

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 07/20/12; Decision Issued: 07/23/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9846; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 08/03/12; EDR Ruling No. 2013-3405 issued 08/09/12; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 08/03/12; DHRM Ruling issued 08/21/12; 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: 9846

Hearing Date: July 20, 2012

Decision Issued: July 23, 2012

PROCEDURAL HISTORY

On February 17, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow policy.

On March 6, 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 19, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 20, 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. He has been employed by the Agency for approximately five years without receiving prior active disciplinary action.

Grievant received training regarding how to complete incident reports and how to supervise residents.

On January 18, 2012, Grievant and Officer H were working in Unit 19 at the Facility. Unit 19 is a housing unit with several bunk beds for residents. Officer H was seated at a post at a desk in the front of the dorm. Grievant was seated at a post in the back of the dorm. Resident R and Resident H were in the back of the dorm near Grievant's post. At approximately 10:05 p.m., Grievant walked from the back of the room to the front and sat down to the side of Officer H and begin speaking with him.

A conflict arose between Resident H and Resident R. Their beds were within a few feet of Grievant's post in the back of the room, but Grievant was not seated there. At 10:06 p.m., Resident R was standing out of his bed and Resident H was lying in his bed. Resident R used his hand to hit Resident H in the back. At 10:07 p.m. Resident R again hit Resident H in the back.

Resident H yelled that Resident R had put water in his shoe and asked Officer H if he wanted him to handle it. Officer H told Resident H "yeah", "you handle it, by staying on your bed." Resident H construed Officer H's statement to mean that he had

the authority to resolve the conflict with Resident R. A fight followed between Resident H and Resident R. At 10:13 p.m., Grievant responded quickly to stop the fight.

On January 18, 2012 11:30 p.m. Grievant drafted an Incident Report. He mentioned that he had moved to the front of the unit before the unit was being mopped up so that he could float between units 18 and 19. He mentioned that Officer H told Resident H to put his shoes on because he was going to lock up. Grievant failed to mention Officer H's comment "you handle it, by staying on your bed."

Grievant was later asked to write a more detailed statement. On February 1, 2012, Grievant wrote an Incident Report in which he described Officer H's comment as "you handle it by not getting off your bed or something to that effect."¹

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. Agency Policy 100-4.0 governs Incident Reports and it provides that "the importance of writing clear, concise, factual, and complete reports cannot be over emphasized." Officer H told Resident H "you handle it, by staying on your bed." Grievant knew or should have known that Officer H's comment "you handle it" could be an inappropriate comment for a Juvenile Correctional Officer to make to a resident.³ Officer H's comment was a material fact that precipitated the conflict between Resident H and Resident R. By failing to include Officer H's comment, Grievant submitted an incident report that was not complete thereby acting contrary to the Agency's policy and the training he had received.

Agency Policy 212-4.2 governs Movement and Supervision of Residents and provides, "Staff shall always position themselves where there will be maximum sight supervision and not be 'blind spots' in the coverage/supervision of residents."⁴ The fight between the two residents occurred within a few feet of Grievant's post. Had he been sitting at his post, Grievant would have been able to immediately respond to the initial

¹ Agency Exhibit 5.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ Grievant later asked a supervisor regarding whether Officer H's comment was appropriate.

⁴ Agency Exhibit 7.

conflict and possibly have prevented the fight by speaking to the residents and separating them. Grievant did not position himself to provide maximum site supervision of the two residents.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, the Agency's suspension of Grievant for three workdays must be upheld.

Grievant argued that he moved from the post in the back of the room to the front so that the area around his post could be mopped and cleaned. He also moved because he planned to change from the status of being assigned to a particular post to serving as a "floater". This argument fails. Nothing in the Agency's policies would permit Grievant to leave his post because the area around him was being mopped. Grievant's responsibilities as a floater would not have begun until the Sergeant in Unit 18 ended his shift at 10:30 p.m. The Sergeant testified Grievant would not have needed to leave Unit 19 and walked to Unit 18 until approximately 10:15 p.m. The conflict between the two residents occurred at approximately 10:07 p.m. It was not necessary for Grievant to have left his post prior 10:15 p.m.

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 Resolution...."⁵ 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 contends the disciplinary action should be mitigated because the disciplinary action was unnecessarily harsh and that the Agency failed to engage in progressive disciplinary action. The Standards of Conduct encourages agencies to engage in progressive discipline, but it does not require agencies to do so. Once an agency meets its burden of proof the Hearing Officer cannot substitute his preference for disciplinary action absent mitigating circumstances. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁵ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a three 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 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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Juvenile Justice

August 21, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9846. For the reasons stated below, the Department of Human Resource Management (DHRM) will not intercede in the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer identified the following as **ISSUES** in this case:

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?

The **PROCEDURAL HISTORY** of this case, as listed by the hearing officer, is as follows:

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. He has been employed by the Agency for approximately five years without receiving prior active disciplinary action. Grievant received training regarding how to complete incident reports and how to supervise residents.

