

Issues: Group III (unsatisfactory performance, failure to follow policy), Group III (failure to follow instructions/policy), Group III (failure to follow policy/instructions), Group III (failure to follow policy, providing misleading information to investigator), and Termination; Hearing Date: 05/27/15; Decision Issued: 09/10/15; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 10583; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10583

Hearing Date: May 27, 2015
Decision Issued: September 10, 2015

PROCEDURAL HISTORY

On February 19, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance and failure to follow instructions and/or policy. On February 19, 2015, Grievant was issued a second Group III Written Notice of disciplinary action with removal for failure to follow instructions and/or policy and providing false or misleading information to investigators. On February 19, 2015, Grievant was issued a third Group III Written Notice of disciplinary action with removal for failure to follow instructions and/or policy. On February 19, 2015, Grievant was issued a fourth Group III Written Notice of disciplinary action with removal for failure to follow instructions and/or policy.

Grievant timely filed grievances to challenge the Agency's actions. The matter proceeded to hearing. On April 6, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 27, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's 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 employed Grievant as a Captain at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On October 15, 2014, Grievant was working as the Shift Commander in charge of the Facility. Grievant was responsible for complying with Security Post Order 2. The Job Summary for this post provided:

Responsible for the security of [Facility], insuring the institution operates in a secure, safe, and sanitary manner. Schedules appropriate employee work assignments and grants time off when ensuring adequate coverage for security needs. Supervises lieutenants and sergeants in the normal function of their assigned duties. Ensures that changes in policy and/or procedure are distributed to employees on their shift. May perform the duties of a Major in his/her absence on instructions of the Superintendent or Assistant Superintendent. Performs required inspections and reports on same. Must be thoroughly knowledgeable of all 100 and 200 Series

Departmental and Institutional Operating Procedures and Institutional Post Orders. Reports any procedural discrepancies in writing to the Chief of Security.

Grievant's Post listed Specific Post Duties including:

9. Make at least one security check of all internal post per shift, to include Housing Units, DCE, Infirmary, and Dining Hall. Sign unit logbook; annotate discrepancies and observations.

10. Tour the Administrative Segregation and Intensive Services Units at least once a shift insuring that all documentation is correct and complete. Review Confinement Monitoring Forms for accurate and complete documentation. ***

14. Right or review and submit to the appropriate parties Institutional Incident Reports and/or Serious Incident Reports as established by written policy. ***

18. Intervene in crisis or emergency situations. ***

24. Tour isolation units and sign logbooks and Confinement Monitoring Forms. ***

25. Ensure that when a subordinate violates the Standards of Conduct, the violator, along with appropriate reports and witnesses, are presented to the Major or, in his absence, to the Assistant Superintendent for Security or the Superintendent at the earliest possible opportunity. Submission of written report only is unacceptable.

Security Post Order 2 contains General Post Duties including:

8. Maintain continual observation of area of control. Be alert for any unusual activities, behaviors, conditions, or violations of institutional program rules and report to Shift Commander.

9. Maintain professional decorum and keep security and safety of the resident as the most important element of supervision.¹

“High Risk” residents were placed in the Unit and more closely monitored than other residents at the Facility. Resident JJ was placed in the Unit on February 21, 2014. He was given a “SIB Alert Level II status. The Facility required that “[a]ny youth on SIB II will be on at least 5 minute observations.”²

¹ Agency Exhibit 16.

² Agency Exhibit 3.

Each resident's room in the Unit was secured by a door with a window in the door. The window was approximately 5 feet tall and 1 foot wide. When an Officer was standing in front of the window, he or she could see the entire inside of the room. Residents were not permitted to block the door windows. If a resident blocked his door window, security staff were expected to attempt to persuade the resident to unblock the window and, if necessary, open the door and remove whatever was blocking the window. On occasion, a resident would block his door's window in order to force security staff to open the room door. Once the door opened, the resident would attempt to push through the door and enter the day room or assault security staff.

On October 15, 2014, Officer K and Officer Q were working in the Unit. They were responsible for observing residents to ensure their safety and then recording their observations on Confinement Monitoring Forms for each resident. To observe a resident, an officer was expected to stand in front of the resident's door, look inside, and determine if the resident was in distress. The Post Orders for these officers required them to keep cell doors and windows unobstructed.

Resident JJ was in his room in the Unit. He made numerous threats to harm security staff. Security staff working in the Unit were concerned that Resident JJ would attempt to harm them if they opened the door to his room. Resident JJ wanted to "rack up as many charges" as he could so that he could be transferred to another Facility and remain near his father.

Resident TD and Resident DC were also residing in separate rooms in the Unit. The rooms were located near Resident JJ's room.

At 8:30 p.m., Resident JJ blocked the door window of his room by placing a mattress against the window.

