

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 11/07/11;  
Decision Issued: 11/08/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9699; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9699**

Hearing Date: November 7, 2011  
Decision Issued: November 8, 2011

**PROCEDURAL HISTORY**

On June 23, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On July 1, 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 October 17, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 7, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
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?
5. Whether the Agency retaliated against Grievant.

### **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 Senior at one of its Facilities. She has been employed by the Agency for approximately 9 years. The purpose of her position is:

Provide juveniles with a safe environment by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform. Facilitate work skills and/or training prior to release from a JCC or from parole supervision. Address criminogenic factors associated with recidivism by facilitating delivery of appropriate treatment services that will assist juvenile's reentry to the community. Provide assistance as needed to facilitate the juveniles' plan for reentry to the community that addresses the transitioning of work, school, housing, and treatment needs. Improve relationships with our local and state government partners to ensure maximum services for youth.<sup>1</sup>

On June 9, 2011, Grievant and Officer C were responsible for moving approximately 25 residents from the housing unit into a fenced in area in order to walk to the dining hall. At approximately 11 a.m., the residents lined up. Neither Grievant nor Officer C counted the residents before or as the residents were lining up. Grievant went to the

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<sup>1</sup> Agency Exhibit 15.

restroom and then returned to the group. Officer C was at the front of the line and Grievant was at the back of the line. Officer C asked the residents to count off as they passed from the housing unit into the fenced in area. Officer C walked with the front of the line and only heard residents count to approximately 12. He assumed that the remaining residents had counted off and that the count was correct. Grievant assumed that Officer C had accurately and fully counted the residents.

Once Grievant was inside the fenced in area, she heard banging on a window. She ran to the back door of the housing unit to unlock it and found the Resident in the day room. She asked him where he had been because she assumed the Resident might have been meeting with counselors. The Residents said "I was in the bathroom, he knew I was in the bathroom". Grievant asked "he who?" The Resident replied that he was referring to Officer C. Grievant and the Resident rejoined the group and they went to the dining hall. Grievant told the Sergeant of the incident.

### **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."<sup>2</sup> 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 follow policy is a Group II offense.<sup>3</sup> Agency Standard Operating Procedure 212-4.2(1) states, "All juvenile correctional Center staff are responsible for maintaining sight and sound supervision of assigned (and physically present) wards inside and outside the building at all times." Agency Standard Operating Procedure 212-4.1(5) states, "Wards shall be counted before exiting any building or area and again upon arrival at the destination per SOP - 207." Agency Standard Operating Procedure - 207-4.1(8) states, "All counts shall be taken with wards in a stationary position to prevent a miscount. The ward shall be told to stand at a particular spot (i.e., beside your bed or locker) or in a particular formation (i.e., a line - straight or paired) so that an accurate count can be taken."

On June 9, 2011, Grievant failed to take a stationary count of the residents in the housing unit before they moved to the fenced in area. Grievant acted contrary to Agency policy thereby justifying the issuance of a Group II Written Notice. As a result of Grievant's failure to conduct a stationary count, a Resident remained in the housing unit and was outside of Grievant's sight and sound supervision.

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

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

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...”<sup>4</sup> 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 disciplinary action against her should be made mitigated for several reasons. First, the incident had little or no impact on agency operations. Second, the Agency inconsistently disciplined employees engaging in similar behavior. Third, she reported the matter herself because she recognized that the matter was serious. Fourth, her work performance was excellent and she had no prior disciplinary action. Fifth, the level of discipline was harsh. Sixth, she was unaware that Officer C had allowed the Resident to use the restroom after he lined up the residents for lunch.

Grievant has not presented sufficient evidence to mitigate the disciplinary action. Grievant’s failure to comply with policy impacted the Agency because the resident was no longer receiving proper supervision. Had the Resident not indicated that he had been left behind, Grievant might not have recognized he was missing. An unsupervised resident poses a significant risk to the Agency.

Grievant failed to present sufficient details to support her allegation that the Agency had inconsistently disciplined employees. The Assistant Superintendent testified that he had not given lesser disciplinary action to other employees engaging in similar behavior. Officer C received a Group II Written Notice.

The Assistant Warden testified that he considered the fact that Grievant reported the incident but considered the matter so serious that it was not sufficient to reduce the disciplinary action. Although Grievant’s decision to report her own violation of policy speaks well of her professionalism, it is not, in itself, a basis to establish that the Agency’s level of disciplinary action exceeds the limits of reasonableness.

Grievant presented testimony showing that her work performance was excellent. She had no prior disciplinary action. These facts, standing alone, rarely form a basis to mitigate disciplinary action under the EDR Rules.

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<sup>4</sup> Va. Code § 2.2-3005.

Grievant considered the level of disciplinary action to be harsh. If the Hearing Officer assumes for the sake of argument that the level of disciplinary action was harsh, that fact does not permit the Hearing Officer to mitigate the disciplinary action. The Agency's action was consistent with written policy. Thus, it did not exceed the limits of reasonableness.

Although Grievant was unaware that Officer C had not properly counted the residents, Officer C's behavior does not provide a basis to reduce the disciplinary action against Grievant. Grievant had an independent duty to count the residents prior to their leaving the housing unit.

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

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>5</sup> (2) suffered a materially adverse action<sup>6</sup>; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>7</sup>

Grievant argued that the Agency retaliated against her because she filed a grievance against another employee at the Facility. Grievant engaged in protective activity because she filed a grievance. She suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between the adverse action and her protective activity. The Assistant Warden testified that he did not take disciplinary action against Grievant in order to retaliate against her. His denial was credible. There is insufficient evidence for the Hearing Officer to conclude that the Agency retaliated against her.

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<sup>5</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>6</sup> On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

<sup>7</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>8</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.