



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11817

Hearing Date: November 7, 2022
Decision Issued: November 28, 2022

PROCEDURAL HISTORY

On March 7, 2022, Grievant was issued a Group III Written Notice of disciplinary action for gross negligence on the job that results or could have resulted in the escape, death, or serious injury of an inmate and refusal to obey instructions that could result in a weakening of security.

Grievant filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 29, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 7, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
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 Virginia Department of Corrections employed Grievant as a Sergeant at one of its facilities. He began working for the Agency on June 1, 2015. No evidence of prior active disciplinary action was introduced during the hearing.

The Building consisted of several pods including N1 and N2. Pod N1 was the restrictive housing unit. Pod N1 had cells on two floors connected by a stairway. Pod N1 had a log book located on the desk in the pod. Each cell door had an Individual Inmate Log sheet for security staff to record each time they checked on the inmate inside the cell.

The Floor Officer working in N1 was responsible for making an entry in the post log every time an event occurred in the pod. When the Floor Officer checked on an inmate, the Floor Officer was supposed to initial the Individual Inmate Log Sheet. The Floor Officer was supposed to check on each inmate every 30 minutes. The checks were supposed to be staggered so that one check was not precisely 30 minutes after the other check but rather was at some time within a 30 minute period. If an employee were to relieve the Floor Officer then that employee was obligated to assume the Floor Officer's duties including checking each inmate within a 30 minute time period.

On September 15, 2021, Grievant was assigned to work post 14 as the N Building Supervisor. Officer J was assigned to work post 62 as the N 2 Floor Officer. Post 60 was the N2 Floor Officer. Because of staff shortages, Officer J was responsible for both the N1 and N2 Floor Officer posts.

Grievant's post order 14 required him to "Maintain relevant logs/records ensuring that they are adequately completed, kept current, and that all pertinent activities occurring on this post are documented."¹ Grievant's specific duties included, "Ensure that all assigned posts in your area of control are manned by a certified corrections officer." Grievant's record keeping duties included "Ensure that all logbooks are kept properly. All incidents must be logged, facts and recorded, and reports prepared."²

The post order for post 60, N1 Floor Officer, required the Floor Officer to, "Maintain Special Housing logbook and related records." Post order 60 required:

Complete security checks on each Inmate RHU twice per hour, no more than 40 minute apart, on an irregular schedule, with each check recorded on the Restorative Housing: Individual Log.³

Inmate G was serving a 14.5 year sentence. He was diagnosed with Other Specific Bipolar and Related Disorder. Inmate G was placed in pod N1 in cell 113.

Officer J observed Inmate G at 10:47 a.m. and made an entry on Inmate G's Individual Inmate Log Sheet. That was the last entry Officer J made on the Individual Inmate Log Sheet prior to Inmate G's death.

At 12:02 p.m., Officer J entered pod N1 and spoke with Inmate G at 12:04 p.m. and 12:05 p.m. At 12:14 p.m., Officer J picked up food trays and looked into Inmate G's cell. At 12:22 p.m., Officer J picked up Inmate G's tray.

At 12:22 p.m., the Facility's inmate count began for all pods including N1 and N2. At 12:26:02 p.m., Officer W entered pod N1 and observed Grievant seated at a desk. At 12:26:20 p.m., Officer J and Officer W began to count inmates in pod N1 beginning on the bottom floor at what appeared to be cell 116. Officer J and Officer W walked to Inmate G's cell number 113 and observed Inmate G. They counted Inmate G as part of their count. Officer J and Officer W reached the end of the first floor cells in N1 at 12:27:18 p.m. They walked to the bottom of the stairs at 12:27:38 p.m. They walked up the stairs and walked to the left to the end of the cells on the second floor at 12:28:10 p.m. They walked back to the center of the second floor and then continued walking to reach the end of the second floor cells at 12:28:44 p.m. They walked back to the top of the stairs

¹ Agency Exhibit p. 184.

² Agency Exhibit p. 191.

³ See Grievant's Exhibits.

and both reached the bottom of the stairs at 12:29:33 p.m. They left pod N1 at 12:29:44 p.m. to continue counting inmates in pod N2.

At 12:31:55 p.m., Inmate S appeared to hand Inmate G something through their open tray slots.

Until an institutional count is cleared there remains the possibility of the need for recount. Corrections staff are supposed to remain available in the event a recount is necessary. The Facility count cleared at 12:56 p.m.

While neither Officer J nor Grievant was in pod N1, Inmate G used a shirt to cover the window in his cell door.

At 1:01 p.m., Grievant entered pod N2.

An Inmate Worker entered pod N1 at approximately 1:10:52 p.m.

