

Issues: Group I Written Notice (unsatisfactory work performance), Group III Written Notice (neglect of wards, violating safety rules, conduct unbecoming), and Termination; Hearing Date: 11/28/11; Decision Issued: 12/21/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9668, 9711; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9668, 9711

Hearing Date: November 28, 2011
Decision Issued: December 21, 2011

PROCEDURAL HISTORY

On May 4, 2011, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. On September 9, 2011 Grievant was issued a Group III Written Notice of disciplinary action with removal for abuse or neglect of clients, violating safety rules where a threat of bodily harm exist, and conduct occurring on the job of such a nature that to continue an employee in his position would constitute negligence.

On June 3, 2011, Grievant filed a grievance to challenge the Agency's issuance of a Group I Written Notice. On September 19, 2011, Grievant filed a grievance to challenge the Agency's issuance of a Group III Written Notice. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested hearings. On September 21, 2011, the EDR Director issued Ruling No. 2012-3108, 2012-3109 consolidating the grievances for a single hearing. On October 26, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On November 28, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee

Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 employed Grievant as an Assistant Superintendent at one of its Facilities. He had been employed by the Agency for approximately 13 years prior to his removal effective September 9, 2011. Except for the facts giving rise to the disciplinary actions against Grievant, his work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency entered into an Interagency Agreement with the Virginia State Police regarding allegations when a crime was committed within a juvenile correctional center operated by the Agency.¹ Under this agreement:

¹ The Agency's agreement is consistent with its obligation under 6 VAC 35-51-160 which provides:

The Virginia State Police has primary responsibility for receiving reports of and investigating alleged criminal activity throughout the Commonwealth. The Department of Juvenile Justice, through its Office of Inspector General has the same powers as a law-enforcement officer in the investigation of allegations of criminal behaviors affecting the operations of DJJ. Additionally, the OIG has the obligation to protect the integrity of DJJ's programs, operations, and juvenile correctional centers.

Investigation of Alleged Criminal Activity Against One or More Residents With an Alleged Resident Victim.

1. Exclusive jurisdiction for investigation will be with the VSP.

D. 1. DJJ and VSP will each designate one or more persons to serve as a liaison between each agency and to the Commonwealth's Attorney office in each jurisdiction in which a juvenile correctional facility or halfway house operated by DJJ is located.²

Several years ago, the Superintendent's practice was to refer incidents of possible criminal behavior by residents to the Virginia State Police for investigation. The number of referrals became frequent. The local Commonwealth's Attorney raised concerns about bringing the Virginia State Police to the Facility for what the Commonwealth's Attorney considered minor issues. He was concerned that the resources of the Virginia State Police could be utilized better elsewhere. Agency managers evaluated the need to utilize the Virginia State Police investigators and informed the Superintendent that he should contact the Virginia State Police for criminal investigations only when residents received serious injuries. The Superintendent communicated that standard to Grievant.

The Superintendent was responsible for supervising three Assistant Superintendents. Grievant was the Assistant Superintendent primarily responsible for security operations at the Facility. His Position Objective was:

Serves as the Assistant Superintendent for Operations at the [Facility]. Supervises activities and staff in the following areas: security, maintenance, food service, staff training, safety, sanitation, and ward

The Departments of Education; Juvenile Justice; Mental Health, Mental Retardation and Substance Abuse Services; and Social Services are responsible for complete and prompt investigation of all complaints and allegations made against providers for which they have regulatory authority, and for notification of the appropriate persons or agencies when removal of residents may be necessary. Suspected criminal violations shall be reported to the appropriate law-enforcement authority.

² Grievant Exhibit 20.

disciplinary process. To plan, implement and manage the overall operations department of [Facility].³

Residents reside in a housing unit at the Facility. The housing unit consists of a room with several tables surrounded by several resident cells. On December 27, 2010, approximately ten residents were in the housing unit with one Juvenile Correctional Officer. The residents were either seated, standing, or moving around the housing unit. The Juvenile Correctional Officer was seated at one of the tables. The Resident⁴ entered the housing unit and walked to the table where the Juvenile Correctional Officer was seated. The Resident had been a member of a gang but had withdrawn from the gang. Several of the other residents were members of the gang from which the Resident had withdrawn. They viewed the Resident as an enemy. The Resident observed the other residents whispering and behaving in a manner that he believed signaled that they planned to attack him. The Resident asked the Juvenile Correctional Officer to let him inside his cell. The Juvenile Correctional Officer and the Resident walked from the table to the Resident's cell. As they approached the cell, at least four of the other residents charged the Resident and began punching and kicking him.⁵ The Resident fell to the floor, tucked his knees inward, and covered his head as the residents continued to punch and kick him. A trash can was thrown at the Resident. The Juvenile Correctional Officer used his radio to call for help and a group of Juvenile Correctional Officers entered the housing unit to stop the residents from assaulting the Resident.

