



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11800

Hearing Date: May 18, 2022

Decision Issued: May 19, 2022

PROCEDURAL HISTORY

On January 19, 2022, Grievant was issued a Group III Written Notice of disciplinary action for falsifying records.

On January 20, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 14, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 18, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately 16 years. Except for the facts giving rise to this disciplinary action, the Agency considered Grievant's work performance to be satisfactory. No evidence of prior active disciplinary action was introduced during the hearing.

On September 21, 2021, Grievant and Officer L were working in a Unit at the Facility. The Facility conducted inmate count five times per day. The purpose of a count was to protect employees, inmates, and the public. One of those counts was to take place at approximately 9 p.m.

To complete the count, Grievant was supposed to walk past each cell in the lower level, look inside to view the inmate, and then add that inmate to his count. Officer L was to follow Grievant and look into each cell to observe the inmate and add that inmate to his count. Once they both counted, Grievant and Officer L were to verify that their counts matched. Following a count, Grievant and Officer L were to sign a count sheet recording the total number of inmates in the Unit.

Grievant and Officer L did not count inmates at 9 p.m. Grievant and Officer L signed the count sheet indicating that each had counted 45 inmates in the Unit. Grievant knew that he had not counted inmates at 9 p.m.

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.” 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”¹

“Falsifying any records either by creating a false record ... willfully ... including ... count sheets ...” is a Group III offense.² On September 21, 2021, Grievant signed a count sheet showing he had counted 45 inmates in the Unit at 9 p.m. He had not counted inmates. Grievant knew that his representation of having counted inmates was false. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that the Facility was poorly staffed and that no one came to relieve him from his post so that he could conduct the count. Whether another employee came to relieve Grievant from his post so he could conduct count does not affect the outcome of this case. Grievant could have called the Watch Commander, reported his circumstances, and waited for someone to relieve him. Instead, Grievant chose to falsely report that he had counted inmates.

Grievant recognized that his behavior justified disciplinary action but argued removal was excessive discipline. Although the Agency could have taken lesser disciplinary action, the Agency’s issuance of a Group III Written Notice with removal was consistent with the Standards of Conduct.

Grievant argued that other employees were not removed from employment even though they engaged in similar behavior. He argued that supervisors at the Facility had instructed officers to sign count sheets even though the officers had not conducted counts. Grievant did not present evidence to support these assertions.

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

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² See, DOC Operating Procedure 135.1 (XIV)(B)(2).

accordance with rules established by the Department of Human Resource Management”³ 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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must

³ Va. Code § 2.2-3005.

refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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]

[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

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