

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (failure to follow instructions, and Termination (due to accumulation); Hearing Date: 11/25/13; Decision Issued: 12/16/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 10211, 10212; 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: 10211 / 10212

Hearing Date: November 25, 2013
Decision Issued: December 16, 2013

PROCEDURAL HISTORY

On June 11, 2013, Grievant was issued a Group II Written Notice of disciplinary action for violation of policy. On September 20, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and failure to follow policy. Grievant was removed from employment based upon the accumulation of disciplinary action.

On July 3, 2013, Grievant timely filed a grievance to challenge the Agency's action first Group II Written Notice. On October 1, 2013, Grievant timely filed a grievance to challenge the Agency's second Group II Written Notice with removal. On October 29, 2013, the Office of Employment Dispute Resolution issued Ruling No. 2014-5753, 2014-5754 consolidating the two grievances for a single hearing. On November 5, 2013, EDR assigned this appeal to the Hearing Officer. On November 25, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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. The purpose of her position was:

To protect the public through a balanced approach of comprehensive services that prevent and reduce juvenile delinquency through partnerships with families, schools, communities, law enforcement and other agencies, while providing the opportunity for delinquent youth to develop into responsible and productive citizens.¹

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

On June 1, 2013, at approximately 10 a.m., Grievant and another Juvenile Correctional Officer were working in the Housing Unit supervising residents. They escorted the unit residents out of the unit and to the gym for recreation. They left one resident in the Unit secured inside his room. The resident was left unsupervised for

¹ Agency Exhibit 9.

approximately 1 hour. When the Agency investigated the matter, Grievant admitted that she and the other Officer left the resident in his room for approximately 1 hour but added that they did not do so intentionally.

Grievant was scheduled to work on July 17, 2013. At approximately 8:30 a.m., Grievant called the Facility and reported to Lieutenant G that she would be absent that day and would claim Family Personal Leave. Lieutenant C and Lieutenant S called Grievant at her home in spoke with her regarding her leave requests. Grievant said that she was “taking a personal day” because she had some things to do with her family. Lieutenant C told Grievant that according to Institutional Operating Procedure 114 governing Employee Leave, Family Personal leave should be requested and approved in advance and that due to a the shortage of staff, Grievant’s leave request was denied. Grievant stated that she wanted her shift supervisors to show her the policy upon her return to work. Grievant ended the call. At the Major’s direction, Lieutenant S called Grievant again and instructed Grievant to report to work as scheduled. Grievant failed to follow the instruction and did not report to work.

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. Failure to follow a supervisor’s instruction is a Group II offense.³

Institutional Operating Procedure 212 governs Movement and Supervision of Residents. Section 212–4.2 (6) provides:

Staff shall always be responsible for knowing the exact number of residents assigned to the unit, as well as knowing the on-campus location of each resident assigned to the unit. The unit logbook shall record the location of residents assigned to the unit who are away from the campus at court, in jail, in the hospital or for any other reason.

On June 1, 2013, Grievant was responsible for supervising the residents in a housing unit. She was responsible for knowing the location of each resident in the unit.

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.

At approximately 10 a.m., she and another Officer escorted the residents out of the unit into the gym. Grievant failed to take all of the residents out of the unit and one resident remained secured in his room. Grievant did not know the location of one of the residents assigned to a unit thereby acting contrary to Institutional Operating Procedure 212. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Institutional Operating Procedure 114 governs Employee Leave. Section 114-4.1 provides:

All employee leave requests must be approved by the employee's supervisor. ***

Leave requests may be denied if reasonable notice has not been provided by the requestor, or if the absence conflicts with the business needs of the work unit.

On July 17, 2013, Grievant was scheduled to work. Prior to the beginning of her shift, she notified the Agency that she did not intend to report to work. Grievant was informed that her request for leave was denied. Grievant was instructed to report to work. Grievant failed to comply with that instruction. She did not report to work on July 17, 2013. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with Institutional Operating Procedure 114 which requires a supervisor's approval before taking leave and failure to follow a supervisor's instructions by failing to report to work as instructed.

Grievant argued that she had a family crisis which prevented her from reporting to work. No credible evidence was presented to support this allegation and that was not how she described her need for leave to Agency supervisors.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. The Agency's decision to remove Grievant must be upheld.

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"⁴ 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

⁴ Va. Code § 2.2-3005.

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.

Grievant argued that the Agency was inconsistently disciplining its employees. She argued that other Juvenile Correctional Officers had left residents unsupervised in housing units but those Officers only received Group I Written Notices. The Agency denied the allegation. Grievant presented no evidence to support her allegation. In light of the standard set forth in the Rules, 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 on June 11, 2013 is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action on September 20, 2013 is **upheld**. Grievant's removal based upon the accumulation 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.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.