

Issue: Group III Written Notice with Termination (sexual misconduct with offenders);
Hearing Date: 05/13/11; Decision Issued: 05/16/11; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9588; Outcome: No Relief – Agency Upheld;

**Administrative Review: EDR Ruling Request received 05/24/11; EDR Ruling No.
2011-2996 issued 06/28/11; Outcome: AHO's decision affirmed; Administrative
Review: DHRM Ruling Request received 05/27/11; DHRM Ruling issued 07/12/11;
Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9588

Hearing Date: May 13, 2011
Decision Issued: May 16, 2011

PROCEDURAL HISTORY

On February 14, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for sexual misconduct with offenders.

On February 28, 2011, 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 April 27, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2011, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency Advocate

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 employed Grievant as a Corrections Officer at one of its Facilities. The purpose of her position was to, "provide security over inmates at the institution and while in transport; supervises their daily activities and observes and records their behavior and movement to ensure their safe and secure confinement." Grievant had prior active disciplinary action. On May 13, 2010, Grievant received a Group I Written Notice of disciplinary action for unsatisfactory or inadequate job performance. On November 16, 2010, Grievant received a Group I Written Notice of disciplinary action with suspension for unsatisfactory or inadequate job performance.

On December 14, 2010, Grievant was working as a Control Booth Officer at the Facility. She became frustrated with the male inmates in the pod. She posted two handwritten signs for offenders to read. Grievant wrote, "I CAN BUY A DICK – IF WANT ONE! RUBBER DIFFERENT COLORS and I can be a!" Grievant also wrote, "What is SHE DOING? I AM NOT A DIKE GAY, WITCH OR VODO!"

Offenders in the pod were upset by Grievant's actions and refused to return to their cells. Other Corrections Officers had to enter the pod to calm down the inmates and persuade them to return to their cells.

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

Department of Corrections Operating Procedure 130.1 sets forth the Rules of Conduct Governing Employees Relationships with Offenders. “Sexual misconduct” is defined as:

Any behavior of a sexual nature between employees and offenders is prohibited. Behavior of a sexual nature includes sexual abuse, sexual assault, sexual-harassment, physical conduct of a sexual nature, sexual obscenity, and conversations or correspondence of an emotional, romantic, or intimate nature. Sexual misconduct will be treated as a Group III offense under Operating Procedure 135.1.

Department of Corrections Operating Procedure 135.1 provides that Group III offenses include:

sexual misconduct with offenders. Any behavior of a sexual nature between employees and offenders under the Department of Corrections supervision is prohibited. This includes behavior of a sexual nature such as, but not limited to, sexual abuse, sexual assault, sexual harassment, physical conduct of a sexual nature, sexual obscenity, and conversations or correspondence of an emotional, romantic, or intimate nature.

Grievant communicated with offenders using sexually charged language in order to intimidate them. Grievant used slang for genitals and sexual orientation rather than addressing offenders in a professional manner. Grievant angered the offenders to the point that other Corrections Officers had to intervene and enter the pod to calm down the offenders. Grievant’s behavior increased the risk of injury to other Corrections Officers. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an employee may be removed. Accordingly, Grievant’s removal must be upheld.

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).

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...”⁴ 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.

Grievant submitted documents and requested witnesses prior to the hearing. She failed to appear at the hearing. The Hearing Officer waited approximately 15 minutes for Grievant to appear. Several hours after the hearing was finished and the record was closed, Grievant contacted the Division of Hearings and asked that the hearing be reopened. Grievant wrote:

I am sorry that I did not show up @ the scheduled time. I was thinking it was suppose to be @ 11:00. That 11:00 stayed in my head because the hearing letter stated be advised we will work pass 11:00. I know this does not look good in my favor. Can a hearing be rescheduled?

The Hearing Officer denies Grievant’s request to reopen the hearing. Grievant was notified by the Hearing Officer during a prehearing conference that the grievance hearing would begin at 10 a.m. The Hearing Officer sent Grievant a letter confirming the time. Grievant requested witness orders. The Hearing Officer sent Grievant copies of witness orders requesting the appearance of witnesses at 10 a.m. No correspondence was given to Grievant mentioning a time of 11 a.m. Just cause does not exist to reopen the hearing.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

⁴ Va. Code § 2.2-3005.

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.⁵

[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].

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

July 12, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9588. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer stated, in relevant part, the following:

On February 14, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for sexual misconduct with offenders.

On February 28, 2011, 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 April 27, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2011, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

In his FINDINGS OF FACT, the hearing officer stated, in relevant part, the following:

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 employed Grievant as a Corrections Officer at one of its Facilities. The purpose of her position was to, "provides security over inmates at the institution and while in transport; supervises their daily activities and observes and records their behavior and movement to ensure their safe and secure confinement." Grievant had prior active disciplinary action. On May 13, 2010, Grievant received a Group I Written Notice of disciplinary action for unsatisfactory or inadequate job performance. On November 16, 2010, Grievant received a Group I Written Notice of disciplinary action with suspension for unsatisfactory or inadequate job performance.

On December 14, 2010, Grievant was working as a Control Booth Officer at the Facility. She became frustrated with the male inmates in the pod. She posted two handwritten signs for offenders to read. Grievant wrote, "I CAN BUY A DICK - IF WANT ONE! RUBBER DIFFERENT COLORS and I can be a !" Grievant also wrote, "What is SHE DOING? I AM NOT A DIKE GAY, WITCH OR VODO!"

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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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

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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 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 nonexclusive 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.

Grievant submitted documents and requested witnesses prior to the hearing. She failed to appear at the hearing. The Hearing Officer waited approximately 15 minutes for Grievant to appear. Several hours after the hearing was finished and the record was closed, Grievant contacted the Division of Hearings and asked that the hearing be reopened. Grievant wrote:

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DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is upheld.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In her request to this Department for an administrative review, the grievant simply states that she is requesting a review. We must remind the grievant that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following applies:

1. If new evidence was discovered that could not have been discovered before the hearing, or if the grievant believes the decision contains an incorrect

legal conclusion, the grievant may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If the grievant believes the hearing decision is inconsistent with state policy or agency policy, the grievant may request the Director of the Department of Human Resource Management (DHRM) to review the decision. The grievant must refer to the specific policy and explain why it is believed the decision is inconsistent with that policy.

3. If the grievant believes that the hearing decision does not comply with the grievance procedure, the grievant may request the Director of EDR to review the decision. The grievant must state the specific portion of the grievance procedure with which it is believed the decision does not comply.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, the grievant's request does not identify any such policy. Rather, it appears that the grievant is disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must respectfully decline to honor this request to conduct the review.

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services