On January 18, 2012, Grievant and Officer H were working in Unit 19 at the Facility. Unit 19 is a housing unit with several bunk beds for residents. Officer H was seated at a post at a desk in the front of the dorm. Grievant was seated at a post in the back of the dorm. Resident R and Resident H were in the back of the

dorm near Grievant's post. At approximately 10:05 p.m., Grievant walked from the back of the room to the front and sat down to the side of Officer H and begin speaking with him.

A conflict arose between Resident H and Resident R. Their beds were within a few feet of Grievant's post in the back of the room, but Grievant was not seated there. At 10:06 p.m., Resident R was standing out of his bed and Resident H was lying in his bed. Resident R used his hand to hit Resident H in the back. At 10:07 p.m., Resident R again hit Resident H in the back.

Resident H yelled that Resident R had put water in his shoe and asked Officer H if he wanted him to handle it. Officer H told Resident H "yeah", "you handle it, by staying on your bed." Resident H construed Officer H's statement to mean that he had the authority to resolve the conflict with Resident R. A fight followed between Resident H and Resident R. At 10:13 p.m., Grievant responded quickly to stop the fight.

On January 18, 2012 11:30 p.m., Grievant drafted an Incident Report. He mentioned that he had moved to the front of the unit before the unit was being mopped up so that he could float between units 18 and 19. He mentioned that Officer H told Resident H to put his shoes on because he was going to lock up. Grievant failed to mention Officer H's comment "you handle it, by staying on your bed."

Grievant later was asked to write a more detailed statement. On February 1, 2012, Grievant wrote an Incident Report in which he described Officer H's comment as "you handle it by not getting off your bed or something to that effect."

In his **CONCLUSIONS OF POLICY**, the hearing officer wrote the following:

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."

Failure to follow policy is a Group II offense. Agency Policy 100-4.0 governs Incident Reports and it provides that "the importance of writing clear, concise, factual, and complete reports cannot be over emphasized." Officer H told Resident H "you handle it, by staying on your bed." Grievant knew or should have known that Officer H's comment "you handle it" could be an inappropriate comment for a Juvenile Correctional Officer to make to a resident. Officer H's comment was a material fact that precipitated the conflict between Resident H and

Resident R. By failing to include Officer H's comment, Grievant submitted an incident report that was not complete, thereby acting contrary to the Agency's policy and the training he had received.

Agency Policy 212-4.2 governs Movement and Supervision of Residents and provides, "Staff shall always position themselves where there will be maximum sight supervision and not be 'blind spots' in the coverage/supervision of residents." The fight between the two residents occurred within a few feet of Grievant's post. Had he been sitting at his post, Grievant would have been able to immediately respond to the initial conflict and possibly have prevented the fight by speaking to the residents and separating them. Grievant did not position himself to provide maximum site supervision of the two residents.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, the Agency's suspension of Grievant for three workdays must be upheld.

Grievant argued that he moved from the post in the back of the room to the front so that the area around his post could be mopped and cleaned. He also moved because he planned to change from the status of being assigned to a particular post to serving as a "floater". This argument fails. Nothing in the Agency's policies would permit Grievant to leave his post because the area around him was being mopped. Grievant's responsibilities as a floater would not have begun until the Sergeant in Unit 18 ended his shift at 10:30 p.m. The Sergeant testified Grievant would not have needed to leave Unit 19 and walked to Unit 18 until approximately 10:15 p.m. The conflict between the two residents occurred at approximately 10:07 p.m. It was not necessary for Grievant to have left his post prior to 10:15 p.m.

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 Resolution..." 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 contends the disciplinary action should be mitigated because the disciplinary action was unnecessarily harsh and that the Agency failed to engage in progressive disciplinary action. The Standards of Conduct encourages agencies to engage in progressive discipline, but it does not require agencies to do so. Once an agency meets its burden of proof the Hearing Officer cannot substitute his preference for disciplinary action absent mitigating circumstances. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

In his **DECISION**, the hearing officer stated the following:

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

No other active disciplinary actions were noted for the grievance record.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, according to the evidence as outlined in the hearing decision, the grievant was charged with and found guilty of failing to follow instructions regarding writing an accurate and complete incident report and failing to follow instructions regarding manning his post. According to the evidence, an avoidable incident occurred between residents because the grievant had stepped away from his post. He later submitted an inaccurate incident report that described the incident. For these two violations, the agency issued to him a Group II Witten Notice with a three workday suspension.

In his appeal to the DHRM, the grievant submits that the agency failed to follow its own policies regarding staffing, lights out in the dormitories and having clients clean the floors. Even if the grievant's allegations are true, he failed to show how these conditions caused him to be away from his post and to write an incomplete and inaccurate incident report.

Because there is no indication that the agency violated or misapplied any human resource management policy, we have no basis to interfere with the execution of this hearing decision.

Ernest G. Spratley, Assistant Director