

Issue: Group III Written Notice with termination (failure to follow instructions); Hearing Date: 06/30/15; Decision Issued: 07/24/15; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 10603; Outcome: No Relief – Agency Upheld;  
**Administrative Review**: EDR Ruling Request received 07/29/15; EDR Ruling No. 2016-4201 issued 09/16/15; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 07/29/15; DHRM Ruling issued 09/18/15; 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: 10603**

Hearing Date: June 30, 2015  
Decision Issued: July 24, 2015

**PROCEDURAL HISTORY**

On April 9, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow instructions.

On April 9, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 11, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 30, 2015, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
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 employed Grievant as a Trainer II at one of its facilities. The purpose of her position was:

To provide quality educational programs in science to meet the individual needs of students as well as provide administrative support to the Principal in the areas of classroom management, instructional effectiveness, and record keeping.<sup>1</sup>

Grievant had been employed by the Agency for approximately seven years.

Grievant received a performance evaluation on October 12, 2012, stating, "[Grievant] needs to disengage with the students by simply telling them her expectations and moving on."<sup>2</sup>

On January 14, 2014, the Principal instructed Grievant, "The REACH program must be run and there must not be any arguments with residents."

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<sup>1</sup> Agency Exhibit 11.

<sup>2</sup> Agency Exhibit 6.

Grievant had prior active disciplinary action. On September 26, 2014, Grievant received a Group II Written Notice for violation of policy. She was advised that, “staff should refrain from using insulting language ....”

On April 18, 2014, the Supervisor gave Grievant an Interim Evaluation indicating that Grievant “needs to work on: [p]ositive techniques for managing discipline in her classes.”<sup>3</sup>

On August 25, 2014, Grievant received a memorandum from the Principal setting forth “Job Expectations.” Grievant was instructed:

We had discussed the expectations of the classroom, and I had advised you again about getting into discussions with students in your classroom. You were to disengage with them and move forward with instruction. \*\*\*

After discussing with you the expectations in the classroom, on 8/22/2014, you were involved in a “heated” discussion with another student who did not respond appropriately in your class. Instead of disengaging with the resident, you began to raise your voice and to escalate the matter to the point that you did not respond to my directions to leave the room. \*\*\* You are expected to work, speak, and respond to students in an appropriate manner. \*\*\* Any subsequent reports of action(s) that violate the expectations to maintain a commitment to professional ethics from this date, will result in disciplinary action.<sup>4</sup>

Students at the Facility ranged in age from 14 and a half years old to 18 years old. If a student behaves inappropriately, a teacher should tell the student that he will receive a charge because of the offensive behavior. Teachers can use a stern or authoritative voice, but they are prohibited from yelling at students. Teachers are expected not to use threatening body language.

On February 4, 2015, Grievant was teaching several students including Student TW in her classroom. Student TW was 16 or 17 years old. The class period began at 8 a.m. and ended at 9:30 a.m. A Juvenile Correctional Officer was assigned to work in the classroom. Several students began arguing. One student left the classroom, but returned a few minutes later. A second student left the classroom. JCO S entered the classroom when the students became disruptive by yelling and cursing at Grievant. Grievant left the classroom. JCO S walked near the group of students. Grievant reentered the classroom and stood near the entrance.

Student TW was seated at a desk a few feet away from the other students. He was upset. JCO S walked next to his desk and began trying to calm him down.

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<sup>3</sup> Agency Exhibit 7.

<sup>4</sup> Agency Exhibit 12.

Grievant walked to her desk and stood. She was located approximately 15 to 20 feet from Student TW. She began speaking to Student TW and he argued with her. While standing next to her desk, Grievant began pointing her finger in Student TW's direction as she waved her left arm up and down in a manner as if to emphasize a point. Grievant walked towards Student TW as she argued with him. She pointed towards Student TW as she approached him. She stopped approximately 7 or 8 feet away from Student TW and continued to speak to him. Student TW said he did not want to be there any more. Grievant replied, "I don't want you in here either." Student TW raised his head upward and straighten his back as he began the process of getting out of his seat. JCO S recognized that the conflict between Grievant and Student TW was increasing so she moved her body in front of Student TW so that he could not see Grievant. Her objective was to de-escalate the argument between Grievant and Student TW. Two other security staff approached Student TW and joined JCO S in attempting to minimize the conflict between Student TW and Grievant. Grievant turned around and walked back to her desk. A few moments later, she raised her left arm with the back of her hand towards Student TW. She made a waving motion with her hand to signal "come here." Student TW got up out of his seat and moved in Grievant's direction while surrounded by the three juvenile correctional officers. Grievant moved backwards. Student TW sat back down with two juvenile correctional officers near him. Student TW put his head down on his desk as JCO S remained next to him. A few minutes later, Student TW stood up and left the classroom.

## **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."<sup>5</sup> 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 instructions is a Group II offense.<sup>6</sup> Grievant had been instructed to disengage with students and not to argue with students. On February 24, 2015, Grievant began arguing with Student TW while standing approximately 15 to 20 feet away. Her voice was loud. She raised her arm and pointed in Student TW's direction. She began walking towards Student TW as she argued. She pointed at Student TW as she walked several feet towards Student TW. Grievant's movement toward Student TW along with her words and hand gestures increased the level of conflict such that JCO S believed it was necessary to position her body to block Student TW's view of Grievant and distract Student TW's attention from Grievant. The Agency has presented sufficient

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<sup>5</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>6</sup> See, Attachment A, DHRM Policy 1.60.

evidence to show that Grievant did not follow instructions to disengage and refrain from arguing with students. The Agency's evidence rises to the level of a Group II offense.

Grievant had prior active disciplinary action consisting of a Group II Written Notice. Upon the accumulation of a second Group II Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

The Agency argued that Grievant's behavior rose to the level of a Group III offense because she created an unnecessary security risk. The evidence is not sufficient to support this assertion. Grievant's behavior may have prolonged the conflict but it is not clear that conflict rose to the level of a security risk.

Grievant argued that the students had been disruptive all morning and that she was merely explaining to them the consequences of their behavior such as incurring charges. She argued she had disengaged on several occasions in accordance with her job expectations.

The evidence showed that on several occasions, Grievant walked away from disruptive students and turned her attention elsewhere. As discussed above, however, in at least one instance, Grievant engaged in an argument with Student TW and continued the argument while pointing at him and walking towards him. This was not behavior consistent with disengaging from a conflict.

Grievant asserted that the Agency retaliated against her but presented no credible evidence to support this allegation.

*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 ...."<sup>7</sup> 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 the disciplinary action.

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<sup>7</sup> Va. Code § 2.2-3005.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>8</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.