

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 10/22/13;  
Decision Issued: 10/23/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10179; Outcome: Full Relief.



# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10179**

Hearing Date: October 22, 2013  
Decision Issued: October 23, 2013

### **PROCEDURAL HISTORY**

On April 30, 2013, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On May 28, 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 22, 2013, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Agency Representative

### **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. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency's evidence consisted of four exhibits. Grievant submitted one document. Neither party presented any witness testimony.<sup>1</sup>

### **CONCLUSIONS OF POLICY**

The Agency alleged that on January 14, 2013, Grievant stepped on a resident's snack and kicked it under the resident's room door. The Agency alleged that Grievant's behavior was a violation of Administrative Directive 05-009.2.C<sup>2</sup> which provides, "I will perform all of my duties professionally and competently and will treat all persons in an evenhanded and courteous manner, humanely, and with respect" and IOP 210-4.1.5 which provides, "Any action which is humiliating, degrading, or abusive is prohibited at [the Facility]." The Agency alleged that Grievant admitted to engaging in the behavior alleged and that such an admission supports the issuance of a Group I Written Notice.

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<sup>1</sup> Neither party explained why witness testimony was unnecessary.

<sup>2</sup> See, Administrative Procedure Vol. 1-1.2-01 (V)(A).

Agency Exhibit 4 contains a series of images depicting an employee (presumably Grievant) facing a door (presumably the resident's door). The pictures show the employee holding a bag with a small item on the floor that could be a snack. The employee appears to use his foot to slide the snack under the door. The pictures do not show the act of stepping on and compressing a snack.

Grievant wrote a "Rebuttal" to the Agency's allegations stating:

On Jan 14, 2013 at approximately 1858, I, [Grievant] was issuing snacks to the residents secured in the Behavior Management Unit. [Resident] began arguing with other residents in the unit. [Resident] was acting out and threatening to "buck on the tray slot" to prevent other residents from receiving their snacks. I made the decision not to open his tray slot at the time. [Resident] requested that I "smush" his snack (sealed honey bun) under his door. At the time it did not seem like an unreasonable request. In hind site it was not a good decision, but there was no malicious intent on my part. I have worked at [Facility] for five (5) years. I have attended multiple INSERVCES (TRAINING) but I have never been trained on proper procedure to pass out snacks. I accept responsibility for my errors; however, I believe a Group 1 recommendation is excessive. I am requesting that a written reprimand be considered in lieu of a GROUP 1.<sup>3</sup>

When the Hearing Officer considers the documents submitted including Grievant's statements therein, the evidence, at best, shows that Grievant used his foot to push a snack under a door to a resident at the resident's request. This conclusion alone is not sufficient to support the disciplinary action.

The Agency did not present any testimony to establish how Grievant's behavior violated Administrative Directive 05-009.2.C which provides, "I will perform all of my duties professionally and competently and will treat all persons in an evenhanded and courteous manner, humanely, and with respect." Grievant's "Rebuttal" is not sufficient to establish that Grievant admitted that he was not courteous, humane or respectful. To the extent Grievant's statement is an admission, he admits complying with the Resident's request. If the Resident requested Grievant's actions, it is difficult for the Hearing Officer to believe that the Resident was not treated courteously, humanely and respectfully.

The Agency did not present any testimony to establish how Grievant's behavior violated IOP 210-4.1.5 which prohibits "[a]ny action which is humiliating, degrading, or abusive." Grievant's "Rebuttal" is not sufficient to establish that Grievant admitted that he humiliated, degraded or abused the resident. To the extent Grievant's statement is an admission, he admits complying with the Resident's request. If the Resident

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<sup>3</sup> During the hearing, Grievant changed his request for relief to removal of the Group I Written Notice without receiving a written reprimand.

requested Grievant's actions, it is difficult for the Hearing Officer to determine that the Resident was humiliated, degraded, or abused.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>4</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.