

Issue: Group III Written Notice with Demotion (failure to follow policy and safety rule violation); Hearing Date: 06/21/17; Decision Issued: 06/29/17; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 11009; Outcome: Partial Relief.

VIRGINIA: IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,  
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: DEDR CASE NUMBER 11009

**DECISION OF HEARING OFFICER**

HEARING DATE: JUNE 21, 2017

DECISION DATE: JUNE 29, 2017

**I. PROCEDURAL BACKGROUND**

The agency issued a Group III Written Notice to the grievant on February 24, 2017. The grievant filed his Form A on March 16, 2017. The Office of Employment Dispute Resolution appointed me as Hearing Officer effective May 3, 2017. I conducted a prehearing conference call with counsel for the parties on May 24. The hearing was held at the subject facility on June 21.

**II. APPEARANCES**

The agency was represented by counsel. It presented three witnesses. Eight exhibits were offered and accepted into evidence.

The grievant was represented by legal counsel. He testified on his own behalf and as his only witness. A total of 13 exhibits were proffered by him and accepted into evidence without objection.

**III. ISSUE**

Whether the agency properly issued the grievant a Group III Written Notice on February 24, 2017 and demoted him?

#### **IV. FINDINGS OF FACT**

The agency operates a corrections facility in a rural area. The facility has a secure perimeter with certain operations taking place outside that perimeter. One of those operations is a dairy. Inmates who are approved to work at the dairy are to be searched and properly identified before being allowed to go beyond the secure perimeter. Each approved inmate has a gate pass that is pulled from a central location and placed at the point of exit. Each inmate has an identification badge as well. The officers working the point of exit are to verify that the inmate is authorized to leave the facility by virtue of the existence of a gate pass. The identification of the inmate is to be verified by comparing his appearance with the photograph on his identification badge.

Inmate T had been working in the dairy for an unspecified amount of time prior to January 26, 2017. He was classified as a Level I offender, the lowest security risk classification. Before January 26 the work privileges of Inmate T were revoked and he was issued a “detainer.” The Warden of the facility restored the work privileges of Inmate T on January 26. The foreman of the dairy was informed of this development and knew that Inmate T would be returning to work under him.

The grievant was assigned to work the point of exit on January 31. A captain with the agency was working with him. The captain assumed the duties of searching the inmates prior to exit. The grievant had the responsibility of verifying the existence of a gate pass for each individual and the identity of the inmate.

On that date the inmates assigned to the dairy were released from their cells to be processed through the exit point. Inmate T was one of those inmates. The corrections officer responsible for making sure the appropriate gate passes were at the exit point did not pull the

pass for Inmate T. Instead, he had pulled a pass for Inmate R. Inmate R had the same surname as Inmate T but is of a different race. The grievant looked at the pass for Inmate R and called him forward by using only the surname. Inmate T stepped forward. The grievant allowed him to exit the secure perimeter to work at the dairy. Inmate R was not present nor a part of the group of inmates scheduled to work at the dairy.

The grievant negligently failed to follow the dual verification process. He failed to note that no gate pass was present for Inmate T, making it improper for that inmate to be allowed to leave the perimeter. Upon the error by the grievant being detected later that day, Inmate T was returned to the secured portion of the agency without incident

The captain working with the grievant testified that he observed the grievant failing to verify the existence of the gate passes for the inmates. The captain failed to correct the behavior of the grievant. He testified that he was reluctant to do so in the presence of the inmates. He said nothing to the grievant about the incident until after an investigation had revealed the lack of a pass for Inmate T and his release from the facility.

The grievant has been employed by the agency for multiple years. His supervisors have regularly given him performance evaluations of “Exceeds Contributor.”

## **V. ANALYSIS**

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a

preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The grievant stipulated that he failed to properly verify the identity of Inmate T and released him to work in the dairy without a gate pass being present. The evidence adequately supports this stipulation. The grievant further stipulated that his omissions constitute a violation of Agency Operating Procedure 425.1, "Outside Work Assignments." This stipulation is also supported by the evidence. That policy sets forth the requirements for proper identification of inmates leaving for an outside work assignment, such as Inmate T.

