

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 01/08/13;
Decision Issued: 01/14/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9971; 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: 9971

Hearing Date: January 8, 2013
Decision Issued: January 14, 2013

PROCEDURAL HISTORY

On July 16, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow written policy.

On August 10, 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 November 26, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On January 8, 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 employs Grievant as an Academic Teacher at one of its facilities. The purpose of her position is:

To provide quality instructions and to meet the individual needs of the students in the areas of Adult Basic Education and GED. Additionally, to meet the standards defined under the Commonwealth's statutes and program certification requirements.¹

As part of her job responsibilities, Grievant was issued a set of keys to enable her to open locked doors in her work area. She received training regarding her responsibility to keep the keys in her pocket so that inmates could not view the keys. Grievant received training that maintaining control of her keys was an important security consideration and that losing her keys was a matter that had to be reported immediately.

On July 10, 2012, Grievant was at the Facility and in possession of keys that opened secured doors in the education area of the Facility. She lost the keys. She told her supervisor she could not find the keys. Facility staff began an investigation to attempt to find the keys. Staff conducted an exhaustive search of the Facility including

¹ Agency Exhibit 3.

the kitchen, division of education building, Facility grounds, and waste water plant. Facility security staff stopped all inmate movement and conducted strip searches of 29 offenders working in the kitchen and 35 offenders located in the division of education area. The keys were not located and the Agency had to re-key all of the doors that could have been opened with Grievant's keys. This cost the Agency approximately \$1,200.

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

"[F]ailure to ... comply with applicable established written policy" is a Group II offense.⁵ Under the Agency's written policy, Grievant was obligated to carry her keys in a manner that offenders would be denied access or close visual scrutiny. On July 10, 2012, Grievant lost control of her keys inside the Facility. This meant that offenders could have obtained the keys and undermined the Agency's security operations. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Grievant argued that the disciplinary action was excessive and posed an unnecessary financial burden on her because it resulted in her being ineligible to receive a bonus. This argument fails. The Hearing Officer is not a super-personnel officer who can substitute his decision for that of the Agency once the Agency has met its burden of proof. Only if mitigating circumstances exist as defined by DHRM can the Hearing Officer reduce the disciplinary action. *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

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

⁶ Va. Code § 2.2-3005.

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.

If the Hearing Officer were to assume for the sake of argument that mitigating circumstances exist to reduce the disciplinary action, aggravating circumstances exist. By losing her keys, Grievant cause the Agency to stop inmate movement during the search, strip search inmates, and pay approximately \$1,200 to re-key locks. The impact on the Agency was sufficient to counter any mitigating circumstances existing on behalf of Grievant. 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 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 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.