

Issue: Group III Written Notice with Termination (resident abuse); Hearing Date: 12/20/12; Decision Issued: 01/02/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9984; 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: 9984

Hearing Date: December 20, 2012

Decision Issued: January 2, 2013

PROCEDURAL HISTORY

On September 26, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for physical abuse of a resident.

On September 28, 2012, Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded to hearing. On November 19, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 20, 2012, 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 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 Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant filed a charge against the 18 year old Resident because of his abusive language. The Resident became angry with Grievant. On September 13, 2012 at approximately 8:01 p.m., Grievant was assisting with pill call for residents in the housing unit. Grievant was escorting the Resident back into 3C pod after he received medication. The Resident became verbally abusive towards Grievant and said he was going to "beat his ass". The Resident called Grievant insulting names. Grievant instructed the Resident to go back into his pod. The Resident refused and continued to argue with Grievant. The Nurse was standing a short distance away from Grievant and the Resident and observed that the Resident was not passing through the door to enter his pod. She walked towards the Resident and Grievant who continued to argue. She spoke to the Resident and attempted to have him move backwards away from Grievant. When it became clear that neither the Resident nor Grievant was willing to separate, she began to move between them. She placed her left hand on the Resident's chest and her right hand on Grievant's chest and began to push them apart as they continued to argue. Once her arms were extended, she turned towards the Resident and continued to try to persuade him to move into the pod. As she faced the Resident, she held her arm towards him and against his chest. Grievant remained behind the Nurse but continued to argue with the Resident. The Resident moved to his right and used his right hand to pick up a pillow in a chair next to the door. The Resident tossed the pillow upward at Grievant and the pillow hit Grievant's head. Grievant responded by taking a long quick step forward to challenge the Resident. The Resident backed up until

Grievant stopped his forward motion. The Resident then moved forward towards Grievant and used his right arm to punch over the Nurse and hit Grievant in the face with his fist. Grievant moved backwards and the Resident continued to move forward punching Grievant. Grievant backed into the side of a cart and then fell into a chair next to the cart. The Resident moved to the chair, stood over Grievant, and continued to punch him in the face and body. Grievant rose from the chair, grabbed the Resident's waist, and pushed the Resident backwards while the Resident continued to struggle. The Resident stopped Grievant's momentum and pushed Grievant back to the right side of the chair. Grievant regained his balance by punching the Resident in the face so that the Resident backed away from Grievant. Grievant took several steps towards the Resident and continued to punch the Resident as the Resident continued to attempt to hit Grievant. Grievant and the Resident moved towards a couch and the Resident continued to hit Grievant. Eventually another juvenile correctional officer approached the Resident and attempted to stop him from hitting Grievant. Other security staff entered the area and the conflict ended.

Grievant received medical treatment for his injuries after receiving multiple blows to his head and body. He suffered facial and scalp contusions. He was unable to return to work for at least two days.

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."

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

In the Agency's judgment, Grievant should receive a Group III Written Notice for failing to avoid a fight with the Resident. Grievant received training regarding the importance of deescalating conflict with residents. Grievant had the opportunity to walk away from the Resident when the conflict became heated. When the Nurse felt it necessary to get between the Resident and Grievant, Grievant should have used that as an opportunity to walk away from the Resident. When the Resident tossed the pillow at Grievant, it was unnecessary for Grievant to lunge toward the Resident. By lunging toward the Resident, Grievant aggravated the Resident and increased the likelihood

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

that the Resident would respond with violence. Grievant's behavior served to escalate, not deescalate, the conflict. The Agency has presented sufficient evidence to support its judgment that Grievant should receive a Group III Written Notice with removal.

Grievant argued that his response was in self-defense and that he had the right to exercise his right of self-defense following the Resident's crime against Grievant. Once the Resident began punching Grievant, Grievant had the right to punch the Resident in the face and body because Grievant had no other method of stopping the Resident's attack. Had Grievant properly deescalated the conflict, however, Grievant would have walked away and not have been in a position to be subjected to an assault by the Resident. Grievant's exercise of his right of self-defense occurred after he had failed to take action to deescalate the conflict.

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. 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

² Va. Code § 2.2-3005.

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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.