹¹

In that same investigative report regarding the paperwork requirements for this matter, Lieutenant S was quoted as follows:

Lieutenant S identified that he was aware that there was paperwork missing (restraint form) from the officers concerning the restraint of [the

⁷ Agency Exhibit 6, Pages 1 through 6

⁸ Agency Exhibit 1, Tab 6, Page 2

⁹ Agency Exhibit 1, Tab 6, Page 6

¹⁰ Agency Exhibit 1, Tab 4, Pages 1 through 12

¹¹ Agency Exhibit 1, Tab 4, Page 2

resident], but he did not follow up with the officers to obtain the paperwork and had not addressed the issues with the officers.¹²

Lieutenant S was further quoted as follows:

On the August 19 incident, he did not authorize [the Grievant] to enter the resident's room. His instructions were to "check it out" and his expectation was that the sergeant would assess the situation and report back to him before taking any action.¹³

Lieutenant S stated that he did not question the Grievant because he had other situations that he was dealing with at the time.

In his testimony before the Hearing Officer, Lieutenant S testified that he simply told the Grievant to go and check out the issue regarding the tray slot that was being held open by one (1) of the residents. He testified that he trusted the Grievant's judgment in fixing the problem.

This Lieutenant testified before the Hearing Officer that the Grievant prepared the package of documents that needed to be filed regarding this incident and put it on his desk. The Lieutenant testified that he did not look at that package and simply passed it along to the appropriate authorities. However, as noted above, when questioned by the Special Agent in his investigative report, the Lieutenant testified that he was aware that a restraint form was missing. The Hearing Officer finds that much of this witness' oral testimony was in conflict with what he told the Special Agent.

The Hearing Officer heard testimony from another Sergeant who is employed at this Agency. This Sergeant testified that he knew of no directive that required a Sergeant to seek further permission to open the door of a resident's room. He specifically stated that a Sergeant has that authority. Further, he testified that a towel in this resident's room is deemed to be contraband and that a Sergeant does not need any authority whatsoever to enter a cell to recover contraband.

The Hearing Officer heard from a Corrections Officer of this Agency. This Officer testified that a Sergeant has the authority to open the door of a resident. He further testified that a towel is contraband and that a Sergeant has the authority to retrieve contraband at any time.

Finally, the Hearing Officer heard from the Grievant. The Grievant testified that he was not at the December 17, 2009 Security Supervisor's meeting when the change in policy regarding tray slots was discussed. He further testified that he had never seen it in any written form and that he had never been advised of it by any of his superiors. He testified that he had been sent by his superior officer, the aforesaid Lieutenant, to check out the situation. He deemed that he had authority as a Sergeant to enter the resident's room to retrieve contraband. Pursuant to this perceived authority, he did in fact enter the resident's room and he retrieved the contraband.

¹² Agency Exhibit 1, Tab 4, Page 3

¹³ Agency Exhibit 1, Tab 4, Page 11

Regarding the proper execution of all necessary forms, the Grievant testified that he did in fact fill out all forms that were required of him. However, when he was interviewed by the Special Agent for the Agency, the Special Agent reported that the Grievant stated as follows:

He stated he forgot to complete the Physical Restraint form because he was working by himself that day as a supervisor on the “Max” side of the facility and he had a lot of paperwork to get completed.¹⁴

Finally, while the Superintendent of this Agency did not testify, it is important to note that in a letter of February 11, 2011, he wrote to the Grievant as follows:

...Therefore, I am removing the 5 day suspension and restoring your pay for those days. By accepting this mitigation of removing the 5 day suspension, you agree to cease the grievance procedure at this point.¹⁵

It is clear that, upon his review of this matter as required by the Grievance Procedure, the Superintendent felt that the five (5) day suspension and the five (5) day loss of pay should be mitigated and removed.

The Hearing Officer finds that the Agency has not borne its burden of proof showing that the Grievant was aware of the change in policy regarding tray slots in clients’ doors. The Agency cannot meet its burden of proof regarding whether or not he attended the meeting when this change in policy was announced. The Chief of Security could not testify that the Grievant was present and the Agency has lost the sign-in sheet, the one (1) piece of evidence that would definitively prove whether or not the Grievant was at the meeting. Further, the Agency presented only one (1) witness to corroborate that this matter was discussed at musters and that same witness contradicted himself in his testimony at the hearing as opposed to his testimony when he was interviewed by the Special Agent. The Agency has not borne its burden of proof regarding a violation of IOP 219.

Regarding the issue of failure to properly file all of the necessary documentation in this matter, the Hearing Officer finds, pursuant to the Grievant’s own testimony before the Special Agent, that it is more likely than not that he did in fact fail to file the physical restraint form.

MITIGATION

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...”¹⁶ 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

¹⁴ Agency Exhibit 1, Tab 4, Page 9

¹⁵ Agency Exhibit 1, Tab 2, Page 6

¹⁶ Va. Code § 2.2-3005

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Hearing Officer adopts the reasoning of the Superintendent of this Agency and, because the only issue here before the Hearing Officer now is the failure to file the physical restraint form, the Hearing Officer mitigates this matter by removing the five (5) day suspension and restoring the lost pay of the Grievant for those five (5) days.

DECISION

For reasons stated herein, the Hearing Officer upholds the Group II Written Notice but finds that the five (5) day suspension must be rescinded and all lost pay must be returned to the Grievant.

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 Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁷ 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.¹⁸

[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]

William S. Davidson
Hearing Officer

¹⁷An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁸Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.