

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 05/25/18;
Decision Issued: 05/29/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11196; 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: 11196

Hearing Date: May 25, 2018

Decision Issued: May 29, 2018

PROCEDURAL HISTORY

On November 14, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On December 4, 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 April 23, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 25, 2018, a hearing was held at the Agency's office.

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

On September 25, 2017, Grievant was at the Hospital working in the crucial care Unit. He and Corrections Officer 2 were responsible for supervising an offender receiving medical treatment. The Unit was not in a secured or segregated area. Members of the public could access the Unit and contact an offender in the Unit if they knew the offender was at the Hospital. Grievant was responsible for supervising the Offender and ensuring that only authorized persons enter the Offender's room. He was responsible for ensuring that the Offender did not harm medical staff.

The Offender was in the room receiving treatment from a nurse and a medical provider. Grievant was seated next to Corrections Officer 2. Grievant had his bottom towards the front of the chair seat and his back slouching against the back of the chair. His head was tilted backwards towards the wall. Grievant was facing up towards the ceiling and looking at the ceiling.

At approximately 9 a.m., the Assistant Warden was making his rounds by walking to different rooms in the Hospital. As he approached the Offender's room, he observed Grievant with his head back facing the ceiling. The Assistant Warden stopped and

looked at Grievant for at least two minutes. Grievant continued to look up at the ceiling and not at the Offender or the medical staff. Grievant did not notice the Assistant Warden enter the room.

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.

On September 25, 2017, Grievant was supervising the Offender and responsible for watching the Offender to ensure the safety of the nurse and medical provider. Grievant was responsible for ensuring no one entered the Offender’s room without his permission. Grievant did not carry out his responsibilities because he was looking at the ceiling for at least two minutes. He was not able to perform his duties while he was looking at the ceiling. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

Grievant argued he was alert and speaking with Corrections Officer 2. Although it does not appear that Grievant was sleeping, he was not focusing his attention on the Offender and the Hospital staff treating the Offender. He was not providing security as expected by the Agency.

The Agency argued Grievant should receive a Group II Written Notice for violation of policy. The Agency argued Grievant violated Operating Procedure 425.2 governing Hospital Security and the Security Post Order.

Operating Procedure 425.2 does not contain a provision instructing Grievant to be in constant sight supervision of the Offender. Section IV(E) addresses Staffing

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).

Requirements by security level for the escort and supervision of offenders in all areas of the hospital. In a security level 2 and above area, “two armed Corrections Officers with constant sight supervision” are required. This directive is to Agency supervisors to place two (instead of one) armed corrections officer at a security level 2 and above unit. This language is not an instruction to a corrections officer telling the corrections officer to keep constant sight supervision of an offender. It does not provide a basis to elevate the level of discipline from a Group I offense to a Group II offense.

The Security Post Order provides:

All offenders shall remain under constant sight supervision at all times, regardless of location ***

Be alert and watchful at all times and maintain constant observation of the area of control for this post.

Although the Post Order provides a basis to elevate the disciplinary action from a Group I to a Group II offense, it may not be relied upon by the Agency in this case. The Post Order requires:

Before assuming this post, read and carefully review the post order with your supervisor. After having a clear understanding of the post requirements, sign the attached post order review log. Subsequent signing of post orders is necessary not less than quarterly or when a post order is revised or changed.

Grievant was not presented with the Post Order for his signature or discussion with a supervisor. The Agency has not established that Grievant received Notice of the Security Post Order requirement for constant sight supervision of the Offender.

The Post Order contains signature lines for the Chief of Security and Warden. Neither signature line has a signature. It is unclear whether this policy became effective.

Upon consideration of the evidence, the most appropriate level of disciplinary action in this case is a Group I Written Notice.

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

⁵ Va. Code § 2.2-3005.

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.

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]

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

[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