

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 03/13/18;
Decision Issued: 04/02/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11160; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11160

Hearing Date: March 13, 2018
Decision Issued: April 2, 2018

PROCEDURAL HISTORY

On September 20, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On October 17, 2017, 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 1, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 13, 2018, a hearing was held at the Agency's office.

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 employs Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant is referred to as Officer M in this decision.

Officer B and Officer M were responsible for supervising an Inmate who was at the Hospital. The Inmate was in a room in the Emergency Unit which was open to the general public. Both officers were expected to remain alert because they served as the primary source of security over the Inmate. Officer M and Officer B arrived at the Hospital at approximately 7 a.m. At some point during the day, Officer B took off his ballistic vest.

The Assistant Warden for the Secured Care Unit walked down the hallway towards the Inmate's room. As he approached the room, he could see inside the room and observed Officer B and Officer M seated in chairs. He observed that both of them had their eyes closed. He became concerned because the corrections officers were armed and seated only a few feet from the Inmate. The Assistant Warden knew that the corrections officers were expected to remain alert at all times. He tapped on the glass window loud enough to get the attention of the two officers. Officer B and Officer M stood up and focused their attention on the Assistant Warden. The Assistant Warden

identified himself and asked if they were all right. One of the officers said yes. The Assistant Warden asked if they needed to be relieved from the posts and both declined. The Assistant Warden asked Officer B to put on his ballistic vest and Officer B did so.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁴ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was aware of the Agency’s expectation that he remain alert at all times when supervising the Inmate. On August 17, 2017, Grievant was not asleep, but his eyes were closed for a few seconds. He was not alert during that time. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

The Agency argued that a Group II Written Notice should be issued because Grievant acted contrary to his written post order. The Agency was supposed to ensure that Post Order 73 was signed and reviewed by Grievant before he assumed the post. The Agency did not present a copy of Post Order 73 signed by Grievant. There is no basis to raise the level of disciplinary action from a Group I to a Group II Written Notice.

Grievant asserted that he was alert when the Assistant Warden approached the room. He contends he properly greeted the Assistant Warden. This argument is not supported by the evidence. The Assistant Warden’s testimony was credible. He had a sufficient opportunity to view Grievant’s behavior. He believed Grievant was not alert. He tapped on the window in order to alert Grievant to his presence. He asked Grievant if Grievant was ok and asked Grievant if he needed to be relieved from his post. The

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Assistant Warden's actions are consistent with someone who believes he observed an employee who was not alert.

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"⁵ 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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.

⁵ 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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