

Issue: Group III Written Notice with Termination (actions which undermine Agency's effectiveness);
Hearing Date: 08/28/14; Decision Issued: 09/17/14; Agency: DOC; AHO: Sondra K. Alan, Esq.;
Case No. 10406; Outcome: No Relief - Agency Upheld; Administrative Review: DHRM Ruling
Request received 09/29/14; DHRM Ruling issued 10/31/14; Outcome: AHO's decision affirmed;
Judicial Review: Appealed to Circuit Court in Wise County. Outcome: Final Order issued 05/27/15 -
AHO's decision affirmed.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10406
HEARING DATE: August 28, 2014
DECISION ISSUED: September 17, 2014

PROCEDURAL HISTORY

A complaint was made against Grievant based on an offense dated May 13, 2014 regarding Grievant's actions which undermine the effectiveness of the Agency. Grievant was issued a Group III Written Notice with termination for violation of Operating Procedure 135.1 Standards of Conducts and Offense Code 99.¹

A Hearing Officer was appointed on July 9 2014 and a pre-hearing conference was scheduled on July 24, 2014. During the prehearing conference a Hearing was scheduled for August 20, 2014 and reset by request of counsel to August 28, 2014.

APPEARANCES

Agency advocate
Agency representative as witness
Agency four additional witnesses
Grievant as witness

ISSUES

- 1) Whether Grievant's accidental contact with an inmate was sufficient to warrant a Group III termination.
- 2) Whether Grievant's failure to report the accidental contact with inmate was sufficient to warrant a Group III termination.
- 3) Whether mitigation based on years of service was considered.
- 4) Whether Agency's discipline was over harsh.

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

¹ Agency Ex. 11 Written Notice

APPLICABLE LAW and POLICY

The Agency relies on its Operating Procedure 135.1² and Offense Code 99. Agency also introduced Operating Procedure 130.1³ as evidence during the hearing.

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." 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."⁴

FINDING OF FACTS

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

On the morning of May 13, 2014 Grievant, the laundry manager at his facility, was outside the laundry room in a hall with another officer and three offenders. At the time Grievant was discussing a movie where an ape throws out his arm when the actor says, "Right turn, Clyde". Grievant threw up his arm at this point and accidentally hit an offender standing near him in the offender's facial area. There was no evidence that indicated the contact was anything other than accidental.⁵ The amount of force with which the offender was hit was in dispute. The offender was examined in the medical department of the facility and all parties, including the offender, believed no physical harm had occurred.⁶

The other officer in the hall at the time of the incident reported the incident. Grievant did not report the incident. The warden was notified. Grievant was called to the warden's office and questioned by the warden regarding the incident later the same day. It was reported that Grievant was very hesitant about what had happened and stated in testimony at the hearing that he didn't even know he had hit the offender.

Grievant had fourteen years of service with the Agency and no prior disciplines. Grievant had recently received acclaim for saving his department costs on supply purchases.

² Agency Ex. 12, Operating Procedure 135.1

³ Agency Ex. 13, Operating Procedure 130.1

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ Agency Ex. 1-9 witness statements and summary

⁶ Agency Ex. 9 page one

The Agency used the word “assault” to describe the incident. Grievant contends his actions did not have the statutory elements of “assault”. This Hearing Officer has previously ruled that in civil matters the statutory definition of criminal acts is not relevant⁷. This Hearing Officer also announced at this hearing that the issue was that of physical contact and, regardless of the word used, “physical contact” is how the incident would be perceived. There was no controversy that the incident being described was accidental. The Agency made an important point in testimony stating that any contact with an inmate could potentially be dangerous to the officer as well as compromise the control of the facility in general.

The Grievant’s good record was already considered by the Agency in determining Grievant’s discipline. It will not be reconsidered by the hearing officer.

Both length of service and otherwise satisfactory work performance are grounds for mitigation by Agency management under the Standards of Conduct. However, a hearing officer’s authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the Agency’s authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the Agency’s discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are never relevant to a hearing officer’s decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer’s finding that an Agency’s disciplinary action exceeded the limits of reasonableness. The weight of an employee’s length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee’s service, and how it relates and compares to the seriousness of the conduct charges. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.⁸

The Grievant’s action of physical contact with an offender was significant.

The Agency has a role as guardian of public and institutional integrity regarding the security of the facility. The hearing officer accepts, recognizes, and upholds the Agency’s important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers.

It should be noted Grievant’s counsel attempted to put one of the Agency’s witnesses in a negative light. Counsel questioned actions by that witness that may have been actionable offenses. Grievant’s counsel never developed whether he was attempting

⁷ Hearing Officer Decision dated January 8, 2014, Case No. 10151, Collins v Department of Corrections

⁸ EDR Ruling No. 2007-1518 (October 27, 2009)

to impeach the witness and/or to show disparate treatment. The Hearing Officer cannot presume counsel's motives. Further, Grievant's counsel never mentioned disparate treatment nor witness impeachment in his opening or closing statements.

OPINION

It is regrettable that Grievant, a good employee, caused an accidental incident to occur. However, physical contact with an inmate is strictly prohibited.⁹ Further, any physical contact is to be reported.¹⁰ The Agency's concern for the safety of the facility is paramount.¹¹ No mitigating factors were presented that the Hearing Officer felt further reduced the discipline.

DECISION

For the above stated reasons, Agency's Group III Written Notice with termination 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:

⁹ Operating Procedure 130.1, page 2 B5, 7

¹⁰ Operating Procedure 130.1, page 4 C2

¹¹ Operating Procedure 130.1, page 4 E

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.¹²

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

Sondra K. Alan, Hearing Officer

¹² 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.