Sometime during Grievant's shift, Officer K called the Lieutenant and Grievant. The Lieutenant placed the call on speakerphone so that Grievant could hear what Officer K was saying. Officer K said that Resident JJ had covered his door window and was claimed he would assault staff if they attempted to open his room door. The Lieutenant told Officer K to continue speaking with Resident JJ but not to open the room door. Grievant overheard the conversation but took no action to correct the Lieutenant's instruction.

At 8:42 p.m., Resident TD pushed out of his room and sat at a table near Resident JJ's room. At 8:45 p.m., the Sergeant entered the Unit. At 8:50 p.m., Grievant and the Lieutenant entered the Unit. At 8:53 p.m., Officer K, Officer Q, the Lieutenant, and the Sergeant restrained Resident TD in front of Resident JJ's room. Grievant was also in front of Resident JJ' room. At 9 p.m. Grievant and the Lieutenant left the Unit.

At approximately 9:45 p.m., Resident JJ's door window was uncovered. At approximately 9:51 p.m., Resident JJ covered the door window to his room.

At approximately 10:59 p.m., Resident JJ's window became uncovered. Resident JJ made a thin white rope from a shirt and tied it around his neck to commit suicide. At approximately 11:02 p.m., Officer Q walked to Resident JJ's room to look through the window. The mattress covering the window had slid down enabling Officer Q to see inside the room. He observed Resident JJ lying on his bunk and blue in the face. Officer Q called for assistance and entered the room along with Officer K. Other staff, including Grievant, responded to the call for assistance and entered the room. They attempted to remove the rope from Resident JJ's neck but had difficulty doing so. Eventually they were able to cut the rope. Resident JJ was breathing and responsive to questions. At approximately 11:09 p.m. Resident JJ was escorted in a wheelchair to the Medical Unit.

At approximately 10:47 p.m., Resident DC covered his door window. It remained covered until approximately 11:57 p.m. when the Lieutenant briefly opened Resident DC's door and looked inside. At 12:03 a.m. on October 16, 2016, Resident DC covered his door window with a towel. His door window remained covered until 12:59 a.m. At 1:14 a.m., Resident DC was standing at his door looking out the window. At 1:28 a.m., Resident DC's window was covered. The window remained covered until at least 6:31 a.m.

At approximately 2:19 a.m. on October 16, 2014, Grievant and the Superintendent entered the Unit. At approximately 2:36 a.m., the Superintendent picked up the Confinement Monitoring Form for Resident DC and looked at the form. Grievant also looked at the form. At approximately 2:37 a.m., Grievant looked in the direction of Resident DC's room. At approximately 2:38 a.m., Grievant and the Superintendent left the Unit.

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."³ 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. Post orders reflect the Agency's policy regarding work performance of a person holding a particular post. Grievant's Post Order required that she:

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

8. Maintain continual observation of area of control. Be alert for any unusual activities, behaviors, conditions, or violations of institutional program rules and report to Shift Commander.

Standard Operating Procedure IV – 4.1 – 2.28 governs Special Housing. Section 2.28 – 4.8 provides:

2. Residents confined to their room shall be visually checked by the officer a minimum of every 15 minutes, unless otherwise specified by BSU or health services staff, and documented on the Confinement Monitoring Form.

3. Two (2) security series staff shall be present at the resident's door prior to step opening the door. If there is an imminent life, health, safety threat the staff shall call for immediate assistance, described the situation, and respond.

a. The staff shall instruct the resident to sit on the end of the bunk furthest from the door.

b. If the resident has a history of or is actively displaying aggressive behavior, he/she shall be instructed to lay on the bunk on his/her stomach with legs crossed, facing the wall.

c. Staff shall not open the door until the resident complies and document any incidence of non-compliance.

Standard Operating Procedure IV – 4.1 – 2.04 governs Movement and supervision of Residence. Section 2.04 – 4.1 addresses Supervision of Residence and states:

1. There shall be at least one (1) trained security series staff on duty and actively supervising residents at all times *** .

12. Room Checks and Confinement Monitoring Forms:

a. When residents are in their rooms, security series staff shall conduct and document staggered/varied room checks at a minimum of every 15 minutes, unless otherwise specified (e.g., self-injurious behavior).

b. For residents on constant site supervision, the security series staff shall document on the Confinement Monitoring Form the time the constant supervision began, any change in activity or behavior, and the time the constant supervision ended.

c. The documentation shall note the actual time the room check was conducted. The time shall not be the scheduled time of the room check or an approximate time.

d. Confinement Monitoring Forms may be attached to the resident's door shall be readily accessible for documentation purposes.⁴

Grievant testified that if a resident failed to uncover his window after being instructed to do so, the Agency's policy⁵ was for a team of employees ("strike force") to enter the room and remove the items blocking the window.⁶

Group III Written Notice – Resident TD and Resident JJ

On October 15, 2014 at 8:30 p.m., Resident JJ covered his window. His window remained covered when Grievant entered the Unit at 8:50 p.m. and during Grievant's visit to the Unit until she left at 9 p.m. Grievant was in a position to observe Resident JJ's door window but failed to observe Resident JJ's unusual behavior and violation of institutional program rules. Grievant's behavior was contrary to her Post Order thereby justifying the issuance of a Group II Written Notice.