The Resident was removed from the Facility and taken to a local hospital. When he returned to the Facility, he was placed in an isolation cell for his own security.

When Grievant learned of the assault of the Resident, Grievant assigned the Captain to investigate the incident. The Captain's investigation included viewing the video recording of the incident.

On December 29, 2010, the Captain drafted a memorandum⁶ to the Superintendent stating, in part:

On Monday, December 27, 2010 at approximately 2028 hrs, while in HB-400 (a general population unit), Resident ... who had transferred to the unit several hours earlier), was assaulted by four (4) other residents;

³ Grievant Exhibit 6.

⁴ The Resident had attacked staff at various Facilities. He had many "mental health challenges" according to the Superintendent.

⁵ At least one of the attackers was an adult.

⁶ The memorandum was redacted to remove the names of the juveniles involved.

During the assault, Resident ... was punched, kicked, stomped and hit several times with a large plastic trash can and as a result, Resident ... had to be sent out to the emergency room. Resident ... sustained a sprained to his right wrist and a minor bruise to his face.

At the time of the incident, there were ten (10) residents in the unit (including Resident ...). Nine (9) residents were out on the day room floor and one (1) resident was secured inside his room.

On Tuesday, December 28, 2010, [Grievant] asked [Captain] to conduct a preliminary investigation as to why Resident ... was assaulted.

After talking to [Grievant], I [Captain] reviewed the incident via the Rapid Eye Surveillance System and confirmed that Residents ... were the only residents involved in the physical assault of the Resident.

[Resident] said that he believes that the [gang members] are going to assault him every chance they get until he rejoined again. [Resident] said that no matter what they did to him he will not fight back to defend himself. Lastly, [Resident] said that he is afraid for his safety and would like to file criminal charges against the residents who assaulted him.

Investigative Findings or Recommendations:

1. The Rapid Eye Surveillance System captured Resident ... being assaulted by Residents It is recommended that these four (4) residents be charged with Assault on Resident with injuries and reviewed for possible criminal charges.
2. Recommended further review by the Superintendents Office.⁷

As part of the process of formulating his recommendation, the Captain met with Grievant to discuss the incident. The Captain showed Grievant a video recording of the attack. As they discussed the video, Grievant stated words to the effect of "As big as [the Resident] was, if he didn't fight back, he deserved to get his ass whipped." Grievant received a copy of the Captain's memorandum to the Superintendent. The Captain and the Agency referred to the incident as an assault.

On January 3, 2011, Grievant and the Superintendent discussed the incident. They discussed the Captain's report and the Superintendent learned that the Resident

⁷ Agency Exhibit 1.

wanted to press criminal charges. Several days later, the Superintendent met with the Resident to discuss the Resident's request that the other residents be prosecuted criminally. The Resident did not like being placed in an isolation cell. He believed that the residents who had assaulted him should have been segregated instead. The Superintendent explained that the Resident was being isolated for his own security. The Superintendent asked the Resident if he wished to prosecute the other residents. The Resident indicated he no longer wanted to press charges against the other residents. The Superintendent decided not to contact the Virginia State Police because the Resident no longer wanted a criminal prosecution of the other residents.

On March 15, 2011, the Resident wrote a letter to the Agency Head alleging that he had been abused by residents and Agency staff. He wrote that he had been taken to the hospital emergency room because of injuries he suffered. He indicated he no longer felt safe at the Facility in that he might be assaulted by staff and "set up" by residents. He stated that he was very afraid that he would kill some staff or residents because he thought he otherwise might be killed by them first. He wrote that he was involved in a five on one assault and was sent to the emergency room due to the seriousness of his injuries and that he requested to file charges but the administration did not approve it. In response to the Resident's letter, the Deputy Director was assigned to investigate the Resident's allegations.

On April 1, 2011, the Deputy Director first met with Grievant alone regarding the incident. The Deputy Director challenged how Grievant handled the incident and demanded that Grievant explain why Grievant had not referred the matter to the Virginia State Police for criminal prosecution. The Deputy Director was astounded that Grievant had not referred the matter to the Virginia State Police and expressed to Grievant his concern about Grievant's performance. The Deputy Director asked Grievant if he had viewed the video of the incident. Grievant stated that he had not viewed the video. The Captain was asked to bring a copy of the video with him and join the meeting. Grievant, the Deputy Director, and the Captain watched the video. After viewing the video of the assault, Grievant said that it was a serious incident and that if he had reviewed the video previously, he would have pursued criminal charges with the Virginia State Police. The Captain was surprised by Grievant's comment because the Captain knew Grievant's comment was untrue.

