

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 10/03/11; Decision Issued: 10/05/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9672; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9672

Hearing Date: October 3, 2011
Decision Issued: October 5, 2011

PROCEDURAL HISTORY

On February 3, 2011, Grievant was issued a Group II Written Notice of disciplinary action with a 10 workday suspension for violation of written policy.

On March 2, 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 August 29, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
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 Juvenile Correctional Officer at one of its Facilities. The objective of her position is:

To ensure the protection of the citizens of the Commonwealth by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform.¹

On Saturday, January 15, 2011 at approximately 9 a.m., Grievant, Officer M, and Officer N escorted 22 residents from their housing units into the courtyard for an hour of scheduled recreation. The courtyard is an outdoor area with basketball courts and areas for other activities. At approximately 9:15 a.m., Officer N took a one half hour break and left the courtyard. Grievant sat on a bench and observed residents. Officer M sat on another bench in another part of the courtyard and observed residents. While seated on the bench, Grievant could observe all 22 residents without much difficulty. Some residents were "stepping" and other residents were playing basketball. Some of the residents were seated on the ground within Grievant's line of sight. Some of the residents were standing many feet from Grievant. Other residents were closer to Grievant.

¹ Agency Exhibit 5.

Resident S sat on the bench to Grievant's side. Resident Z sat on the bench to Resident S's side. Resident S called Resident T to come and sit on the bench. Resident T stood 5'4" tall and weighed 296 pounds. In accordance with Resident S's direction, Resident T sat between Resident S and Grievant.² While Grievant was not observing them, Resident S "left a passion mark, 'hickey'" on Resident Z's neck. Residents were not permitted to engage in inappropriate touching. Resident S's and Resident Z's behavior was contrary to the Agency's policies. They understood that their behavior was not permitted.

Officer N returned from her break at approximately 9:45 a.m. The residents returned to the housing unit at approximately 10 a.m. At approximately 11:25 a.m., Officer N noticed on Resident Z's neck a red mark that was about the size of a grape. Officer N asked Resident Z how she got the mark on her neck. Resident Z and Resident S initially denied doing anything wrong but then admitted to Officer N that Resident S put the mark on Resident Z while they were in the courtyard during recreation that morning. Officer N asked them where she was when the behavior happened. They responded that Officer N was on break.

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."³ 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."

Failure to comply with policy is a Group II offense.⁴ Institutional Operating Procedure 212 governs Movement and Supervision of Residents. The purpose of this policy is "to establish consistent procedures to control the movement and supervision of residents within the facility." Section 212 – 4.4 provides:

Staff shall always position themselves where there will be maximum site supervision of recreation activities. Supervisory positions shall encircle the area of resident activity and cover all exit gates or doors.

The Agency argued that Grievant acted contrary to Institutional Operating Procedure 212. Grievant was responsible for supervising 22 residents located

² Resident T believed Resident S asked her to sit between Resident S and Grievant so that Resident T could help block Grievant's view of Resident S.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

throughout the courtyard. Institutional Operating Procedure 212 requires that she positioned herself where there will be maximum site supervision of recreational activities. The question becomes whether Grievant's position was appropriate to observe 22 residents. The evidence showed that Grievant was in a position to observe Resident Z and Resident S because she was positioned next to them. The evidence showed the Grievant was in position to observe the other residents in the courtyard as well. Grievant complied with Institutional Operating Procedure 212 because she was positioned in a location in the courtyard that would enable her to observe all 22 residents including Resident Z and Resident S. The Agency has not established a Grievant acted contrary to Institutional Operating Procedure 212.

The Agency argued that Grievant should have moved from the bench to another position in the courtyard. Institutional Operating Procedure 212 does not require a Juvenile Correctional Officer to reposition herself periodically. It requires that she remain in a location where there will be maximum site supervision of recreational activities. Grievant did so.

"[U]nsatisfactory work performance" is a Group I offense.⁵ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for supervising residents to ensure that they did not engage in inappropriate behavior. Grievant was in a position to observe the behavior of Resident Z and Resident S. The Agency expected Grievant to observe and prevent inappropriate touching between residents. Grievant failed to observe and prevent inappropriate touching between Resident Z and Resident S. Grievant's work performance was unsatisfactory thereby justify the issuance of a Group I Written Notice.

Grievant argued that Resident Z and Resident S had engaged in inappropriate touching several days prior to January 15, 2011 and that Resident Z could have received the mark on her neck on those days and not on January 15, 2011. This argument fails. Officer N observed Resident Z before she exited the housing unit onto the Courtyard. Officer N did not observe any marks on Resident Z's neck. After recreation, Officer N observed Resident Z's neck and noticed the mark. When Officer N questioned Resident Z regarding the mark, the residents confirmed that Resident Z received the mark from Resident S while they were in the recreation yard. On January 19, 2011, Resident Z wrote a statement:

[Resident S] left a passion mark "hickey" on my neck, Saturday while we were in the outside rec. area.

⁵ See Attachment A, DHRM Policy 1.60.

The Agency has presented sufficient evidence to show that the inappropriate behavior between Resident Z and Resident S occurred in the courtyard Saturday, January 15, 2011.

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....”⁶ 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.

Grievant argued that the Agency failed to provide adequate staffing of employees in accordance with its own requirements. Given that Grievant was seated next to the two residents who engaged in inappropriate behavior, it is not likely additional staffing would have affected the outcome of Grievant’s inattentiveness.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with a 10 workday suspension is reduced to a Group I Written Notice. 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.

⁶ Va. Code § 2.2-3005.

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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.