

Issues: Group II Written Notice (failure to follow policy), and Termination (due to accumulation); Hearing Date: 05/20/16; Decision Issued: 05/23/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10789; 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: 10789

Hearing Date: May 20, 2016

Decision Issued: May 23, 2016

PROCEDURAL HISTORY

On February 17, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On March 4, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 28, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 20, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's 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 Corrections employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately eight years. Grievant had prior active disciplinary action. On March 18, 2015, Grievant received a Group I Written Notice. On January 19, 2016, Grievant received a Group II Written Notice.

On December 4, 2015, Grievant and Officer H were working in the housing unit. They escorted the Offender from his cell to the shower. They placed the Offender in the shower. The Offender threw juice on Officer H and also spit on Officer H. Officer H walked quickly to another part of the housing unit and picked up a tube of spoiled milk from the floor. Officer H walked back to the shower and squirted the milk on the Offender. Grievant observed the Offender throwing juice on Officer H and spitting on him. He did not see Officer H throw milk on the Offender but did smell sour milk coming from the Offender in the shower.

The Offender began complaining while in the shower. Sergeant C was making rounds and passed by the shower. She heard the Offender complaining and asked him about his concerns. The Offender told Sergeant C that he had spit on Officer H and Officer H threw something on him.

Sergeant C observed Grievant nearby so she took him to the stairwell away from the shower and asked him what had happened. Grievant denied seeing the Offender

spit on Officer H. He denied he observed any conflict between Officer H and the Offender.

Grievant did not write an incident report on December 4, 2015 even though he had access to VACORIS, the Agency's incident report database. Grievant wrote an incident report on December 17, 2015 after being instructed to do so as part of the Agency's investigation of the incident.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

DOC Operating Procedure 038.1 governs the Reporting of Serious or Unusual Incidents. An "Incident" under this policy includes an "actual or threatened event or occurrence outside the ordinary routine that involves: The life, health, and safety of employees, volunteers, guests, or offenders"

Grievant's Post Order required that he, "[i]mmediately report any unsafe, unlawful, unusual, suspicious or otherwise inappropriate activity occurring in the area of control of your supervision and persons on other posts that may need to know of such."⁴

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁵ The Offender's action of throwing juice and spitting on Officer H was an incident under the Agency's reporting policy. It was out of the ordinary and involved the health and safety of Officer H. Grievant observed the incident but failed to make immediately an incident report. Grievant acted contrary to policy thereby justifying the issuance of a Group II Written Notice.

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

⁴ Agency Exhibit 4.

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

Grievant argued that he reported the incident to Sergeant C shortly after the incident occurred. Sergeant C testified she asked Grievant about the Offender's claim and Grievant denied observing any conflict between the Offender and Officer H. Grievant presented no evidence to contradict this testimony.

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 II 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 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

⁶ Va. Code § 2.2-3005.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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