

Issue: Group II Written Notice (unsatisfactory performance); Hearing Date: 04/11/13;
Decision Issued: 04/15/13; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10036; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10036

Hearing Date: April 11, 2013

Decision Issued: April 15, 2013

PROCEDURAL HISTORY

On December 5, 2012, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory work performance.

On December 26, 2012, 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 5, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 11, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Counsel
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:

Old Dominion University employs Grievant as a Police Officer. She has been employed by the Agency for approximately 22 years. No evidence of prior active disciplinary action was introduced during the hearing.

On April 24, 2012, the Chief of Police sent a memorandum to employees including Grievant stating:

It has come to my attention that sworn officers are contacting Resident Assistants and Housing staff to assist ODUJ officers in entering resident hall rooms in an attempt to conduct police investigations or to assist outside police agencies locate students; such as to serve a subpoena. This practice is unlawful and should stop immediately. The Constitution and case law supports that an individual is afforded a higher expectation of privacy in their residence than in any other location. This holds true in a residence hall as well. This expectation of privacy expands to more than just the individual room within a residence hall, and extends to the common areas of the room as well as the hallways and lobbies. You should equate a resident hall room to your own house – ask yourself; could the local police enter my home in the same circumstances?

The only exceptions to this will be for matters of life safety and after officers have gained the approval of the on-duty supervisor.

Effective immediately, officers are instructed to notify their road supervisor anytime they will be conducting a search of a resident hall or vehicle prior to initiating the search. The road supervisor will respond to the scene and provide guidance to the officer as needed.

Search and seizure and training will be scheduled for all sworn personnel over the summer months.¹

Training was offered to employees including Grievant regarding this memorandum.

On October 17, 2012 at 12:30 a.m., two students were in their room and were in possession of a laser light. They pointed the light at Officer P while he was in his police vehicle outside of the six-story student housing unit. Their actions were contrary to Va. Code § 18.2-57.01. Officer P notified the dispatcher of what had happened. Officer P got out of his vehicle and walked to the first floor reception area and spoke with Resident Assistant B and Resident Assistant A. He explained what had happened and that the behavior was illegal. He identified what he believed was the room on the fourth floor from which the laser light originated. He spoke with two other students to confirm the room from which the laser light originated. Officer P and the two Resident Assistants walked to the fourth floor of the housing unit. One of them knocked on the door of the students' room but no one answered. The two Resident Assistants discussed whether to get the master keys to enter the room. They decided that because a crime had occurred they would obtain the keys and enter the room. Resident Assistant B called the Assistant Hall Director and explained the circumstances. The Assistant Hall Director authorized the two Resident Assistants to enter the room. Resident Assistant B walked to another floor in the building to obtain the master keys.

Grievant entered the housing unit and met Resident Assistant B after he had obtained a master key and was in the process of returning to the fourth floor of the building. Grievant walked with him and they returned to the fourth floor and joined Officer P and Resident Assistant A. Grievant asked if the Resident Assistants had obtained the permission of their supervisor to enter the room. They told her they had permission from the Assistant Hall Director. Officer P and Grievant watched as Resident Assistant A used the master key to open the students' room. The two Residents Assistants determined that no one was inside the room. Neither Officer P nor Grievant walked inside the room.

CONCLUSIONS OF POLICY

¹ Agency Exhibit 6.

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.”² 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.”

The Agency argued that Grievant should receive a Group II Written Notice for failure to comply with the April 24, 2012 memorandum. Grievant failed to comply with the spirit of the memorandum, but not the specific terms of the memorandum. The memo addresses contacting Resident Assistants to assist with ODU officers entering resident halls to conduct police investigation. Grievant served in a backup role to Officer P. Officer P was in a leadership position. Grievant arrived at the housing unit after Officer P had initiated the investigation and had spoken with the two Resident Assistants. The decision to obtain a key to enter the students’ room had already been made by the two Resident Assistants without any input from Grievant. Grievant was at fault because she should have remembered the contents of the memorandum and recognized that Officer P’s investigation was inconsistent with the Agency’s policy. She should have taken some action to speak with Officer P or her supervisor to address whether the investigation was consistent with policy.³ Grievant’s behavior was unsatisfactory work performance. Unsatisfactory work performance is a Group I offense.⁴ The Agency has presented sufficient evidence to support the issuance of a Group I offense.⁵

Grievant argued that no evidence was presented that the laser light was attached to a weapon. This argument is not significant. Shining a laser light on a police officer is contrary to law regardless of whether or not it is positioned on a weapon.

Grievant argued that the Agency failed to provide her with a Form 31 prior to questioning her about the incident. Form 31 is designed to identify the rights afforded to police officers under Va. Code § 9.1-500 et seq. Va. Code § 9.1-501 governs how the investigation is to be conducted:

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ The road supervisor did not respond to the scene of the investigation as expected under the April 24, 2012 memorandum.

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ This outcome is consistent with how the Agency styled the Written Notice. The Agency alleged Grievant engaged in unsatisfactory work performance and used Code 11 which is the Code for a Group I offense.

The provisions of this section shall apply whenever an investigation by an agency focuses on matters which could lead to the dismissal, demotion, suspension or transfer for punitive reasons of a law-enforcement officer:

1. Any questioning of the officer shall take place at a reasonable time and place as designated by the investigating officer, preferably when the officer under investigation is on duty and at the office of the command of the investigating officer or at the office of the local precinct or police unit of the officer being investigated, unless matters being investigated are of such a nature that immediate action is required.

2. Prior to the officer being questioned, he shall be informed of (i) the name and rank of the investigating officer and of any individual to be present during the questioning and (ii) the nature of the investigation.

3. When a blood or urine specimen is taken from a law-enforcement officer for the purpose of determining whether the officer has used drugs or alcohol, the specimen shall be divided and placed into two separate containers. One specimen shall be tested while the other is held in a proper manner to preserve the specimen by the facility collecting or testing the specimen. Should the first specimen test positive, the law-enforcement officer shall have the right to require the second specimen be sent to a laboratory of his choice for independent testing in accordance generally with the procedures set forth in §§[18.2-268.1](#) through [18.2-268.12](#). The officer shall notify the chief of his agency in writing of his request within 10 days of being notified of positive specimen results. The laboratory chosen by the officer shall be accredited or certified by one or more of the following bodies: the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), the College of American Pathologists (CAP), the United States Department of Health and Human Services Substance Abuse and Mental Health Services Administration (SAMHSA), or the American Board of Forensic Toxicology (ABFT).

Grievant was not interrogated by Agency investigators. She was asked to provide a description of what had happened on October 17, 2012. She was asked during work hours by the Assistant Chief to draft what had happened and send it by email to the Assistant Chief. On October 18, 2012, Grievant drafted the email and sent it as directed. The Agency substantially complied with the statutory requirements.

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

⁶ Va. Code § 2.2-3005.

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 further 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 is **reduced** to a Group I Written Notice.

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
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.