

Issues: Group III Written Notice (falsifying records), Group III Written Notice (unsatisfactory performance, failure to follow instructions, violation of safety rule), and Termination; Hearing Date: 10/04/18; Decision Issued: 01/05/18; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 11079; Outcome: Partial Relief; **Administrative Review: Ruling Request received 01/18/18; EDR Ruling No. 2018-4672 issued 02/15/18; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11079

Hearing Date: October 4, 2017
Decision Issued: January 5, 2018

PROCEDURAL HISTORY

On July 21, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records. On July 21, 2017, Grievant was issued a second Group III Written Notice with removal for unsatisfactory performance, failure to follow instructions, and violation of a safety rule.

On July 31, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 22, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 4, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 employed Grievant as a Juvenile Corrections Officer at one of its facilities. She had been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced.

Grievant was responsible for conducting resident checks. To check a resident, Grievant was obligated to look through the window of the resident's room, observe the resident, and then record her observation. A clipboard with a paper Confinement Monitoring Sheet was attached to the resident's door so Grievant could easily record her observations.

Resident M was locked inside a room with a door that opened into a dayroom. The door to Resident M's room had a window enabling juvenile correctional officers to see inside the room. Inside the room was a bench where Resident M could sit.

Resident M was supposed to be checked every five minutes because Resident M was at risk of injuring himself. On April 18, 2017, Grievant completed the Confinement Monitoring Form by signing her initials and writing the code "5" for the times of 6:20 p.m., 6:25 p.m., 6:30 p.m., 6:35 p.m., 6:40 p.m., 6:45 p.m., 6:50 p.m., 6:55 p.m., 7:00 p.m. and 7:05 p.m. Code "5" meant that Grievant observed Resident M standing at the

door. Grievant signed her initials and wrote code "2" for the times of 7:10 p.m. and 7:15 p.m. Code "2" meant calm/alert. At 7:15 p.m., Grievant wrote "Resident hitting himself" in the comments section of the form.

Grievant did not look into Resident M's room at 5:20 p.m., 5:25 p.m., or 5:30 p.m. She made entries at those times to "cover" for Officer F who was supposed to have completed the checks but had left without doing so.

At approximately 6:24 p.m., Grievant looked into Resident M's room. Resident M was standing at the door. At approximately 6:28 p.m., Grievant looked into Resident M's room. Resident M was standing in front of the door. Grievant wrote on the Confinement Monitoring Sheet for Resident M.

At approximately 6:32 p.m., Grievant walked past Resident M's door, but she did not look inside. She was speaking with other residents. At approximately 6:34 p.m., Grievant walked past Resident M's door, but did not look inside. She walked near the door and stood to talk to other residents, but did not look inside Resident M's door.

Resident M bit his arm at approximately 6:39 p.m. and began other self-injurious behavior. At approximately 6:41 p.m., Grievant opened the door to Resident M's room and gave him a snack. Resident M sat down in his room and began eating his snack. He also began spreading his blood on the wall of his room. He continued self-injurious behavior.

At approximately 6:45 p.m., Grievant walked past Resident M's room and glanced in the door. Resident M was standing in front of the door.

At approximately 6:48 p.m., Grievant walked past Resident M's room and glanced inside the door. Resident M was standing in front of the door.

At approximately 6:51 p.m., Grievant walked past Resident M's room and glanced inside the door. Resident M was standing in front of the door.

At approximately 6:51 p.m., Resident M bit his forearm and spat the blood on the wall. He continued to bite himself and spit blood for several minutes. He hit himself in the face and smeared blood over his face.

At approximately 6:54, Grievant and another employee walked past Resident M's door. Grievant did not glance inside the room. If she had looked inside the room, she would have seen Resident M seated with blood splattered about him.

At approximately 6:54 p.m., another employee looked inside Resident M's room and then walked away without taking any action. If he had looked closely, he would have observed Resident M seated with blood splattered about him.

At approximately 6:56 p.m. Grievant walked out of the office and past Resident M's door. She did not glance inside the room. If she had looked inside the room, she would have observed Resident M seated with blood splattered about him.