The primary argument of the grievant is that the issuance of the Group III Written Notice is not consistent with the applicable policy (Agency Operating Procedure 135.1). Under that policy a Group III discipline is appropriate for "gross negligence on the job that results (or could have resulted) in the escape, death, or serious injury of a ward of the state."

Gross negligence is "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of

[another]. It must be such a degree of negligence as would shock fair minded men although something less than willful recklessness.” *Ferguson v. Ferguson*, 212 VA 86, 92, 181 SE2d 648, 653 (1971). It differs from simple negligence (the failure to exercise ordinary care to avoid injury to another) only as a matter of degree.

The instant situation resulted from Inmate T and Inmate R having the identical surname. The surname is a very common one. No evidence was presented as to the number of inmates with that surname at the facility on January 31. The agency chose not to present as exhibits copies of the identification badges for Inmate T and Inmate R for me to determine the level of difficulty a reasonable person would have in distinguishing between them. Evidence could have been presented, by either side, of the length of time that the grievant had worked the checkpoint and was otherwise familiar with Inmate T from his earlier period of time being released to work at the dairy.

Based on the evidence presented, I find that the grievant was clearly negligent in failing to note that Inmate T did not have a proper gate pass in the box at the exit point on January 31. I do not find, however, that this omission rises to the level of gross negligence. Therefore, the agency should not have issued the grievant a Group III Written Notice.

Operating Procedure 135.1 allows an agency to discipline an employee for less serious offenses. Among the second group offenses (Group II) are the failure to “comply with applicable established written policy.” Also listed as a Group II offense is “violating safety rules when there is not a threat of bodily harm.” When the agency issued the Group III Written Notice the offense codes listed by it included the failure to follow policy and “safety rule violation.” I find that the more appropriate level of offense in this matter is that of a Group II. The grievant clearly violated the practice and Operating Procedure 425.1. That procedure can be

characterized as a “safety rule.” Because Inmate T was approved for release to work at the dairy, there was not an increased threat of bodily harm caused by the omission of the grievant.

The grievant has also argued that his punishment should be mitigated in light of the agency’s failure to discipline the two other officers involved in this situation. The officer who took the first misstep in creating this situation pulled the gate pass for Inmate R, rather than Inmate T. Had the grievant performed his duties consistent with policy, he would have served as a “last line of defense” to cover for the failure of the other officer. I do not find the grievant and the other officer are similarly situated and declined to mitigate the punishment of the grievant any further based on the agency not disciplining that employee.

The grievant further points to the captain who was present at the exit point searching the inmates while the grievant verified identities. He has not been disciplined by the agency. The argument is that by failing to correct the grievant in his work performance, the captain is similarly situated. The captain had known the grievant for a number of years and was aware of the usual quality of his work performance. The agency argued that the omission of the captain is not of the same level as that of the grievant. I agree. The captain’s reluctance to correct the grievant in front of inmates is understandable. It is a well-worn maxim of management to “praise in public but criticize in private.” The situation presented the captain in the early morning hours of January 21 was one that a reasonable supervisor could view as not requiring immediate attention. I will defer to the discretion of the agency in viewing the actions of the captain as being less serious than those of the grievant.

## **VI. DECISION**

For the reasons stated above, I reduce the level of discipline issued to the grievant to a Group II Written Notice. The grievant is hereby notified that the active life of this notice shall

be three years beginning February 24, 2017. I further direct that the grievant be reinstated to his former position as Sergeant and the 10% disciplinary pay reduction be rescinded. I make no award of back pay or benefits.

## **VII. 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 this final.



RENDERED this 29th day of June, 2017.

/s/Thomas P. Walk  
Thomas P. Walk, Hearing Officer