

Issue: Group I Written Notice with Suspension (unsatisfactory performance);
Hearing Date: 10/28/13; Decision Issued: 11/11/13; Agency: DJJ; AHO: Lorin
A. Costanzo, Esq.; Case No. 10197; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA VIRGINIA
DEPARTMENT OF JUVENILE JUSTICE

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10197

Hearing Date: October 28, 2013
Decision Issued: November 11, 2013

PROCEDURAL HISTORY

Grievant was issued a Group I Written Notice with 10 workday suspension on July 17, 2013 for Written Notice Offense Code 11, "Unsatisfactory Performance" (Date of Offense: 7/8/13). The *Nature of Offense and Evidence* indicated:

On July 8, 2013, approximately between the hours of 3PM and 4:15 PM [Grievant] exercised extremely poor judgment by inviting an outside vendor into our [Facility] to set up a portable spray tanning booth in one of the unit's conference rooms in order to provide herself and others with spray tans. [Grievant] did not ask or receive permission from this supervisor, a county administrator who oversees this facility or from our [Director] who was on vacation at the time of this action. This significant lapse in judgment constitutes unsatisfactory work performance.¹

On August 15, 2013 Grievant timely filed a grievance to challenge the Agency's action. Matters proceeded through the resolution steps *and*, when matters were not resolved to her satisfaction, Grievant requested a hearing.² The undersigned was appointed hearing officer effective October 15, 2013. Hearing was held October 28, 2013 at Agency Facility.

The *Written Notice* was corrected as to the date indicated in the first line under *Nature of Offense and Evidence*. The date indicated was corrected changing the date from July 11, 2013 to July 8, 2013. A corrected Written Notice was received by Grievant on July 19, 2013. Both the original and corrected Written Notices indicated the "Offense Date(s)" in Section I as being "7/8/13".³

APPEARANCES

Grievant, who was also a witness
Agency Presenter
Agency Party Designee ("Director"), who was also a witness
Additional witnesses:
Sr. PO
PO#1
Program Director
PO#2
Supervisor

¹ G. Ex. pg. 4.

² A. Ex. 2, 3, and 4.

³ A. Ex. 1, G. Ex. pgs. 1 through 4.

EXHIBITS

By agreement of the parties exhibits were admitted *en masse*. Agency exhibits are tabbed 1-15 (and page numbered 1-62); Grievant exhibits are page numbered 1-23. Agency Exhibits are designated herein as "A. Ex. __" with the tab number inserted at " " Grievant Exhibits are designated as "G. Ex. pg. __"with the page number inserted at" "

ISSUES

Whether the issuance of a Group I Written Notice with 10 workday suspension (from 7/22/13 through 8/2/13) was warranted and appropriate under the 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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.⁴

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

01. Agency supervises minors on probation and parole and provides other services related to minors and the court. Grievant and other staff have offices at Facility and share use of conference room and other areas. Minors, their family, law enforcement officers, and other individuals are seen at Facility.⁵

02. Grievant is employed by Agency as a Probation Officer. Grievant has two active Written Notices (one active Group I Written Notice and one active Group II Written Notice).

a. On November 20, 2012 Grievant was issued a Group I Written Notice for "Failure to follow instructions and/or policy".⁶

b. On March 19, 2013 Grievant was issued a Group II Written Notice for "Failure to follow instructions and/or policy".⁷

03. Without permission of Agency, on July 8, 2013 Grievant employed a woman to come into Facility during business hours that day and perform spray tanning services. Grievant met with her and escorted her to a Facility conference room where the woman set up a pop-up tent and conducted spray tanning for three *women*, including Grievant. No staff members of Agency, excepting Grievant, participated in the tanning.⁸

⁴ Office of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

⁵ A. Ex. 9. and Testimony.

⁶ A. Ex. 14.

⁷ A. Ex. 15.

⁸ A. Ex. 7 and Testimony.

APPLICABLE LAW AND OPINION

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

DHRM Policy 1.60 -Standards of Conduct:

To establish procedures on the Standards of Conduct and Performance for employees of the Commonwealth and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resources Management has promulgated Policy No. 1.60, *Standards of Conduct*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct of employees and acceptable standards for work performance of employees. The *Standards of Conduct* 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.

DHRM Policy 1.60- *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention.

This policy further provides that the examples of offenses set forth are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. The *Standards of Conduct* provides:

*Examples of offense, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this*⁹

Attachment A to Policy 1.60 provides, "Upon accumulation of three active Group I Written Notices an agency should normally suspend the employee for at least five workdays but may not exceed ten workdays".