Grievant argued that when she entered the Unit to address the problem with Resident TD, her focus was on Resident TD and not on whether Resident JJ's window was covered. She testified that if she had become aware of Resident JJ's window being covered, she would have talked to Resident JJ and if that failed, she would have "pulled officers from other areas to suit up." Grievant's Post Order, however, required that she be alert for unusual activity. Resident JJ's room was in the Unit and near enough to Resident TD's room that Grievant should have been able to notice that Resident JJ's window was covered. The Agency alleged but did not present sufficient evidence to show that the Group II should be elevated to a Group III offense.

Group III Written Notice - Telephone Call

Officer K spoke with the Lieutenant and Grievant on a speaker phone. The Lieutenant told Officer K not to enter Resident JJ's room even though Resident JJ had

⁴ Agency Exhibit 19.

⁵ This policy does not appear in the Agency's written policies presented as exhibits during the hearing.

⁶ The practice at Facility, however, was that officers would not enter rooms to uncover windows if the resident was talking to the officer and the officer concluded the resident was all right. Grievant allowed her subordinate to adopt this practice. Although the Superintendent refused to answer the Investigator's question about whether she authorized staff to follow this practice, Grievant did not allege she was merely following the Superintendent's instruction. Grievant is bound by her testimony regarding how the officers should have reacted to a resident covering his door window for a lengthy period of time.

been covering his door window. Grievant should have told the Lieutenant his instruction was not correct. Her failure to do so was unsatisfactory work performance, a Group I offense.⁷

Grievant argued that she did not pay attention to the Lieutenant's comments and that he did not instruct Officer K to refrain from entering Resident JJ's room. The most likely scenario was that the call was placed on speakerphone so that both the Lieutenant and Grievant could hear Officer K's comments. Sufficient evidence exists for the Hearing Officer to conclude that Grievant understood the Lieutenant's instructions to Officer K.

The Agency has not presented sufficient instructions to support the issuance of a Group III Written Notice. The Agency's failure to show a written policy identifying specific criteria identifying when a strike force was to be used and a policy specifying that an employee's tolerance of such a policy amounted to violation of that policy undermines the Agency's assertion that Grievant's behavior rose to the level of a Group III offense.

Group III Written Notice – Resident DC.

Grievant entered the Unit at approximately 2:19 a.m. on October 16, 2014 and left at approximately 2:38 a.m. During that time, Resident DC's window was covered. Grievant was near Resident DC's room and observed or should have observed that Resident DC's window was covered. Grievant took no action in response to observing Resident DC's window covered.

Grievant's Post Order required that she "[b]e alert for any unusual activities, behaviors, conditions, or violations of institutional program rules" The Agency prohibited residents from covering their door windows. Grievant should have recognized that by covering his window, Resident DC engaged in behavior that should have been addressed by Grievant or her staff. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant's behavior does not rise to the level of a Group III Written Notice.

Grievant argued that she did not notice that Resident DC's window was covered because she was focused on the events surrounding Resident JJ's attempted suicide. Grievant's assertion may explain her behavior but it does not excuse her failure to observe other residents in the unit.

Group III Written Notice – False or Misleading Information

The Agency alleged that Grievant provided the Agency's Investigator with false or misleading information. To show this occurred, the Agency must show more than that Grievant provided incorrect information – the Agency must show that Grievant knew

⁷ See, Attachment A, DHRM Policy 1.60.

that the information she was providing was false or misleading. The Agency's conclusion that Grievant presented false or misleading information is based on its review of the video of the events occurring in the Unit. The Agency declined to provide a copy of the video as evidence and, thus, the Hearing Officer cannot determine the extent to which Grievant's statements varied from what actually happened. In other words, if Grievant's statements varied significantly and dramatically from the events displayed in the video, the Hearing Officer could conclude that Grievant provided false or misleading information. Without the video, the Hearing Officer can conclude that many of Grievant's statements were inaccurate but not that she knew or should have known they were inaccurate. The Group III Written Notice for providing false and misleading information must be reversed.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove her from employment.

Mitigation

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"⁸ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action regarding Residents TD and JJ is **reduced** to a Group II Written Notice. The Agency's issuance to the Grievant of a Group III Written Notice regarding a telephone call is **reduced** to a Group I Written Notice. The Agency's issuance to the Grievant of a Group III Written Notice regarding Resident DC is **reduced** to a Group II Written Notice. The Agency's issuance to the Grievant of a

⁸ Va. Code § 2.2-3005.

Group III Written Notice for providing false or misleading information is **rescinded**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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.⁹

⁹ 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