

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (abusive language), and Termination (due to accumulation); Hearing Date: 08/07/13; Decision Issued: 08/13/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 10118; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 08/27/13; EDR Ruling No. 2014-3704 issued 10/02/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/27/13; DHRM Ruling issued 10/28/13; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10118

Hearing Date: August 7, 2013
Decision Issued: August 13, 2013

PROCEDURAL HISTORY

On April 19, 2013, Grievant was issued a Group II Written Notice of disciplinary action for releasing a student from his assigned unit without authority to do so and insubordination to a supervisor. On April 19, 2013, Grievant was issued a second Group II Written Notice for unsatisfactory work performance by using obscene or abusive language towards a resident. Grievant was removed from employment effective April 19, 2013.

On May 16, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 10, 2013, 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 his appeal due to the unavailability of a witness. On August 7, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Senior Juvenile Correctional Officer at one of its facilities. Grievant had prior active disciplinary action. On March 3, 2011, Grievant received a Group II with a 24 hour suspension for failing to provide proper supervision.

Grievant's work shift was from 5:45 a.m. until 6:15 p.m. Employees must receive approval from the Agency in order to take planned leave.

The central control room officer is responsible for unlocking secured doors in the Facility. Doors in the unit have an intercom system next to them. When someone wants to enter or exit the unit, he or she must push the button to notify the officer in the control room. A camera automatically turns to focus on the person pushing the button. The control room officer is supposed to use the camera system to determine the identity of the person seeking passage through the door. If the person is authorized to pass through the door, the control room officer can unlock the door.

On November 21, 2012, Grievant was working in the central control room. She was responsible for unlocking security doors. Resident 1 pushed the button to exit the unit. Grievant did not use the camera system to identify the person seeking to exit the unit. Grievant unlocked the secured door and Resident 1 exited the unit. Officer W was working in the unit and recognized that Resident 1 was exiting the unit without being supervised. She used her radio to notify other staff that Resident 1 had exited the unit and was not supervised. The Lieutenant approached Resident 1 and instructed Resident 1 to return to the unit. Grievant said “my bad” to the Lieutenant to indicate that she knew she had made a mistake.

The Facility has a “blackout” period from November 15th of the current year through January 9 of the following year. During the blackout period, employees with excessive leave balances are given priority to take their leave. This enables employees with high leave balances to take leave rather than have the excessive leave expire at the end of the year. Grievant was not an employee with excessive leave balances.

On November 27, 2012, Grievant met with the Major and Lieutenant to discuss Grievant’s request to take several days off. Grievant wanted to take leave on November 30, 2012, December 1, 2012, and December 2, 2012. She explained to the Major that none of her requests for leave had been granted in 2012. Grievant was frustrated and angry. She said she had ticket to a game on December 2, 2012 and intended to go. The Major ordered her to report to work on December 2, 2012. Grievant said, “I’m not coming and do what you got to do.” Grievant then walked out of the meeting.

On November 30, 2012, Grievant reported to work but became ill and went to the doctor after working most of her shift. Her doctor faxed a note to the Facility on November 30, 2012 at 7:32 p.m. stating:

Please excuse from work starting 11/30.
Reason – injury
Resume regular activity 12/05.¹

Grievant did not report to work on December 1, 2012 and December 2, 2012 as scheduled.

Grievant began short term disability on December 17, 2012 and did not return to work through January 24, 2013.

On March 12, 2013, Resident 2 went to his room to use the bathroom. Only ten residents were permitted in the pod at a time and another resident had taken Resident 2’s place in the pod. Resident 2 asked to return to the pod. Grievant responded that it was not her fault he went to his room. Resident 2 called Grievant a f—king bitch. This angered Grievant and she called Resident 2 a bitch. Later that day, Resident 2 told

¹¹ Grievant Exhibit 5.

Grievant that he did not mean it when he called her a f—king bitch. Grievant apologized and said she did not mean it when she called him a bitch.

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.”

Group II For Failure to Comply with Policy

Under IOP 204, the control center officer is responsible to, “[o]bserve and control all entrance and exit traffic” and for “[i]dentification of employees, visitors, and residents passing beyond the control center.”

