

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 05/09/17;
Decision Issued: 05/10/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10969; Outcome No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10969

Hearing Date: May 9, 2017
Decision Issued: May 10, 2017

PROCEDURAL HISTORY

On November 3, 2016, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On November 18, 2016, 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 March 6, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 9, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
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 Corrections employs Grievant as a Corrections Officer at one of its facilities. Grievant received "exceeds contributor" ratings on his performance evaluations by the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility has a Service Gate that must be locked when not in use. There are two fences outside of and surrounding the Service Gate. Inmates work near the gate and if the gate is left unlocked, an inmate could pass through the gate. If an inmate passed through the unlocked gate, he could hide and create a security risk to employees.

The Facility has a tractor with a power washer trailer referred to as a "water buffalo."

On October 20, 2016, Grievant contacted the Sally Port Officer, Officer M, to meet him at the Service Gate to unlock the gate for Grievant. They met at the Service Gate and the gate was unlocked and opened. Grievant drove the water buffalo through the gate. Officer M drove the tractor the rest of the way out of the compound. Neither Grievant, nor Officer M locked the Service Gate.

Approximately 18 hours later, another employee recognized that the Service Gate was unlocked and reported the matter to Facility managers.

Grievant wrote, "I fully understand the mistake I have made by assuming that someone else had secured those service gates."¹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."² Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁵ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On October 20, 2016, Grievant asked Officer M for assistance to unlock and open the Service Gate. After moving the water buffalo through the gate, Grievant failed to lock the gate. An Inmate could have passed through the Service Gate. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the disciplinary action should be reduced to a written counseling.⁶ Although the Agency could have resolved this matter by issuing a written counseling memorandum instead of a Group I Written Notice, the Agency was not obligated to do so. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice and that Agency's decision to do is consistent with the Standards of Conduct.

¹ Agency Exhibit 2.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

⁶ Grievant pointed out that because he received disciplinary action he was no longer able to remain on the strike force and to serve as a trainer. These consequences were not part of the punishment under the written notice, but they followed as a result of disciplinary action. Grievant is a good employee and removing him from these duties may seem unwise. The decision to issue a written notice instead of a written counseling is squarely within the Agency's authority to manage.

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”⁷ 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.

Grievant argued that the Agency failed to comply with the Grievance Procedure because it untimely responded to Grievant’s timely requests to advance his grievance. Grievant points out that several provisions of the Grievance Procedure require the Agency to respond in five days yet the Agency failed to respond within the required time frame.

Any delay by the Agency in responding to Grievant’s grievance does not change the outcome of this case. Grievant did not seek a compliance ruling from the Office of Employment Dispute Resolution to resolve the Agency’s delay. An employee’s remedy for the Agency’s non-compliance with the Grievance Procedure is to seek a ruling from EDR. Once the grievance advances to the Hearing Officer, whether a party complied with grievance step requirements is moot.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action 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:

⁷ Va. Code § 2.2-3005.

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.⁸

[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

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