

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 04/18/16; Decision Issued: 04/20/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10778; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10778

Hearing Date: April 18, 2016

Decision Issued: April 20, 2016

PROCEDURAL HISTORY

On November 9, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.¹

On November 24, 2015, 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 March 7, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 18, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

¹ The Written Notice also removed Grievant as the treatment team specialist. Grievant indicated she did not seek reinstatement to the treatment team and, thus, the Hearing Officer will not address the appropriateness of including this sanction with the Written Notice.

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 employs Grievant as a Corrections Officer at one of its Facilities. She has been employed by the Agency for approximately 22 years. Employees including Grievant were searched prior to passing from the Facility's Front Entry into the Facility's secured area where inmates reside.

The Front Entry Officer was responsible for determining whether items may be brought into the Facility's secured area. The Warden often selected "strong" employees for the position because he wanted employees who were capable of telling others not to bring in items into the secured area.

The Facility had lockers in the entryway for visitors to the Facility to place their items in the lockers as they visited with inmates on the weekends and holidays. Staff began using the lockers even though they were set aside for visitors. The Warden decided that employees should not use the lockers and should not bring the locker keys into the secured area of the Facility. Employees were notified in the morning briefings that they could not use the visitors' lockers or bring the locker keys into the secured area. Grievant may not have received that notification.

On September 30, 2015, Grievant placed her items in the visitors' locker and took the key with her and approached the Front Entry Officer. The Front Entry Officer searched Grievant and observed the key and knew that it was not permissible to bring the key into the secured area. The Front Entry Officer told Grievant that she could not bring in the key. Grievant did not agree and became angry that she was being prevented from taking the key inside the secured area. Grievant told the Front Entry Officer she was going to bring the key inside. Grievant said that she brought the key inside yesterday and she was going to bring it inside again.

The Front Entry Officer used her radio to ask the Lieutenant to call her on the telephone. Grievant approached the Front Entry Officer and tried to take the key out of the Front Entry Officer's hand. The Lieutenant called the Front Entry Officer who asked him whether Grievant could bring the key inside the secured area. The Lieutenant told the Front Entry Officer to tell Grievant she could not bring the key inside the secured area. Grievant refused to listen to the Front Entry Officer so the Lieutenant told the Front Entry Officer to put Grievant on the telephone. The Front Entry Officer put the Lieutenant on speakerphone. The Lieutenant advised Grievant she could not bring the key inside the secured area. He also said he was on his way to the Front Entry area to solve the issue. Grievant told the Lieutenant two times that she was going to bring the key into the secured area.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁵ In order to prove inadequate or unsatisfactory job 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.

On September 30, 2015, Grievant approached the Front Entry Officer and was told she could not bring a key into the secured area. Grievant disregarded the Front

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Entry Officer's authority and told the Front Entry Officer she was going to bring in the key anyway. Grievant attempted to grab the key from the Front Entry Officer's hand rather than waiting for the Front Entry Officer to give her the key. Grievant disregarded the Lieutenant's authority when she told him she would not follow his instruction not to bring the key into the secured area. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

Grievant argued that the disciplinary action was too harsh and that she was a good employee. The evidence showed that the Agency issued disciplinary action in accordance with the Standards of Conduct and exercised appropriate judgment in determining the level of disciplinary action.

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 Human Resource Management"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. 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 **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 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

⁶ *Va. Code § 2.2-3005.*

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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