

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 10/21/13;
Decision Issued: 10/22/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10178; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10178

Hearing Date: October 21, 2013
Decision Issued: October 22, 2013

PROCEDURAL HISTORY

On May 29, 2013, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

On June 2, 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 September 16, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witness

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 Corrections Sergeant at one of its facilities. Grievant's work performance was satisfactory to the Agency and he had no prior active disciplinary action.

CONCLUSIONS OF POLICY

The Agency alleged that a male resident made an allegation to Grievant about a resident on resident sexual misconduct involving contact. Grievant wrote in his response that (1) he had complied with previous training and practices and (2) he investigated the alleged sexual misconduct and concluded it was a "normal fabrication" by the resident who frequently reports such false occurrences." The Agency did not call any witnesses to testify. Grievant called an employee as a witness to testify that Grievant did not have any prior similar corrective action in his employment record. The documents admitted as exhibits are insufficient for the Hearing Officer to determine whether there was a sexual misconduct incident¹ (as opposed to a fabrication) and whether Grievant knew or should have known that such an alleged incident was to be reported. In the absence of such evidence, the disciplinary action cannot be upheld.

¹ Under the Agency's IOP 100, an Incident is, "[a]n event or happening outside the ordinary routine which disrupts or threatens the security, good order, and discipline of the JCC and/or harms or poses a threat of harm to staff, residents, visitors, or the physical facility."

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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.²

[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

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.