



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11928

Hearing Date: May 1, 2023
Decision Issued: May 22, 2023

PROCEDURAL HISTORY

On October 16, 2022, Grievant was issued a Group III Written Notice of disciplinary action with demotion and ten percent salary reduction for reporting a count that had not been completed.

On November 9, 2022, 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 February 13, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 1, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
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. 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 Lieutenant until his demotion to Sergeant.

Institutional counts are one of the most important tasks to be performed at a correctional facility because an inaccurate inmate count could undermine public safety. For example, if an inmate had escaped, Institution managers might not be aware of the escape if an inmate count incorrectly reported the escaped inmate as being present.

To perform an inmate count, two corrections officers independently are to count inmates by walking past each cell in a pod and counting the inmates. The two officers then compare their counts and if the counts match for the whole pod, they would report the count to Grievant by telephone and then bring the count sheets to Grievant.

On October 16, 2022, Grievant was working as a cluster supervisor. He supervised corrections officers located in three buildings. The Institutional count started at 3 a.m. Grievant instructed Officer L1 and Officer L2 to count inmates and bring him the count sheets when they were finished. Grievant monitored their activities by contacting Officer H and asking the status of the counting by the two officers.

The Major asked Grievant several times for the results of the inmate count. Grievant felt pressured to give the Major the count number. The Major had the count numbers for two of the three buildings in the cluster. Grievant called Officer H to see if the two officers had completed the count in the building. Officer H told Grievant that the officers had finished counting, left the building, and were on their way to give Grievant their count sheets. Officer H assumed this because he believed the two officers had left the building. After the Major's third request, Grievant told the Major the count number for the third building even though Officer L1 and Officer L2 had not told Officer H or Grievant their count results and had not presented their count sheets to Grievant. Based on the number Grievant gave the Major, the Major was able to clear the count meaning there were no discrepancies in the number of inmates counted.

After clearing the count, the Major overheard Grievant on the radio asking one of the officers to bring him the count sheets. An officer said that he would do so once he had finished counting. The Major viewed cameras in the housing unit and observed the two corrections officers still counting. The Major realized that Grievant had provided him with an estimate of the number of inmates counted rather than the actual number counted because the count had not been completed at the time Grievant reported the count number.

The Major asked Grievant about the count. Grievant said that no one had called the count to him and that he told the officers to bring the count sheets to him. When the Major asked Grievant how he knew the count number, Grievant said, "I knew the count from the last count so I called that in."

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

Group III offenses include:

Falsifying any records either by creating a false record, altering a record to make it false, or omitting key information, willfully or by acts of gross negligence including but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports statements,

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

insurance claims, time records, leave records, or other official state documents.

On October 16, 2022, Grievant was responsible for reporting the count to the Major. The two corrections officers had not finished counting the building and had not reported a number to Officer H or to Grievant. Because they had not reported a number to Grievant, there was no way that Grievant could know the number of inmates counted. Grievant told the Major a number he remembered was correct and implied that it was the number obtained following a completed count. Grievant's representation to the Major was false. Grievant knew or should have known that he was falsely representing the number of inmates counted after a completed count. The Major created a record clearing the count based on false information provided by Grievant. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of records. Upon the issuance of a Group III Written Notice, an agency may remove an employee or in lieu of removal, transfer, demote, and impose a disciplinary salary reduction. Accordingly, the Agency's decision to issue Grievant a Group III Written Notice with demotion and salary reduction must be upheld.

Grievant argued that the count number he gave was correct and, thus, he did not falsify any number. He claimed he simply called in the count early. The issue, however, is not whether Grievant told the Major the correct number of inmates. The issue is that Grievant represented the number he gave the Major was determined after a count had been completed. Something which was not true.

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"² 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 demotion and disciplinary salary reduction is **upheld**.

² Va. Code § 2.2-3005.

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 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.