Failure to comply with policy is a Group II offense.³ On November 21, 2012, Grievant failed to control the secured door to the unit. She failed to identify that Resident 2 had pushed the button to exit the unit. She permitted Resident 2 to exit the unit without being supervised. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with policy.

The Agency alleged that Grievant was insubordinate to the Major. The Agency has not established this allegation. Grievant told the Major she wanted to be away from work on November 30, 2012, December 1, 2012, and December 2, 2012. The Major told her she had to report to work on those days. She reported to work on November 30, 2012 thereby recognizing the Major’s authority and rank. It is reasonable for the Hearing Officer to conclude that Grievant would have reported to work on December 1, 2012 and December 2, 2012 had she been well enough to attend work.⁴ Although the Agency failed to establish insubordination, it has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with policy.

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 Grievant expressed frustration with the Major’s refusal to grant her leave request. Her frustration should be viewed in the context of Va. Code § 2.2-3000(A) which provides, in part, “[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.”

Group II Written Notice for Using Obscene or Abusive Language

Unsatisfactory work performance and use of obscene language are Group I offenses. Abuse of clients⁵ is a Group III offense.⁶ Webster's New Universal Unabridged Dictionary defines "obscene" to include "offensive to morality or decency; indecent; depraved; obscene language." "Abusive" is defined to include, "using, containing, or characterized by harshly or coarsely insulting language; an abusive author; abusive remarks."

On March 12, 2013, Grievant called Resident 2 a bitch. Her language was abusive because she intended to insult him. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. The Group II Written Notice for abusive language must be reduced to a Group I Written Notice.

Upon the accumulation of two or more Group II Written Notices, an employee may be removed from employment. Grievant had a prior active Group II Written Notice. Grievant has accumulated a Group I Written Notice and a second Group II Written Notice. The Agency has presented sufficient evidence to support its decision to remove Grievant from employment based on the accumulation of disciplinary action.

Mitigation

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.

⁵ During a prehearing conference the Hearing Officer informed the parties that if the matter was actually concerning client abuse, the disciplinary action would have to be addressed by the Circuit Court. Neither party sought removal or argued that the matter was not appropriately before the Hearing Officer. The Agency did not argue during the hearing that Grievant engaged in client abuse.

⁶ See, Attachment A, DHRM Policy 1.60.

⁷ Va. Code § 2.2-3005.

Allegations of Procedural Defects

Grievant argued that the Agency failed to timely issue disciplinary action. For example, the first Group II Written Notice was for behavior occurring on November 21, 2012 but it was issued on April 19, 2013. The Agency explained that the delay resulted, in part, because Grievant was away from work on short term disability status.

When Grievant returned to work, however, there were many weekdays on which Grievant could have been given the Group II Written Notice. It is clear that the Agency was slow to issue the first Group II Written Notice. The Agency's delay, however, is not a sufficient basis to reverse the disciplinary action. The delay did not cause the memories of witnesses to become unreliable. Although the delay may have impeded Grievant's ability to obtain a copy of the video⁸ of the incident, it is unlikely the video would have contradicted credible witness testimony. The consequence of the Agency's delay is that Grievant remained employed longer than she might otherwise have been employed.

Grievant argued that she was denied procedural due process. She argued that the Agency did not give her a complete opportunity to present her defenses at the Agency's internal disciplinary hearing regarding releasing Resident 1 from the unit. She argued that she was presented with the Agency's evidence about Resident 1 exiting the unit only a week prior to her removal. Grievant argued that the Agency conducted an internal disciplinary hearing regarding the second Group II Written Notice prior to completing its investigation.

When an employee is removed from employment, the adequacy of procedural due process is not evaluated solely by the actions of the Agency prior to the taking of disciplinary action. After an employee receives a Written Notice with removal, he or she may file a grievance and have that grievance proceed to an evidentiary hearing before a Hearing Officer. In this case, Grievant had the opportunity to present to the Hearing Officer any testimony, document, or argument that she could have presented to the Agency prior to her removal. The hearing process has cured any defect in the Agency's failure to provide Grievant with appropriate procedural due process.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to comply with policy is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for use of abusive language is **reduced** to a Group I Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

⁸ The Agency's video system erases 90 days after the date of recording.

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.⁹

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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