

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (failure to follow policy), and Termination; Hearing Date: 06/06/12; Decision Issued: 06/21/12; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9821, 9822; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9821 / 9822

Hearing Date: June 6, 2012
Decision Issued: June 21, 2012

PROCEDURAL HISTORY

On February 2, 2012, Grievant was issued a Group II Written Notice with removal for violating DCE Policy 2-1, Information Technology System Usage and DCE Policy 3-5, Use of Inmate Aides. On February 2, 2012, Grievant was issued a second Group II Written Notice of disciplinary action with removal for failure to follow DCE Policy 3-28, Tool Control.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On April 25, 2012, the EDR Director issued Ruling No. 2012-3330, 2012-3331 consolidated the grievances for a single hearing. On May 7, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 6, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 Correctional Education employed Grievant as a Vocational Teacher at one of the Department of Corrections Facilities. He began working for the Agency in June 2004 until his removal effective February 2, 2012. The purpose of his position was:

To provide effective Career and Technical Education instruction in the assigned trade area; to assist assigned students to complete the required competencies for that trade area; demonstrate effective classroom or lab management; ensure that the lab is operated in compliance with all aspects of safety management; and to maintain accurate and current student records for assigned students.¹

Grievant had prior active disciplinary action. On September 22, 2011, Grievant received a Group II Written Notice for violating DCE Policy 3-5, Use of Inmate Aides.

¹ Grievant Exhibit 1.

The Inmate was a student in Grievant's class.² He sat at a desk with a computer in the back of the classroom approximately 30 feet away from Grievant's desk.³ Over an unknown period of time, the Inmate wrote a screenplay on his computer in the classroom. When Grievant was at his desk or working with another student, Grievant could not observe the Inmate. When Grievant walked near the Inmate, the Inmate could have stopped working on his screenplay and resumed other appropriate computer work. Over a period of one or more days, the Inmate removed the printer attached to Grievant's computer located in the front of the classroom and attached it to his computer in the back of the classroom. He Inmate printed a 68 page screenplay that he had written. Grievant had not permitted the Inmate to print the screenplay. Grievant did not know that the Inmate had removed Grievant's computer because Grievant was distracted in order to attend to other duties.

The Department of Corrections has a Tool Officer who is responsible for accounting for and issuing tools including those used by Grievant as part of his teaching. Because of concerns about inmates stealing tools and using them as weapons or for other purposes, the Agency established a procedure to identify tools and ensure their safekeeping. When a new tool for the Facility is purchased by the Agency, the DOC Tool Officer engraves a unique number on the new tool and enters that number into an inventory system. The DOC Tool Officer places the tool on a wall and paints a silhouette of the tool. When a tool is removed from the wall, the silhouette remains so that an employee can see that the tool has been removed and what type of tool has been removed.

Grievant wanted to replace a conduit bender. He filled out an order form and submitted it to the Secretary who ordered the tool. Several days later, the Secretary called Grievant and told him that some electrical supplies for him had arrived at the Facility. When Grievant looked through the electrical supplies, he noticed that the conduit bender he wanted was included with the electrical supplies. He noticed that it had not been processed by the Tool Officer because he observed that the conduit bender had not been engraved. He used a nail to write a number on the tool that was the same number as the conduit bender he intended to replace. He took the conduit bender to his classroom and placed it in his locked tool room for use by Inmates.

The DOC Tool Officer did not know that Grievant was in possession of the conduit bender and that it had not been engraved or silhouetted as required. On January 4, 2012, the Major conducted an inspection of Grievant's classroom and tool room. The Major observed the conduit bender on a shelf in the tool room of the classroom.

CONCLUSIONS OF POLICY

² Grievant taught students from 8:15 a.m. until 11:15 a.m. and from 1:15 p.m. until 3:15 p.m.

³ There were approximately eight or nine computers in the classroom.

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.”⁴ 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 II Written Notice for Inmate Use of Printer

The Agency alleged that Grievant allowed the Inmate to write and print a 68 page screenplay on a computer in Grievant’s classroom. No credible evidence was presented to show that Grievant knew or permitted the Inmate to write a screenplay on a computer in the classroom. Given the arrangement of workstations in the room, it would have been easy for the Inmate to observe Grievant approaching him and then stop working on the screenplay until Grievant went to another location in the classroom. No credible evidence was presented to show that Grievant allowed the Inmate to use his printer to print off the Inmate’s document. No credible evidence was presented showing that Grievant was negligent in his failure to observe the Inmate. It appears that the Inmate took Grievant’s printer without Grievant’s permission or knowledge and printed the document. Grievant had many duties that would have taken him away from his desk and prevented him from observing the Inmate. There is no basis to take disciplinary action against Grievant. The Group II Written Notice for failure to comply with DCE Policy 3-5 must be reversed.

Group II Regarding Tool Control

DCE Policy 3-28 governs Adult Tool Control and is intended to provide standard tool control guidelines to meet the security requirements of each correctional institution operated by the Department of Corrections. Section F of this policy provides:

Failure to adhere to the “Standard Tool Control Guidelines for Adult Career and Technical Education Programs,” and/or local tool control procedures will result in a Corrective Action Plan, which may affect the operation of the identified CTE⁵ program or a Written Notice, per Department of Human Resource Management’s Standards of Conduct policy.⁶

The Agency’s Tool Control Procedure provides:

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ CTE refers to Career Technical Education.

⁶ Agency Exhibit 4.

Whenever a new tool is ordered, it shall be delivered to the designed administrator in the school office. The tool shall be locked in a secured closet or cabinet until the teacher or administrator can take it to the CTE classroom. Any new tool must be engraved, silhouetted, added to the inventory, and locked in a secure cage or tool room before it can be used by students or staff. This should be accomplished within one business day of the tool arriving. If there is insufficient space for a new tool, a cage should be ordered prior to ordering the tool. If a new tool cannot be silhouetted it must be stored off-site until an appropriate area is developed for the tool to be silhouetted. (Emphasis added.)⁷

Grievant received the tool from the Secretary, wrote a number on the tool that was the same number as the one that was being replaced, and then took the tool to his tool room for use. Grievant failed to comply with the Agency's Tool Control Procedure and Adult Tool Control policy because he began using the tool before it has been engraved, silhouetted, and added to the tool inventory by the DOC Tool Officer. Grievant knew that the tool had to be engraved because he attempted to engrave it with the same number as the tool being replaced. The number Grievant wrote was not a unique number and was not the same as engraving a tool. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant had prior active disciplinary action consisting of a Group II Written Notice. With the Group II Written Notice upheld as part of this grievance, Grievant has accumulated two Group II Written Notices and, thus, the Agency's removal must be upheld.

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..."⁸ 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.

⁷ Agency Exhibit 4.

⁸ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for violating DCE Policy 2-1 and DCE Policy 3-5 is **rescinded**. The Agency's issuance to the Grievant of a Group II Written notice of disciplinary action with removal for violating DCE Policy 3-28 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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.