At 1:14:56 p.m., Grievant entered pod N1 with an Inmate Advisor. Grievant walked to the desk where the post log was located. Grievant noticed that Officer J's documentation of his cell checks and post log book were not current. Grievant did not want to make entries on the cell check sheets and post log book until after he gave Officer J an opportunity to update those items. Grievant did not write in the post log book that he had relieved Officer J. Grievant did not write on the cell door sheet that he had checked inmate status.

Grievant and the Inmate Advisor walked upstairs. Grievant came down stairs at 1:17:05. He went to cell 116 at 1:17:54 and began speaking with the inmate inside that cell. At 1:22:22, Grievant walked to the next cell. At 1:23:24, Grievant approached Inmate G's cell and observed the window covered preventing Grievant from seeing inside the cell. Grievant knocked on the cell door a couple of times but Inmate G did not respond. Grievant used his ink pen to push the shirt covering to the side so he could look inside the cell. Grievant looked inside the cell and observed Inmate G hanging. Grievant called the booth officer to open the cell door. With the assistance of an Inmate Worker, Grievant entered the cell and removed a noose from around Inmate G's neck. Medical assistance was called to provide assistance. Agency staff were unable to revive Inmate G.

Inmate G left a note. The Agency concluded Inmate G died by suicide.

When Officer J returned from break, Grievant asked Officer J if he had conducted his rounds and Officer J said, "Yes." Grievant told Officer J, "If you made your rounds, you need to write them on the sheets. You need to fix your sheets." Grievant told the Investigator "I did not tell [Officer J] to lie."

At approximately 2 p.m. on September 15, 2021, Officer R went to pod N1 to take pictures. He noticed that Officer J had not finished completing the inmate log sheets on cell doors. Officer J's last entry was at 10:47 a.m. Officer R spoke to Officer J about the

inadequate documentation. Officer J said he would go back and fill in the information when he had time.

After Officer J returned from his lunch break, he made entries in Inmate G's Individual Inmate Log sheet for 11:17 a.m., 11:47 a.m., 12:17 p.m., 12:47 p.m., and 1:17 p.m. Officer J wrote false entries on the Individual Inmate Log sheet. For example, Officer J was not in pod N1 at 12:47 p.m. and 1:17 p.m.

The Agency conducted an investigation. Officer J told the Investigator that "When we finished our count, [Grievant] told me to go ahead and go to break so I did. I took my hour break about 12:45 – 1:45"⁴

In a second interview, Officer J told the Investigator that the last log entry he made was at 12:30 p.m. cell check and that he caught up the last entries after returning from lunch break.

During a due process meeting, Grievant told the Warden:

Policy of being on the floor 24/7/365 cannot find it. Watch commander comes in and says nobody goes on break until count clears, but if established by watch commander then in my line of thinking, that is when I took over the floor. I had no idea that [Officer J] had been back on the floor, no idea when I was for 16 mins but I am sure it's on video or could find it somewhere.⁵

CONCLUSIONS OF POLICY

The Group III Written Notice states, in part:

Gross negligence on the job that results (or could have resulted) in the escape, death, or serious injury of an inmate/probationer/parolee or serious injury of a State employee. Violation of OP 135.1, refusal to obey instructions that could result in a weakening of security. Violation of Operating Procedure (OP) 425.4, Management of Bed and Cell Assignments. ***

Due to the circumstances that led to the death of the inmate, the actions taken by [Grievant] allowed the weakening of security measures due to his inattentiveness to properly document rounds that were conducted and completed cell inspections in a timely manner. Based on the severity of the

⁴ Agency Exhibit p. 54.

⁵ Agency Exhibit p. 160. These notes of the meeting are not clear.

circumstances and egregious result of the violation of policy, a Group III Written Notice with termination is warranted.⁶

There is no basis to take disciplinary action against Grievant for refusing to obey an instruction. He was not given an instruction.

Whether Grievant engaged in gross negligence that resulted in the death of an inmate depends on the time that Grievant relieved Officer J. At the time Grievant relieved Officer J, Grievant became responsible for Officer J's duties as the Floor Officer in N1 and N2. Grievant became responsible for inmate checks within a 30 minute time period every 30 minutes.

The evidence showed the Officer J and Officer W counted inmates in pod N1 in 3 minutes and 24 seconds. They left pod N1 at 12:29:44 and went to pod N2. It is likely that their count in N2 took about 4 minutes. Thus, they finished counting inmates in N2 at approximately 12:34 p.m. If Officer J left for lunch at 12:34 p.m. and Grievant did not enter pod N1 until 1:14:56 p.m., it means pod N1 did not have a Floor Officer for approximately 41 minutes. Forty-one minutes is more than the 30 minute requirement. The Agency suggested that if Grievant had checked Inmate G within the 30 minute time frame, Grievant may have recognized Inmate G's behavior and intervened sooner to prevent Inmate G's death.

