

Issue: Group III Written Notice with Termination (violating safety rule where there is threat of physical harm); Hearing Date: 03/14/13; Decision Issued: 03/18/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10038; 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: 10038

Hearing Date: March 14, 2013

Decision Issued: March 18, 2013

PROCEDURAL HISTORY

On January 17, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating a safety rule where there is a threat of physical harm.

On January 28, 2013, Grievant timely filed a grievance to challenge the Agency's action. The dispute proceeded to hearing. On February 20, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 14, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 until her removal effective January 17, 2013. The purpose of her position was to, "provide security over adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement."¹ One of her posts included working in the Control Room of a Housing Unit.

The Agency prohibited inmates at the Facility from hugging, holding hands, and dancing. The Agency regulated how large groups of inmates moved from one location to another at the Facility.

The Control Room was located at the center of the Housing Unit. A vestibule area surrounded the Control Room. Four wings opened into the vestibule. While Grievant was seated in the Control Room facing one wing, other wings were located to her back, left, and right. Sixty inmates resided inside each wing. Grievant was responsible for opening the door to each wing.

On January 1, 2013 at 12:03 a.m., Grievant was working as the Control Room Officer for the Housing Unit at the Facility. Another employee was working as the Floor Officer. Grievant was persuaded by inmates to open the door of each wing so that inmates could enter the vestibule. She opened each of the wings in turn permitting up

¹ Agency Exhibit 4.

to 60 inmates in the vestibule area. Several inmates danced, hugged, and held hands while Grievant watched. One inmate wore a robe into the vestibule contrary to Facility rule and then opened her robe to expose her body to other inmates. Grievant took no action to stop the inmates' inappropriate behavior. Grievant let the inmates hold a party for approximately 17 minutes.

On January 2, 2013, a few inmates complained to Agency managers about the New Year's Eve party and expressed that they felt unsafe because of the behavior of the other inmates. The Agency began an investigation and reviewed the video of the event.

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

"Violating safety rules where there is a threat of physical harm" is a Group III offense.⁵ The Agency has several rules intended to reduce the risk of harm to inmates and staff. For example, inmates are prohibited from hugging, holding hands, and dancing to restrict romantic relationships from forming among inmates. In addition, the Agency controls "mass movements" of inmates to prohibit conflict among inmates. The Assistant Warden testified that if a fight occurred between two inmates while 60 inmates were crowded in the vestibule, the fight could have spread and endangered the safety of the inmates and also the floor officer. The Assistant Warden added that the inmates who complained to Agency managers on January 2, 2013 about the incident were concerned about their safety. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for violating a safety rule where there is a threat of physical harm. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant admitted that she made a mistake and sought to have the disciplinary action reversed so that she could resign to pursue other employment without having

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁵ DOC Operating Procedure 135.1(V)(D)(2)(g).

adverse disciplinary action on her record. The Hearing Officer does not have the authority to grant Grievant's request.

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 III 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
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

⁶ Va. Code § 2.2-3005.

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.