The Captain called Special Agent H and told him about the meeting he attended between Grievant and the Deputy Director. The Captain said that the Deputy Director met with Grievant and they had a "heated exchange." The Deputy Director asked Grievant if Grievant had seen the video, and Grievant said he had not seen the video. The Captain exclaimed "but we watched the video together" indicating that the Captain and Grievant watched the video contrary to Grievant's statement to the Deputy Director. Special Agent H perceived the Captain's statements to be "getting something off his chest."

Special Agent H spoke with the Inspector General and informed him of his conversation with the Captain. The Inspector General subsequently told the Deputy

Director of the Captain's comments. Grievant filed a grievance challenging the Agency's issuance of a Group I Written Notice. As part of the Agency's process to prepare for a hearing regarding the Group I Written Notice, the Deputy Director spoke with the Captain on August 23, 2011 and asked him details about whether Grievant had viewed the video prior to Grievant's meeting with the Deputy Director. The Captain told the Deputy Director that Grievant and the Captain had viewed the video

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."⁸ 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."

Group I Written Notice

The Agency contends that Grievant should receive a Group I Written Notice for unsatisfactory work performance because Grievant failed to "follow up" with the Captain's recommendation and Grievant "had yet to review the video".

The Agency has not presented sufficient evidence to support the issuance of a Group I Written Notice. The Captain recommended that, "four (4) residents be charged with Assault on Resident w/ injuries and reviewed for possible criminal charges." The four residents were given disciplinary charges by the Agency. Grievant reviewed the incident with the Captain and the Superintendent. Grievant and the Superintendent discussed whether criminal charges should be pursued with the Virginia State Police. The Superintendent concluded that criminal charges were not appropriate given the Resident's relatively minor injuries. Grievant complied with the Captain's recommendation and acted in accordance with the Superintendent's direction. In addition, Grievant viewed the video. The Agency's assertion that Grievant had not viewed the video is not correct. The Group I Written Notice must be reversed.

Group III Written Notice.

The Agency contends that Grievant abused or neglected clients. No credible evidence was presented to show that Grievant abused or neglected residents. Grievant was not involved in any of the assaults of the Resident. The Agency did not present sufficient evidence to show that failing to refer a matter for criminal prosecution constituted client neglect.

⁸ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

The Agency contends that Grievant violated safety rules where there existed a threat of bodily harm. The Resident's safety depended upon how staff at the Facility cared for him. It did not depend on whether residents who had assaulted him would be prosecuted for their crimes. Grievant did not violate any safety rules that resulted in the assault. After the assault, the Resident was placed in isolation for his safety. Grievant did not violate a safety rule where there was a threat of bodily harm.

The Agency contends that Grievant engaged in "[c]onduct occurring on the job of such a nature that to continue an employee in his position would constitute negligence in regard to agency's duties to the public". No credible evidence was presented to show that if Grievant continued his position it would constitute negligence in regard to the Agency's duties to the public. Grievant did not knowingly or intentionally disregard any Agency policy. Grievant complied with the Facility's practice as defined by the Superintendent based on his conversations with Agency managers. If Grievant had been informed to report all criminal assaults by residents regardless of injuries suffered, there is no reason to believe that Grievant would have disregarded that standard.

The Agency argued that Grievant should be disciplined for his "intentional decision to disregard [the Resident's] request to file charges". The evidence showed the Grievant did not disregard the Resident's request to file criminal charges. Grievant considered referring the matter to the Virginia State Police but did not do so because of the minor injuries suffered by the Resident. Grievant applied the standard for referral that he believed governed contacting the Virginia State Police. Grievant discussed with the Superintendent whether to refer the matter to the Virginia State Police. The Superintendent informed Grievant that the matter was not appropriate for referral. Grievant was entitled to rely upon the judgment of his supervisor.

The Agency argued that Grievant should be removed from employment for telling the Captain that the Resident deserved to be beaten up because he failed to defend himself against numerous residents. The Agency contends that "This statement indicates a total disregard for residents' safety and cannot be tolerated. Your conduct is clearly so egregious in nature that for DJJ to continue you in your position could constitute negligence in regard to the DJJ's duties to the public or to other state employees." Although Grievant's statement was inappropriate, it did not form the basis for Grievant's decision to refrain from referring the matter to the Virginia State Police. Grievant's statement, standing alone, is not sufficient to form a basis for removal. Grievant took no action consistent with his statement. It is not the case that Grievant failed to report the matter to the VSP because he believed the Resident deserved to be beaten up. Grievant failed to report the matter to the VSP because of the Resident's relatively minor injuries. Based on the evidence presented, it is reasonable to conclude that Grievant would have reported the matter to the VSP if the Resident's injuries had been severe even if Grievant believed that the Resident deserved to be beaten up.

