



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11813

Hearing Date: July 8, 2022
Decision Issued: July 11, 2022

PROCEDURAL HISTORY

On March 7, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On March 7, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 14, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 8, 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 Corporal at one of its facilities. He had been employed by the Agency for approximately 17 years. Grievant had prior active disciplinary action. On November 5, 2020, Grievant received a Group III Written Notice for sleeping during work hours.

One of Grievant's duties was to make rounds. To accomplish this task, Grievant was to get up from the desk, walk into the A or B side dorm and observe the probationers inside the dorm to make sure they were not engaged in any misbehavior and were safe. After leaving the first side dorm, he was to walk to the other dorm and observed the probationers inside to make sure they were behaving appropriately and were safe. After making a round, Grievant was to record in a log book the time he made the round and sign his initials to signify he had completed the round.

On January 27, 2022, Grievant was working at the Facility. He sat at a desk in a room. To his left was the B side dorm where probationers stayed. To his right was the A side dorm. There were probationers on both sides for a total of approximately 21 probationers.

Grievant wrote in the log book:

2230 Rounds were made. (initialed by Grievant)
2300 Rounds were made. (initialed by Grievant)
2330 Rounds were made. (initialed by Grievant)
0000 Rounds were made. (initialed by Grievant)

Although Grievant wrote that he conducted rounds 10:30 p.m., 11 p.m., 11:30 p.m., and midnight, Grievant did not enter the A and B sides to observe the inmates. He did not conduct rounds during those times contrary to his log book entries.

A probationer reported that Grievant was sleeping while seated at the desk. The Agency investigated the allegations by looking at a video recording of the area where Grievant worked. The video showed when Grievant was seated at a desk in the room and when he left and the directions he walked. The Lieutenant watched the video and could not conclude that Grievant was asleep while sitting at the desk. He was able to see that Grievant did not conduct rounds every thirty minutes as required.

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, insurance claims, time records, leave records, or other official state documents.²

The Facility’s log book was an official State document. Grievant knew what the Agency considered to be completing a “round.” On January 27, 2022, Grievant wrote in the log book that he had conducted four rounds between 10:30 p.m. and midnight even though he knew he had not conducted rounds during those times. Grievant falsified

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² Operating Procedure 135.1(V)(E)(2)(b)

records thereby justifying the Agency's 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 he conducted "visual rounds" meaning he could see inside each side while sitting at the desk. Grievant did not write in the log book that he conducted visual rounds. He wrote that rounds were made and he knew that he was representing that he had entered A and B sides and observed inmates in those areas.

Grievant argued that he was not feeling well and needed to remain seated at the desk. Grievant should have informed the Sergeant that he could not conduct rounds rather than writing something that was untrue.

Grievant argued the Facility was short-staffed. Whether the Facility lacked adequate staffing did not permit him to falsify records.

Grievant argued that the Agency failed to comply with the Corrections Officer Procedural Guarantee Act. Operating Procedure 135.1 provides:

Investigations focusing on non-criminal matters that could lead to a Corrections Officer being issued a Written Notice with transfer, suspension without pay, demotion, or termination will be conducted in accordance with the Correctional Officer Procedural Guarantee Act (COV §9.1-508 et seq.).

a. Any questioning shall take place at a reasonable time and place, preferably when the Corrections Officer under investigation is on duty.

b. Prior to any questioning, eligible Corrections Officers under investigation shall be presented the Correctional Officer Procedural Guarantee Investigation Notice 135_F8 or Internal Audit Unit Notice of Investigation 030_F23 to inform the Officer of the following:

- i. The name and job title of the investigator
- ii. The name and job title of any other individual to be present during the questioning
- iii. The nature of the investigation.

Whether the Agency complied with the Corrections Officer Procedural Guarantee Act does not affect the outcome of this case. If the Hearing Officer excludes any statements made by Grievant to the Agency as part of its investigation, there remains sufficient evidence to support the disciplinary action. The Lieutenant compared the log book entries with the video and concluded Grievant falsified documents. The disciplinary action did not depend on evidence obtained from Grievant.

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”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.

Grievant argued that his otherwise satisfactory work performance and his length of service justified giving him another opportunity to work. Although these are factors the Agency could have used to reduce the disciplinary action, they are not in themselves sufficient to allow the Hearing Officer to mitigate the disciplinary action for exceeding the limits of reasonableness. In light of the standard set forth in the Rules, 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.

³ Va. Code § 2.2-3005.

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.