

Issues: Group II Written Notice (failure to follow policy), and Group II Written Notice with Termination (failure to follow policy); Hearing Date: 03/05/13; Decision Issued: 03/13/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 10027; 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: 10027**

Hearing Date: March 5, 2013  
Decision Issued: March 13, 2013

#### **PROCEDURAL HISTORY**

On January 14, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow Policy 204. On January 14, 2013, Grievant was issued a second Group II Written Notice of disciplinary action with removal for failure to follow Post Order 13.

On January 15, 2013, Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded to hearing. On February 4, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 5, 2013, 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 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 Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its facilities.

On January 1, 2013, Grievant was working in the Housing Unit Control Room for the Special Housing Unit. Officer R and Officer T entered the Housing Unit pod to deliver after-dinner snacks to the Resident in his cell. As Officer T and Officer R entered the pod, Officer T propped the hallway entry door open. He did so out of habit. They walked in front of the Resident's cell door. The Resident was standing in front of his door ready for the door to open. Each cell in the pod had a camera inside the cell. Grievant could have observed that the Resident was standing in front of his door but Grievant did not look at the camera. Under the Agency's practice, residents must be sitting on their beds when juvenile correctional officers open the doors to the cells in the special housing unit. Although the Resident was standing at his door, Officer R waived his arm to signal Grievant to open the cell door.

The Agency's facility has an interlock system which prevents a cell door from opening if the hallway entry door is open. In order for Grievant to open the Resident's cell door, he had to override the interlock system because the hallway entry door had been propped open by Officer T. Once the Resident's door was open, the Resident received his snacks. He placed his arm in the doorway to block closure of the door. Grievant walked out of the housing unit control booth without locking the door to the control room. He walked down the hallway outside the pod to do paperwork in another

location of the facility. Grievant left the door to the housing unit control room unlocked. Officer R spoke with the Resident and asked that he remove his arm. He refused. The Resident then pushed open the door further and walked outside of his cell into the pod common area. The Resident then observed that the hallway entry door was open and he exited the pod and closed the door behind him. When the door shut, Officer R and Officer T were locked inside the pod. The Resident turned down the hallway and walked into the Housing Unit Control Booth formerly occupied by Grievant. The Resident broke several windows and several computer panels and equipment. He caused damage of approximately \$22,000 to the Housing Unit Control Booth.

## 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>1</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>2</sup>

### Group II Written Notice - Policy 204.

Institutional Operating Procedure 204 governs Institutional Control Centers. Section 204-4.2 provides:

Doors to the Master Control Center, Secondary Control Centers, and Housing Unit Control Centers shall remain locked and no unauthorized personnel shall be permitted to enter. \*\*\*

At [Facility], no resident is allowed access to the Control Centers. All cleaning, painting, and maintenance is to be accomplished by staff members or contract employees.<sup>3</sup>

On January 1, 2013, Grievant left his post in the Housing Unit Control Room without locking the door. This enabled the Resident to gain entry and destroy property inside the Control Room. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with Policy 204.

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> Agency Exhibit 4.

## Group II Written Notice – Post Order

Post Orders are the Agency's policy governing specific posts. Grievant was subject to Post Order 13 governing Special Housing Control Room Operator. This Post Order provides that Grievant was obligated to:

Ensure that doors remain locked at all times when not in use.

Ensure all doors are locked when not in use. Any unlocked door indications on the touch screen will be reported immediately to a Supervisor.

Control Room Operator shall not initiate an "Interlock override" of any doors unless authorized by the Shift Commander.

On January 1, 2013, Officer T left the entry door propped open thereby activating a light on Grievant's touch screen. Grievant failed to report this to the Supervisor. Grievant initiated an "Interlock override" to open the Resident's cell door without obtaining authorization from the Shift Commander. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with Post Order 13.

Upon the issuance 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 Grievant.

*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 ...."<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 Agency inconsistently applied disciplinary action because the Agency removed him from employment but did not remove Officer T and Officer R. The Agency took disciplinary action against Officer T for propping the door open. The Agency took disciplinary action against Officer R for not waiting until the

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<sup>4</sup> *Va. Code § 2.2-3005.*

Resident was seated on his bed before signaling that the cell door should be opened. Grievant violated Policy 204 and Post Order 13 thereby justifying the issuance of two Group II Written Notices. Insufficient evidence was presented to show that Officer T and Officer R violated two separate policies. It is not clear that Grievant and Officer T and Officer R were similarly situated given that Grievant violated two policies but the other officers did not do so. In addition, the Agency perceived Grievant's behavior to be more severe given the amount of damage done to the Control Room. The Agency's judgment is supported by the evidence. In light of the standard set forth in the Rules, 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 for failure to comply with Policy 204 is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to comply with Post Order 13 is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.