The Agency contends that Grievant's actions were in violation of Agency Directives, Regulations, and Standard Operating Procedures. The Agency contends that Grievant acted contrary to:

Administrative Directive 05-009.1, Code of Ethics for Employees of the Department of Juvenile Justice which requires employees “to protect the integrity of personnel, programs and facilities, the Virginia Department of Juvenile Justice hereby promulgates the following Code of Ethics for its employees. All employees must subscribe to this Code of Ethics, which should be included in the Department’s orientation for new employees and presented and explained in appropriate training sessions.” Specifically, this directive requires in part that “I will perform all of my duties in a professional and competent manner, and treat all persons in an evenhanded and courteous manner, humanely and with respect.” Further the directive mandates that “I will strive to be a positive example for persons placed in my care and to act in such a manner as to encourage their reform and rehabilitation.

Grievant did not violate the Agency’s Code of Ethics. He complied with his obligation to have the assault investigated. He reviewed the Captain’s findings and complied with the Captain’s recommendations. He discussed the matter with his supervisor and acted in a manner consistent with his supervisor’s direction. Although Grievant’s comment about the Resident was inappropriate, that comment standing alone, would not form a basis for a Group III Written Notice.

The Agency contends that Grievant violated:

Administrative Directive 05-009.2, [Staff Code of Conduct], under Prohibited Conduct, in part states that: The following actions relating to an employee’s association with wards, probationers, and parolees are specifically prohibited: Treating wards, probationers, or parolees in a manner that is inconsistent with establish Department Procedures; and Refusal to cooperate with or provide requested information during an investigation or providing false or misleading information to investigators.

The evidence showed that Grievant failed to comply with the Agency’s memorandum of understanding with the Virginia State Police but complied with the Superintendent’s interpretation of the circumstances regarding the Facility’s obligation to report an assault to the Virginia State Police. On April 1, 2011, Grievant gave false and misleading information to the Deputy Director who was investigating the assault. Administrative Directive 05-009.2 authorizes the issuance of disciplinary action for violation of the directive but does not specify the level of discipline. Failure to comply with policy is a Group II offense under the Standards of Conduct, DHRM Policy 1.60.

The Agency contends that “you lied to me on April 1, 2011 while I was investigating this matter, by stating that you had not previously reviewed the video of this assault.” The Agency has presented sufficient evidence to support this assertion.

The Agency contends that in its judgment, lying to an investigator constitutes a Group III offense. DHRM Policy 1.60 lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies’ activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.” “[F]alsification of records” is a Group III offense. Falsifying a record includes the intentional misrepresentation of a material fact. On April 1, 2011, Grievant intentionally and untruthfully informed the Deputy Director that he had not watched a video of the assault. The video of the assault and whether Grievant had viewed the video was a material fact with regard to the Deputy Director’s investigation. Grievant’s behavior was similar to behavior such as the falsification of records that would rise to the level of a Group III offense. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant denied that the Captain showed him the video. He contends that his statement to the Deputy Director was truthful. The Agency has established that Grievant viewed the video with the Captain in December 2010 based on two factors. First, the Captain testified that he and Grievant viewed the video in December 2010 as part of the Captain’s investigation. The Captain’s testimony was credible. Second, the Captain was in the room with Grievant and the Deputy Director during part of their meeting. The Captain heard Grievant inform the Deputy Director that Grievant had not viewed the video of the incident. The Captain recognized that Grievant’s statement was untrue. Special Agent H testified that in early April 2011, the Captain called him and said that the Deputy Director came to the Facility and talked to Grievant, they got into a “heated exchange”, and the Deputy Director asked Grievant if Grievant had viewed the video. The Captain told Special Agent H that Grievant denied seeing the video even though the Captain and Grievant had watched the video together. Special Agent H did not have a reason to doubt the Captain’s statements because he perceived the Captain as “getting something off his chest”. Special Agent H’s testimony was credible. The Captain’s statements to Special Agent H are consistent with the Captain’s credible testimony that he and Grievant had viewed the video and that the Captain had observed Grievant falsely deny viewing the video when Grievant met with the Deputy Director.

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....”⁹ 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

⁹ Va. Code § 2.2-3005.

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 **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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 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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.