

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 08/27/12; Decision Issued: 08/29/12; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9865; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9865

Hearing Date: August 27, 2012

Decision Issued: August 29, 2012

PROCEDURAL HISTORY

Grievant is a security officer for the Department of Juvenile Justice, Beaumont Juvenile Correctional Center (“the Agency”), with several years of service with the Agency as of the offense date. On February 17, 2012, the Grievant was charged with a Group II Written Notice, with five days suspension without pay, for failing to follow instructions and/or policy on January 26, 2012. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On July 31, 2012, the Office of Employment Dispute Resolution, Department of Human Resource Management (“EDR”) appointed the Hearing Officer. During a pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, August 27, 2012, on which date the grievance hearing was held at the Agency’s facility.

The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency’s Exhibits. The Grievant submitted one document at the grievance hearing, over the Agency’s objection to timeliness. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group II Written Notice and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II offenses to include acts of misconduct of a more serious [than a Group I offense] and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. An example of a Group II offense is failure to follow supervisor's instructions or comply with written policy.

The Agency's internal operating procedure No. IOP-212, *Movement and Supervision of Residents*, provides

Outside recreational activities.

Supervision may be provided by all BJCC 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.

IOP 212-4.3(2). Agency Exh. J.

The Offense

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

The Agency employed Grievant as a security officer with several years of experience with the Agency. The Grievant has no other active disciplinary actions. On March 28, 2012, the Agency issued a Group II Written Notice, describing the offense:

On January 26, 2012, there was an attempted escape outside in the Max Recreation area involving three (3) residents who were being supervised by you and another staff. An investigation was conducted and the Rapid Eye camera system indicated that you failed to properly position yourself while supervising the residents. This is in direct violation of IOP 212-4.3, paragraph 2.

On January 26, 2012, the Grievant was one of two staff members supervising outside activities of three residents. Video evidence of the incident shows that the Grievant and other staff member allowed two of the residents to position themselves without the staff being on opposite sides. The two residents attempted escape over the fence surrounding the recreational field.

The other supervising staff member testified that they could have positioned themselves on opposite sides of the residents. The other staff member was also disciplined for the supervision lapse.

The Agency witnesses established that the facility staff, including the Grievant, were trained on the supervision policy, and that the Grievant has been observed following the proper supervision methods.

The Grievant, while electing not to testify, asserted in his questioning of witnesses that only the other recreational staff member present had a two-way radio, and that he (the Grievant) requested a radio but one was not available for him. The Grievant contends that all staff members supervising residents during recreation should have a radio. IOP 214, *Radio Communications*; Grievant Exh. 1. However, regardless of the merit to that contention, the lack of a second radio is not causally related to the two staff members not positioning themselves at opposite ends of the supervised residents. Allowing the residents outside the required physical supervision position contributed to the opportunity for the residents to attempt escape.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Based on the evidence, including the video recording of the incident, I find that the Grievant did, in fact, fail to follow applicable policy when he and the other staff member did not maintain supervision from opposite sides of the residents' recreational activity. The offense, unless circumstances warrant mitigation, satisfies the Group II level of discipline as a failure to follow agency policy.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, *even if he would levy lesser discipline*, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.* A hearing officer does not have the same discretion for applying mitigation as management does.

The Grievant argues that he was acting within applicable policy or, alternatively, that the Agency could have exercised discipline along the continuum short of a Group II Written Notice. The Agency had the discretion to elect less severe discipline. 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...." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency 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 was unwarranted, extreme, or should be mitigated. Grievant contends his otherwise good work history, service and performance should provide enough consideration to mandate a lesser sanction than a Group II with five days suspension. However, length of service, alone, is insufficient for a hearing officer to overrule an agency’s mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

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 charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant’s supervision lapse was, at some level, involved in the escape attempt and warrants disciplinary action. 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. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency’s action regarding the Group II Written Notice outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice 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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", is positioned above a horizontal line.

Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.