At approximately 6:59, Resident M continued to bit himself and wipe his blood on the walls.

At approximately 7 p.m., Grievant walked past Resident M's door, but did not glance inside. If she had looked inside, she would have seen Resident M seated, holding his neck, and looking at his blood splattered on the bench and walls.

At approximately 7:01 p.m. another employee and Grievant approached Resident M's door. The other employee looked inside and then walked away. Grievant lifted the Confinement Monitoring Sheet and appeared to make entries on the sheet. She did not glance inside the room. If she had looked inside the room, she would have seen Resident M seated on a bench and holding his neck with blood splattered about him.

At approximately 7:02 p.m., Grievant placed papers on the door of Resident M's room. She did not look inside the room. Resident M was seated with blood splattered about him. Grievant walked away from the room.

At approximately 7:08 p.m., Grievant walked by the door of Resident M's room twice. She did not glance inside. If she had looked inside his room, Grievant would have observed Resident M seated on the bench with blood on his face and splattered around him.

At approximately 7:09 p.m., Grievant walked to Resident M's door and looked directly inside. She observed Resident M standing at the door facing her. She recognized that he was in distress. She unlocked and opened his door. She walked inside the room and escorted Resident M out of the room and out of the unit.

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."¹ 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 III Written Notice - Falsifying Records

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Falsifying records is a Group III offense. The Agency maintains the Confinement Monitoring Sheet as a record reflecting the observations of residents under the Agency's control. Grievant was required to check Resident M every five minutes because he was at risk of hurting himself. Grievant wrote on the Confinement Monitoring Sheet that she checked him every five minutes from 6:20 p.m. to 7:15 p.m. for a total of 12 times. The evidence showed that Grievant did not look into Resident M's room 12 times and that there were time gaps of 13 minutes between 6:28 p.m. and 6:41 p.m. and of 18 minutes between 6:51 p.m. and 7:09 p.m. Grievant falsely wrote that she checked Resident M every five minutes when she did not do so thereby justifying the Agency's issuance of a Group III Written Notice for falsifying records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that the disciplinary action was excessive because she was not trying to hide anything. Although the Agency could have addressed Grievant's behavior with a lesser level of disciplinary action, its decision to issue a Group III Written Notice was consistent with the Standards of Conduct. In the absence of mitigating circumstances, the Hearing Officer cannot reduce the disciplinary action simply because he may have issued a different level of disciplinary action.

Grievant pointed out that at one point an emergency call was made that distracted Grievant. This emergency may account for some of the times Grievant did not make her five minute checks, but it does not excuse Grievant falsely reporting making five minute checks. To the extent this emergency distracted Grievant from her duties, she falsely wrote on the Confinement Monitoring Sheet that she performed her duties.

Grievant asserted that her watch may have been approximately seven minutes faster than the time shown on the video recording. Assuming this to be true, there would remain 13 and 18 minute gaps during which Grievant wrote she conducted checks but she did not do so.

Group III Written Notice – Unsatisfactory Performance, Failure to Follow Instructions, and Violation of a Safety Rule

The second Group III Written Notice is not materially different from the facts and reasoning giving rise to the Group III Written Notice for falsifying records. Unsatisfactory performance is a Group I offense. Failure to follow instructions is a Group II offense. Grievant's failure to comply with a safety rule of completing five minute checks was the reason why Grievant's action was a falsification of records. There is no basis to take disciplinary action a second time for the same facts and reasoning contained in the first Group III Written Notice. Accordingly, the second Group III Written Notice must be reversed.

Mitigation

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”² 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 contends the disciplinary action should be mitigated because two other employees looked into Resident M’s room and took no action. Grievant and those other two employees were not similarly situated. Grievant was responsible for completing timely observations and writing on the Confinement Monitoring Sheet what she observed. The two other employees did not have these duties. 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 III Written Notice of disciplinary action with removal is **upheld**. The second Group III Written Notice with removal for unsatisfactory performance, failure to follow instructions, and violation of a safety rule is **rescinded**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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

² Va. Code § 2.2-3005.

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.