Officer J told the Investigator that Grievant relieved him so he could go on his lunch break from 12:45 p.m. until 1:45 p.m. Officer J did not tell the Investigator at what time Grievant relieved Officer J. If Officer J was relieved by Grievant at 12:45 p.m., then Grievant began his inmate checks four seconds before the 30 minute time period expired. The Agency began disciplinary action against Officer J but he resigned in lieu of removal. Officer J did not testify during the hearing. The accuracy of Officer J's statement is not clear.

The Agency did not present any videos showing where Grievant was prior to his entry into pod N1 at 1:14:56 p.m. The Agency did not present any videos showing where Officer J went after he finished counting pod N2.

Grievant alleged that he relieved Officer J at 12:56 p.m. after count cleared. During the hearing, the Assistant Warden was asked, "If [Grievant] is accurate that he relieved [Officer J] at 12:56 and checked [Inmate G] at 1:23 that would be within policy limits? The Assistant Warden said, "Yes." During the hearing the Investigator was asked, "Wouldn't it be relevant to ask [Grievant] when he assumed duties? The Investigator replied, "In retrospect, yes, I should have asked that question."

Officer J was assigned post 62 at the time he left pod N1. The Floor Officer's post 62 provided:

⁶ Agency Exhibit p. 3.

Do not leave the post until properly relieved or after given permission to do so by your supervisor or a higher-ranking official.⁷ ***

Maintain relevant logs/records ensuring that they are adequately completed, kept current, and that all pertinent activities occurring on this post are documented."⁸ ***

Remain on your post until shift change count has cleared and you have been properly relieved unless a supervisor instructs you to act differently.⁹

Perform routine checks of the pod and cells at least once per hour at alternate times.¹⁰

Ensure that all logbooks are kept properly. All incidents must be logged, facts recorded and reports prepared.¹¹

Operating Procedure 425.4 governs Management of Bed and Cell Assignments in the restrictive housing unit. Section II(B)(6) provides:

Checked by a Corrections Officer at least twice per hour, no more than 40 minutes apart, on an irregular schedule with each check recorded in a logbook.

If Officer J had followed post order 62, he would have remained on his post until count cleared unless Grievant instructed him differently. Grievant testified that he relieved Officer J of his duties at 12:56 p.m. that day and that he did not tell Officer J he could leave at 12:39 p.m. Grievant testified that allowing Officer J to leave at 12:39 p.m. would be a violation of policy and that he did not have the authority to do so.

If Grievant relieved Officer J at 12:56 p.m. and was in front of Inmate G's cell at 1:23 p.m., then Grievant had conducted his rounds within the 30 minute time requirement and his behavior was consistent with policy. There would be no basis for disciplinary action for failing to timely check Inmate G.

The Hearing Officer cannot determine the time Grievant relieved Officer J and assumed Officer J's duties. It could have been at 12:34 p.m., 12:45 p.m., or 12:56 p.m.

⁷ Agency Exhibit p. 207.

⁸ Agency Exhibit p. 209.

⁹ Agency Exhibit p. 213.

¹⁰ Agency Exhibit p. 214. In pod N1 cell checks were supposed to be performed every 30 minutes at alternate times.

¹¹ Agency Exhibit p. 215.

The burden of proof is on the Agency to show that Grievant acted contrary to policy by allowing the floor of pod N1 to be without a Floor Officer in excess of 30 minutes. The Agency has not met that burden of proof. The evidence is not sufficient for the Hearing Officer to conclude that Grievant engaged in gross negligence that could have resulted in the death of Inmate G. In other words, the Agency has not established a basis for a Group III Written Notice.

Although the Agency has not established a basis for a Group III Written Notice, it has established a basis for lesser disciplinary action.

Group II offenses include, "Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure."¹²

Grievant did not comply with post orders because he did not write in the log book when he assumed the Floor Officer post. Also, he did not write on the Individual Log Sheets on each inmate's cell door after he spoke or observed each inmate prior to reaching Inmate G's cell. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. According, the Group III Written Notice with removal must be reduced to a Group II Written Notice with a ten workday suspension.

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"¹³ 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 further the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award

¹² Agency Exhibit p. 245.

¹³ *Va. Code § 2.2-3005.*

unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

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 **reduced** to a Group II Written Notice with a ten workday **suspension**. The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency may account for a ten workday suspension. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue

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.