"Unsatisfactory work performance" is listed as an example of a Group I Offense in Attachment A to Policy 1.60.

⁹A. Ex. 12.

Staff Code of Conduct:

Staff Code of Conduct (Administrative Procedure: VOL I- 1.2-01) indicates, in pertinent part:

All Department of Juvenile Justice employees are subject to this Administrative Procedure (Procedure) and are expected to conduct themselves with integrity, in a professional manner...

All individuals subject to this Procedure shall adhere to the highest moral and ethical standards for business and personal conduct at all times and are expected to understand and comply with the following Code of Ethics:

I am committed to the highest ideals of professionalism and the stewardship of public resources.

I will perform all my duties professionally and competently ...

I will conduct myself at work in a manner that is consistent with the Commonwealths Standards of Conduct for Employees, applicable regulations of the Board of Juvenile Justice, and policies and procedures of this Department and the Department of Human Resources Management.

B. General Conduct

2.This Procedure sets forth the general guidelines for the 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.¹⁰

Grievant:

Grievant does not contest she arranged for a woman who came to Facility and provided spray tanning at Facility on 7/8/13. At about 3:40 p.m. on 7/8/13 the woman texted Grievant that she had arrived at Facility. Grievant met her and took her to a small conference room at Facility where the woman set up her tent and spray tanning equipment. The woman spray tanned 3 women, including Grievant, and then left Facility at approximately 4:10 p.m.

Grievant has maintained that she did not seek or receive permission from Supervisor, (her direct supervisor) for spray tanning to be done at Facility. However, she has consistently contended:

- On 7/8/13, prior to the spray tanning, she told Supervisor she was thinking of having a spray tan done at the office during her lunch hour. After some discussion she stated to Supervisor she was going to get the spray tanning woman come on her lunch hour to give her a tan. Grievant also contends Sr. PO was present for some of the conversation.
- All matters on 7/8/13 were conducted on her break time and did not interfere with her job duties.

¹⁰ A. Ex. 11.

- Grievant does not feel there was an issue since she had previously discussed matters with Supervisor and Supervisor did not appear to have a problem with it.

Conversation:

Grievant does not contend she asked for or received permission for a spray tanning setup at Facility. However, she maintains she had discussed spray tanning with Supervisor on 7/8/13 at a time before she invited the woman into Facility. She also contends there should be no issue since Supervisor did not appear to have a problem with the spray tanning at Facility when she discussed it.

Supervisor testified:

- She did not have conversation with Grievant at any time about having a spray tanning in the office.
- She did not hear anything about anyone bringing a spray tanning service to the office.
- At no time did she give permission for anyone to bring a spray tanning service to the office.

Sr. PO described a general conversation, including joking about tanning, with Grievant (who was at her desk) involving Supervisor. Sr. PO did not hear Supervisor being asked for permission for the spray tanning woman to come to office to do spray tanning. Sr. PO believed Grievant had made the decision for the spray tanning woman to come to the office prior to the conversation and believed Supervisor did not know Grievant was having the spray tanning woman come to office.

Testimony indicated that on 7/8/13 Supervisor was in her office and Grievant was in her office which was adjacent. Sr. PO was talking and going in between the two. Supervisor indicated she heard discussion between the two about tanning but not about spray tanning. Sr. PO asked Supervisor, in a joking manner, if she wanted a tan to which Supervisor replied, "No, do I need a tan?".

There is no evidence to find that Grievant asked Supervisor for permission to have spray tanning done in Facility. There is no evidence that Supervisor gave permission, or implied a permission, to have spray tanning done in the Facility. Supervisor also indicated in testimony she would not approve any such request if she were asked. Furthermore, there is no evidence that any other authority gave Grievant such permission.

The evidence does indicate there was a conversation, mainly between Sr. PO and Grievant, but which also involved Supervisor at times. While this conversation may have included matters relating to tanning there is insufficient evidence to find Supervisor was aware Grievant was going to bring spray tanning at Facility or that Supervisor implied she did not object to spray tanning at Facility.

Supervisor:

Supervisor was not in Facility when the spray tanning woman arrived and set up in the conference room. Supervisor arrived back at Facility about 3:40-3:45 p.m. On arrival Supervisor asked Secretary what was going on. When Secretary told her of the spray tanning Supervisor testified she was

stunned and speechless. Secretary's written statement indicated that when Supervisor returned to Facility and was told what was going on "Her reaction was one of disbelief".

After the spray tanning woman left, Supervisor called Grievant to her office and told her what she did was inappropriate. She asked what would happen if Regional Manager or higher management came in while the spray tanning was going on.

