

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 07/12/12; Decision Issued: 07/16/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9840; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9840

Hearing Date: July 12, 2012

Decision Issued: July 16, 2012

PROCEDURAL HISTORY

On March 20, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failing to properly position himself while supervising residents.

On March 26, 2012, 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 he requested a hearing. On June 6, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On July 12, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Juvenile Correctional Officer at one of its facilities. One of his responsibilities is to supervise residents at his facility. No evidence of prior active disciplinary action was introduced during the hearing.

On January 26, 2012, Grievant and Officer R escorted three residents outside to the recreational area. Grievant had a radio. Officer R did not have a radio. He asked the Sergeant for a radio but the Sergeant told him none were available and that he should supervise the residents without a radio. Officer R was not familiar with Grievant's shift and had not supervised residents for outdoor recreation.

A video of the incident shows that the recreational area consisted of two basketball courts – a left court and a right court. The residents began kicking a ball while on the left court. Grievant and Officer R were positioned on opposite ends of the group of residents. One of the residents moved to the left of the group and Officer R focused on that resident. The two other residents moved to the right court which was closest to the security fence. Grievant turned and watched the two residents as they moved to the right court, but he remained in his position. Officer R observed the two residents moving to the right court and asked Grievant if the residents were permitted to use the right court. Grievant responded that they were permitted to do so. The third resident began walking towards the right court. Officer R and Grievant walked towards the right court with the third resident between them. Grievant, the third resident, and

Officer R stopped at the edge of the right court on the side of the court opposite the fence. Grievant watched the two residents. The two residents began running in the direction away from Grievant, Officer R, and the third resident and towards the security fence. They began climbing the security fence in order to escape. Officer R yelled for them to stop but they disregarded his command. Grievant also yelled for the residents to stop but they disregarded his command. Grievant used his radio to call for assistance from other officers. As Officer R and the third resident walked towards the fence, the third resident tackled Officer R. Officer R gained control of the third resident and told Grievant he did not need assistance. Grievant ran out of the secured fence area along with other security staff to secure the other residents. None of the residents escaped the facility's exterior fence.

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 Agency Policy 212 governs Movement and Supervision of Residents. Section 212-4.3 provides that, Position of staff shall be in accordance with this procedure for resident activities as follows:

Outside recreational activities.

Supervision may be provided by all [Facility] recreational or all JCO Series staff or a combination thereof. Position staff on opposite ends of resident activities. Shift Commander will have responsibility for arranging supervision of residents who prefer not to participate in outside recreational activities, per IOP 1300 Recreation.³

Grievant failed to comply with Agency Policy 212-4.3 on January 28, 2012 because he did not position himself on the opposite side of Officer R with the two residents between them.

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 Employment Dispute

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 Agency Exhibit 4.

Resolution....”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 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.

Mitigating circumstances exist to reduce the disciplinary action from a Group II to a Group I Written Notice. Grievant and Officer R worked as a team. Grievant had control over where he chose to stand, but he did not have control over where Officer R stood. Agency Policy 214-4.4 states that, “[a]ll staff supervising residents will be issued a two-way radio.” The Agency failed to provide Officer R with a radio as required by its own policies. Officer R was reluctant to supervise the residents without a radio but did so after being instructed to do so by the Sergeant. Not having a radio altered Officer R’s behavior. Officer R attempted to position himself closer to the residents in order to stop any fight that may have started between the three residents. In addition, Officer R regularly worked the midnight shift and was not familiar with his obligation to ensure that he and Grievant were supposed to be on opposite ends of the residents when they were outside and engaged in recreation. When Grievant observed the two residents move to the right basketball court, he could have moved in that direction and placed himself between the residents and the fence thereby resulting in Officer R standing in the left court and Grievant standing outside the right court. Thus, there is a basis for disciplinary action against Grievant. Grievant had no control over Officer R. Officer R’s behavior was adversely influenced by the Agency’s inability to provide him with a radio and his lack of experience working on Grievant’s shift. Grievant could not anticipate that Officer R’s positioning would not be consistent with how an experienced officer with a radio might position him or herself. When these factors are considered there is a basis to reduce the disciplinary action from a Group II Written Notice to a Group I Written Notice.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is reduced to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

⁴ Va. Code § 2.2-3005.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 email.

3. 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 the Office of Employment Dispute Resolution to 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 email 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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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

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

[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