

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 07/01/13;
Decision Issued: 07/24/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10100; 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: 10100

Hearing Date: July 1, 2013
Decision Issued: July 24, 2013

PROCEDURAL HISTORY

On December 19, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On January 14, 2013, 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 he requested a hearing. On June 4, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's 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 employs Grievant as a Juvenile Correctional Officer at one of its Facilities. Under Grievant's Employee Work Profile he is expected to be "up walking around to interact with all residents minimally 50% of the time per shift."¹ Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on May 27, 2010 for failing to report to work.

On November 19, 2012, Grievant and Officer T were working in the housing unit. They were supervising approximately 12 residents. Grievant and Officer T were aware of the Agency's expectation regarding having at least one officer standing and observing residents in the housing unit. Grievant and Officer T usually discussed which officer would be standing while the other officer was sitting if one of them decided to sit down in the housing unit. Officer T was seated behind a desk doing paperwork. Grievant sat down in a chair to speak with residents. While Grievant was seated, he could observe Officer T and realize that Officer T was also seated. Grievant took a restroom break and walked out of the resident's area leaving Officer T seated at the desk. When Grievant returned to the resident's area, he sat down in his seat even though Officer T remained seated. Excluding the time for the restroom break, Grievant remained seated for approximately ten minutes while he knew Officer T was seated.

¹ Agency Exhibit 3.

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.”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.”

Failure to follow policy is a Group II offense.³ The Agency’s policy governing Grievant’s post was specified in his Post Order. Grievant’s Post Order provided, in part:

Officers are to be up walking around interacting with all residents minimally 50% of the time per shift. (This means minimally one officer will be up walking around at all times.) Officers will not congregate around any one location.⁴

For a period of approximately ten minutes, Grievant sat in a chair and spoke with residents while Officer T was already seated. Thus, one officer was not up walking around at all times as required by the Post Order. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with policy.

Grievant argued that he was authorized by the Post Order to exercise his discretion to address circumstances not specifically anticipated by the Post Order.⁵ Grievant argued, for example, that it was necessary for him to sit and talk to the residents because they were especially difficult residents to supervise and during the time period at issue, the residents were especially agitated. He felt it was best to sit and speak with the residents to calm (de-escalate) them instead of standing over them. Grievant wrote an incident report stating, “I took a longer time sitting down while answering their questions to make them feel we are a family.”⁶ Grievant’s argument fails. Grievant did not have discretion to disregard the provisions of his Post Order which required him to be standing if the other officer was sitting. Grievant knew that Officer T was sitting yet Grievant took no action to ask Officer T to stand while Grievant sat and spoke with the residents. Grievant was not facing an emergency that would

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

³ See, Attachment A, DHRM Policy 1.60.

⁴ Agency Exhibit 3.

⁵ According to Grievant, the Post Order read, “Post Orders shall not cover every situation of unit operations. Staff must use some discretion in accomplishing the duties and tasks associated with the unit operations.” Grievant Exhibit 8.

⁶ Grievant Exhibit 5.

have compelled him to sit down to resolve the emergency. Grievant left the room for approximately four minutes to go to the restroom. No evidence was presented showing that the residents were especially unruly while Grievant left the room. Grievant knew of the policy and has not established an excuse for failing to follow the policy.

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”⁷ 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 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.

⁷ Va. Code § 2.2-3005.

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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.