

Issue: Two Group II Written Notices with Suspension (failure to follow policy); Hearing Date: 09/26/14; Decision Issued: 10/29/14; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No.10446; 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: 10446

Hearing Date: September 26, 2014

Decision Issued: October 29, 2014

PROCEDURAL HISTORY

On June 24, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failing to report that she observed an officer who was not alert. On June 24, 2014, Grievant was issued a second Group II Written Notice of disciplinary action with a 30 day suspension for failure to follow policy by not taking appropriate action when she observed that 15 minute checks had not been completed by the officer.

On June 24, 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 August 25, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 26, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Counsel
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 employs Grievant as a Sergeant at one of its Facilities. When she served as an Assistant Shift Commander she was responsible, "to ensure all aspects essential to the security operations of [the Facility]." She has been employed by the Agency for approximately 13 years. No evidence of prior disciplinary action was introduced during the hearing.

On April 25, 2014, Officer O was working in the isolation unit. Three residents were inside their rooms. Officer O was sitting at a desk in an office with glass windows. Each of the resident's rooms had a place for a monitoring sheet to be kept. Officer O was supposed to go to the door of each room every fifteen minutes, look through a window in the door, observe each resident, and write his observation of the resident's status on the monitoring sheet. Sometime after 8:30 a.m., Officer O fell asleep. His head was forward and down so that the top of his head was visible to a person standing outside of the office and looking into the office through one of the office windows. He would periodically straighten up, awaken, but then return to being less than alert.

At 8:52:42 a.m., Grievant entered the unit and walked down towards the office. She heard a loud radio playing. She looked into the office and observed Officer O slumped forward in his chair. Officer O's arms were underneath the desk and he was

tilted forward. Grievant walked around another corner of the office to get a better view inside the office. Officer O did not acknowledge her. Officer O appeared to be “dozing”. She left the unit at 8:53:24 a.m. and went to the sally port to allow a contractor to enter inside gates. Grievant returned to the unit at 8:54:39. She went to the office and entered the office. She observed that Officer O appeared to have “dozed off”. She instructed him to turn off the radio and get up and move around if he felt like he was going to fall asleep.

Officer O was supposed to maintain a log book. Grievant looked at the log book and noticed that it was not up to date. Officer O filled out the log book and a monitoring form he had removed from one of the resident’s doors before 8:30 a.m. He got up and checked on the three residents.

Officer O was supposed to go to each resident’s door and look inside the door to observe the resident to ensure that the resident was not in distress. He was supposed to write his initials and observations on a confinement monitoring sheet for each resident. Officer O was supposed to conduct checks every fifteen minutes.

Officer O failed to check the three residents at 8:30 a.m., 8:45 a.m., and 9:00 a.m. After Grievant woke up Officer O, Officer O initialed the confinement monitoring sheets for all three residents for the time periods of 8:30 a.m., 8:45 a.m., and 9:00 a.m. Grievant conducted a check of the first resident at 9:05 a.m., the second resident at 9:06 a.m., and the third resident at 9:15 a.m. For at least one of the confinement sheets, Grievant knew or should have known that Officer O wrote falsely that he had conducted checks at 8:30 a.m., 8:45 a.m., and 9 a.m. In other words, for at least one of the confinement monitoring sheets, Grievant knew that Officer O had filled in entries showing he had checked the resident’s room at a specific time even though that time had passed and a check had not been performed. Grievant then made her entry on the confinement sheet to reflect her observation of the resident.

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.”

DHRM Policy 1.60 lists numerous examples of offenses. 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

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

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 section.”

First Group II Written Notice

In the Agency’s judgment, Grievant should receive a Group II Written Notice for not taking action immediately upon observing Officer O being less than alert. When Grievant first observed Officer O, she recognized that he was “dozing” and less than alert. Because he was less than alert, he was unfit for duty and could not perform his job duties to ensure the safety of the three residents in the isolation unit. Grievant should have entered the office where Officer O was sitting and ensured he was awake before she left the unit. Although Grievant only left the unit for approximately one minute, any one of the residents could have engaged in self-injurious behavior during that time without being detected. The Agency has presented sufficient evidence to support the issuance of the first Group II Written Notice.

Grievant argued that she was unsure whether Officer O was asleep when she first observed him because the radio was loud and Officer O could have been reading papers on his desk. During an investigative interview, Grievant described Officer O as “dozing” when she first observed him (as well as the second time she observed him). There is sufficient evidence in the record to support the Agency’s assertion that Grievant knew Officer O was not alert when she first observed him.

Second Group II Written Notice

In the Agency’s judgment, Grievant should receive a Group II Written Notice for permitting Officer O to make false entries on a confinement monitoring sheet before making her entry on the sheet. The evidence showed that for at least one of the three confinement sheets, Grievant knew or should have known that Officer O made late entries on the confinement sheet to show that he checked the resident even though he had not checked the resident. Her behavior amounted to a tolerance of Officer O falsifying official State documents. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she did not know when Officer O made entries on the confinement sheets. During an investigative interview, Grievant admitted the Agency’s allegations with respect to one of the confinement monitoring sheets.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. In lieu of removal, an agency may suspend an employee for up to 30 work days. Accordingly, Grievant’s suspension 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”² 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 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 inconsistently disciplined its employees because it failed to discipline the Lieutenant who observed the incident on video shortly after it occurred. The evidence showed that the Lieutenant reported the matter to her supervisor and that there was no basis for taking disciplinary action against the Lieutenant. The Agency did not inconsistently discipline its employees. 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 the first Group II Written Notice of disciplinary action is **upheld**. The Agency’s issuance to the Grievant of the second Group II Written Notice of disciplinary action is **upheld**. Grievant’s 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 Va. Code § 2.2-3005.

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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.