Supervisor expressed concern that clients and the public come in and out of Facility and how management would react. She also noted, in testimony, concern that even if it were Grievant's chosen lunch hour other people were working and the spray tanning disrupted work flow.

Secretary's written statement indicated that on 7/8/13 when P0#2 asked in her presence if Grievant had permission for the spray tanning Supervisor replied that Grievant did not have permission. Also, she indicated Supervisor had said that she had overheard a conversation between Grievant and Sr. PO about tanning but she had not given permission nor was she asked for permission by Grievant for the spray tanning.¹¹

Concerns and contentions:

A number of employees used Facility and had offices at Facility. These employees had minors, family members, members of the public, and law enforcement who would come into the Facility, sometimes unannounced, for Agency business reasons.

PO# worked at Facility and believed the matters concerning the spray tanning at the work site to be inappropriate and questioned at the time why it was occurring. She noted that she could detect a scent, the machine was loud, and the people were talking louder due to the spray tanning machine's noise level. P0#2 had concerns as to the level of noise and smell from the tanning spray done in the Facility conference room. She opined it was not appropriate. She considered this to be a disruption and expressed concern as to the need for peace and quiet. She complained to her supervisor. Secretary's written statement noted several staff members came to the front office asking what was going on.

Program Director stated, as a supervisor, she considered the spray tanning to be a disruption as a number of staff were discussing it. She expressed concern with the non-professional image projected by spray tanning going on in the workplace.

Grievant contends matters were done on her lunch break and the spray tanning did not affect her job performance. She contends there were there is no policy in place that was violated. She raises the issue of other employees doing things which were against policy and not being disciplined as she was.

While Grievant may have been on her lunch break there is no evidence the other staff were. Her actions, even if on break, impacted or potentially impacted both the Agency and her fellow staff. Management was concerned concern that Grievant's actions did have an effect on the business of Agency. Concern was expressed by some staff with the noise levels and scent. The evidence indicates work was disrupted to the point staff employees were asking what was going on. Also staff expressed concern that having spray tanning in the workplace was inappropriate.

¹¹ A. Ex. 7.

Grievant brought a vendor into the workplace who was conducting her business there and who was charging for spray tanning services. Management considered spray tanning in the workplace inappropriate. Management was concerned with what impact the spray tanning could have on Agency's business, reputation, and professionalism.

Agency does not have a specific written policy specifically addressing an employee bring a spray tanning operation into Facility during work hours. Agency has indicated in its Staff Code of Conduct the policy sets forth general guidelines and does not provide an exhaustive list of all types of impermissible conduct. Management has the right and the duty to management the business of the Agency. Agency employees are charged with the highest ideals of professionalism, stewardship of public resources, and performing duties professionally.¹²

Management is charged with managing its employees and its physical resources, including the physical property within the workplace. Grievant utilized the space and accommodations within an Agency Facility without permission. The conference room and the expense of maintaining the conference room were Agency responsibilities. Whether or not the conference room was being used or was reserved it was still a resource and responsibility of Agency. Grievant was not entitled to use the conference room as she pleased. Agency furthermore had legal liability/potential liability for matters occurring within Facility.

Grievant points to other employees as not following policy. Grievant has concern that she was treated differently/unfairly in that she was disciplined when others have done things at work. Grievant raised concerns as to employees bringing a dog at work, having a child at work, getting their cars detailed, and products sold by fundraisers. However, she did not address discipline or the lack of discipline for employees under the same or similar circumstances leading to Grievant's discipline.

To find misapplication or unfair application of policy it is necessary to determine whether management violated a mandatory provision of policy, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

Taking into consideration the totality of the circumstances involved, there is insufficient evidence to find unequal or unfair application of policy.

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 the rules established by the department of employment dispute resolution..."¹³

Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agencies consideration and assessment of any mitigating and aggravating circumstances. Additionally, a Hearing Officer may mitigate the Agencies 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."

¹² A. Ex. 11.

¹³ Va. Code § 3005.

Consideration was given to the two prior active Written Notices and consideration was given to the matter being addressed as a Group I Offense. The Hearing Officer does not find the Agency's discipline exceeds the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group I Written Notice with 10 workday suspension was warranted and appropriate under the circumstances and the Agency's issuance of a Group I Written Notice with 10 workday suspension is *UPHELD*.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* 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.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and *received by* the reviewer within 15 calendar days of the date of the original hearing decision. "*Received by*" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the DHRM Director. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The director's authority is limited to ordering the hearing

officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).


B. Final Hearing Decisions:

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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.



Lorin A. Costanzo, Hearing Officer