

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 05/12/15; Decision Issued: 06/03/15; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No. 10584; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10584

Hearing Officer Appointment: March 30, 2015

Hearing Date: May 12, 2015

Decision Issued: June 3, 2015

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge (1) a Group II Written Notice issued by Management of the Department of Juvenile Justice (the "Department" or the "Agency") for failure to follow policy effective September 26, 2014, and (2) a Group I Written Notice for failure to follow instructions also effective September 26, 2014. The Grievant is seeking the relief requested in her Grievance Form A.

The hearing officer was appointed on March 30, 2015.

The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on April 8, 2015. The Grievant's attorney, the Agency's attorney and the hearing officer participated in the pre-hearing conference call. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on April 8, 2015, which is incorporated herein by this reference.

In this proceeding the Agency bears the primary burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. The Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Grievant's attorney represented the Grievant and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely exhibits 1-12 in the Agency's exhibit binder and exhibits 1-8 in the Grievant's exhibit binder which also included a CD.¹

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant's exhibits will be designated GE followed by the exhibit number.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant is a teacher in the educational division of the Agency and works at the Facility.
2. The Facility educates the Commonwealth's most challenged youth who have often experienced trauma.
3. The Grievant was employed as a teacher by the Agency at the Facility on August 22, 2014.
4. Previously, on January 8, 2014, the Grievant and the Agency entered into a Settlement Agreement pursuant to which amongst other things, the Agency agreed to withdraw certain Group 1 and Group II written notices issued to the Grievant. GE 6.
5. By Agency policy, the written notices should have been removed from the Grievant's personnel file but they were not by Agency oversight. Accordingly the Agency Investigator who investigated the incident which is the subject of this proceeding reviewed the settled written notices (AE 3-5) which she should not have seen in the Grievant's personnel file.
6. The Grievant, by counsel, argues that this Agency oversight has tainted the whole process and especially the Agency's mitigation analysis. However, the hearing officer finds credible the Investigator's testimony that the Investigator was made aware that the settled written notices were withdrawn, and that the Investigator did not use anything in the Grievant's personnel file in drawing her investigative conclusion that the present allegation against the Grievant is substantiated. AE 3-10.
7. The testimony of the Deputy Director of Education for the Agency was credible that she was informed that the settled written notices were not active and were not to be used in the present disciplinary process.

8. Additionally, as referenced below, the Grievant has admitted verbally and in writing the statement which primarily constitutes the offense in this proceeding.
9. The hearing officer has also performed an independent mitigation analysis below to further lessen any adverse impact to the Grievant concerning the Agency's oversight of failing to remove the documents from the Grievant's personnel file.
10. On August 22, 2014, at approximately 8:00 a.m., the Grievant walked over to a student in her class, TP, who leaned back in his chair and put his hands up. The Grievant also made a statement: "You know TP, I beat up white boys like I beat black boys." AE 3.
11. The statement angered TP. TP is white and the Grievant is black. TP is about 17 years old. Another student, DP, entered into the room and added to the disruption in the Grievant's classroom resulting from the Grievant's comment to TP. DP is about 17 or 18 and is black.
12. The Grievant admits that the comment to TP might have been inappropriate and that she never thought about it. The Grievant admits that the comment caused a disruption in the classroom.
13. As a teacher in the Facility, the Grievant is a role model for her students and is expected to set a good example concerning appropriate communication and behavior. The Grievant has received considerable training and instruction in this regard, including training concerning the REACH program which teaches staff not to argue with residents and to disengage in the event of adverse encounters. AE 5-1.
14. Inappropriate comments to students and resultant classroom disruption can pose a direct and significant threat to the safety and security of the staff and residents of the Facility.
15. The investigation was independent, thorough and professional and was reasonably relied upon by the Deputy Director of Education.
16. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
17. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
18. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

19. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infraction could clearly constitute a Group II offense, as asserted by the Department. Violations of policies, procedures or laws are specifically cited as Group II Offenses. AE 8-8.

Agency Administrative Procedure VOL I - 1.2 - 01 provides in part as follows:

I. PURPOSE

To ensure Department of Juvenile Justice employees conduct themselves in an appropriate and professional manner when interacting with clients and the public...

2. This Procedure set forth the general guidelines for Department of Juvenile Justice's standards of conduct but does not provide an exhaustive list of all types of impermissible conduct. Examples are provided to establish general guidelines in performing their work in a professional and ethical manner.

Individuals subject to this Procedure shall:

- a) Comply with all applicable statutes, regulations, executive orders, administrative directives, policies, rules and procedures...
- c) Treat clients humanely and in an appropriate manner. Verbal, corporal and physical abuse is prohibited.
- d) Refrain from using profane, demeaning, indecent, or insulting language or words with racial or ethnic connotations in the presence of or toward a client either directly or indirectly. This includes during interactions between employees and volunteers in the presence of a client or outside of the presence of a client...
- f) Conduct himself or herself and perform his or her duties in such a way as to set a good example for juveniles.

AE 9.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

The hearing officer agrees with the Agency's position that it has proven by a preponderance of the evidence that the comment made by the Grievant to TP on August 22, 2014 violated policy VOL I - 1.2 -01 in that it was inappropriate, demeaning or constituted language with racial or ethnic connotations towards a client directly or indirectly, etc.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The Grievant asserts that the discipline is too harsh. The Deputy Director did consider mitigating factors, including the Grievant's past good service to the Agency as a good teacher.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has specifically raised mitigation as an issue in the hearing. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A and all of those listed below in his analysis:

1. the Grievant's good service to the Agency as a teacher over many years;
2. the often difficult and stressful circumstances of the Grievant's work environment;
3. the fact that the residents were difficult to control;
4. the fact that the Grievant was rated overall as a "Contributor" in her most recent ratings by the Agency (GE 7);
5. the fact that the Grievant has no prior active formal discipline; and
6. the fact that the Agency failed to remove the settled written notices from the Grievant's personnel file.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's

length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Of course, there were also aggravating factors in play including the fact that as a teacher, the Grievant is held to a higher standard and is expected to serve as a role model to the troubled students whom she teaches and supervises. *See* EDR Case No. 9872. The Grievant received significant training concerning appropriate discipline and classroom management techniques. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management.

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The Agency has withdrawn the Group I Written Notice which it issued in this proceeding. In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused

his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The Grievant did not fully develop or pursue any affirmative defenses. Senior management at the Agency changed after the settlement of the previous written notices, and before the offenses which gave rise to the present disciplinary action. In any event, the Grievant did not begin to meet her burden of proof concerning any affirmative defenses.

The hearing officer decides for the offenses specified in the Group II written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
- 2. A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This

request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

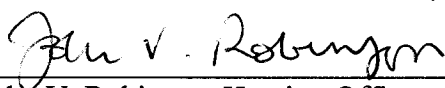
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 6 / 03 / 2015



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).