

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 07/10/14; Decision Issued: 07/29/14; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No.10394; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 08/12/14; EDR Ruling No. 2015-3977 issued 09/11/14; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 08/12/14; DHRM Ruling issued 09/04/14; 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: 10394

Hearing Date: July 10, 2014

Decision Issued: July 29, 2014

PROCEDURAL HISTORY

On March 13, 2014, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow policy.

On April 4, 2014, 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 she requested a hearing. On June 16, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 10, 2014, 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 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. She was responsible for supervising residents at the Facility. No evidence of prior active disciplinary action was introduced during the hearing.

On February 6, 2014, the JCO escorted residents from building 1 to building 2. She escorted six residents into building 2 and then down a hallway towards the unit where the resident's reside. Once inside building 2, the JCO expected to be relieved by another officer who would assume responsibility for the residents so she could return to her post in building 1. Grievant joined the group in the hallway and signaled to the JCO that Grievant would assume responsibility for the residents. Grievant remained with the residents who were lined up to enter the housing unit. Once the door to the unit opened, the residents walked inside but Grievant remained outside. Grievant was no longer able to see or supervise the residents.

The Counselor was inside the unit. The Counselor was not a security employee and was supposed to be protected by security staff. Once the residents realized they were unsupervised by any security staff, they began to check which doors inside the unit were locked and unlocked. They entered the Counselor's office and sat down. The Counselor became frightened by the residents. She realized the residents were unsupervised by a security employee. One of the residents began pushing the intercom button.

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.”¹ 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.² Institutional Operating Procedure 212 addresses Movement and Supervision of Residents. Section 212-4.2 requires:

All juvenile correctional center staff are responsible for maintaining sight and sound supervision of assigned (and physically present) residents inside as well as outside the building at all times.

Once Grievant let the residents walk into the unit but failed to follow them inside, Grievant was no longer in sight and sound supervision of the residents. She failed to comply with Section 212-4.2. To the extent Grievant assumed that another security employee was already inside the unit, she did so at her own risk. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s five workday suspension must be upheld.

Grievant argued that she was not working her regular post but rather was helping out other staff. This argument is not a persuasive defense to the disciplinary action. Grievant remained subject to the terms of the policy regardless of what post she was working at the Facility.

Grievant argued that the Agency failed to provide Grievant with sufficient time to express her defenses to the proposed disciplinary action. To the extent this assertion is true, it does not change the outcome of this case. Grievant had the opportunity to present to the Hearing Officer any defenses and evidence which she would otherwise have presented to the Agency had she been given a sufficient opportunity to do so.

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”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ Va. Code § 2.2-3005.

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension 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.⁴

[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

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