

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 01/10/19;
Decision Issued: 04/08/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11282; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling**
Request received 04/22/19; EDR Ruling No. 2019-4914 issued 05/25/19;
Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11282

Hearing Date: January 10, 2019

Decision Issued: April 8, 2019

PROCEDURAL HISTORY

On April 9, 2018, Grievant was issued a Group II Written Notice of disciplinary action for:

On February 26, 2018, [Grievant] entered an offender's cell without following proper notification procedures according to policy 420.2. [Grievant] failed to notify the proper chain of command before entering the unrestrained offender's cell.

On April 10, 2018, 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 October 29, 2018, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 10, 2019, 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 Sergeant at one of its facilities. He has been employed by the Agency for approximately 32 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in Housing Unit 3. His Post Order designated Grievant's supervisor as "Unit Three Supervisor (Lieutenant)."

The Inmate was in a cell in the segregated portion of Housing Unit 3. He was on a "15 minute watch" meaning his physical status was to be observed every 15 minutes. He was placed on that status because of concerns regarding his mental health. The Inmate was a dangerous inmate. He had been held in a "segregation cell" and was then placed in a "mental health cell" or "suicide cell".

A chart posted on the Inmate's door showed that the Inmate was supposed to have a mattress and blanket. On February 24, 2018, Grievant noticed that the Inmate

did not have a mattress and blanket as authorized by the chart. Grievant gave the Inmate a mattress and blanket. Grievant asked Lieutenant G and Sergeant W why the dayshift employees had not provided the Inmate with a mattress and blanket. Grievant was informed that the chart was not correct and that the Inmate was not permitted to have a blanket and mattress. Grievant removed the items from the Inmate's cell. This may have angered the Inmate.

On February 26, 2018, Grievant was the supervisor for Housing Unit 3. No Lieutenant was working with Grievant in Housing Unit 3.

On February 26, 2018, Grievant noticed that the Inmate had an ink pen and paper that he was not permitted to have. The ink pen was a sharp object that the Inmate could use to hurt himself or others. The Inmate had written "HUNGER STRIKE" and "PROTEST TIL I SEE INTEL AND WARDEN" on the paper. Grievant decided it would be necessary to search the Inmate's cell to retrieve the ink pen and paper and determine if the Inmate had any additional contraband.

Grievant instructed the Inmate to "cuff up". This meant that the Inmate was to place his hands behind his back, back up to the tray slot in the cell door, and allow a corrections officer to place handcuffs on the Inmate. Once handcuffs were placed on the Inmate, corrections officers could enter the cell. The Inmate refused to be placed in restraints. The Inmate did not give a reason why he refused to be restrained.

At approximately 7:20 p.m., Grievant instructed the Control Booth Officer to open the Inmate's cell door. Grievant and Officer D entered the cell. A "scuffle" occurred, but it was not a "boxing match." Grievant secured the Inmate's right hand. Officer D secured the Inmate's left hand. Officer B stood at the door. This frustrated Grievant. Grievant said to Officer B, "Why are you standing at the door [Officer B], come over here and put the cuffs on the man." Officer B put the handcuffs on the Inmate and laid the Inmate on the bunk. Officer D searched the cell. At approximately 7:27 p.m., Grievant, Officer D, and Officer B left the cell.

The Inmate remained in restraints. Grievant instructed the Inmate to come to the tray slot of the cell door so that the restraints could be removed. The Inmate refused to do so. At approximately 7:33 p.m., Grievant called Lieutenant G to come to Housing Unit 3. Lieutenant G arrived at Housing Unit 3. The Inmate complied with Lieutenant G's instruction to put his hands through the tray slot so that the cuffs could be removed.

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

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

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

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴

Operating Procedure 420.2 (May 1, 2015) governs Use of Restraints and Management of Offender Behavior.⁵ Section III (E) governs Restraints Applied Within a Cell for Behavior Management and provides:

1. Clinical restraints (Medical or Mental Health) may be ordered by a physician or QMHP in accordance with Operating Procedure 730.5, Mental Health Services: Behavior Management and are subject to the notification, authorization and documentation requirements of that operating procedure.
2. Offenders may be restrained within a cell when their action poses a physical threat to themselves or others, but only when the Facility Unit Head or designee determines that other less restrictive alternatives have not been effective or would not be effective.⁶
[a] The Facility Unit Head’s designee for approval of restraints applied within a cell is the Administrative Duty Officer (ADO).⁷

On February 28, 2018, Grievant placed the Inmate in restraints because the Inmate possessed an ink pen the Inmate could have used to hurt himself. Grievant did not first contact the Facility Unit Head or designee for that person to determine if other less restrictive alternatives would be ineffective. Grievant failed to comply with Operating Procedure 420.2 thereby justifying the issuance of a Group II Written Notice.

Grievant argued that his action was authorized by Operating Procedure 730.5 which governs Mental Health Services: Behavioral Management. Section E(2) provides:

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)(C)(2)(a).

⁵ Hearing Officer Exhibit 1.

⁶ The Inmate did not leave his cell. This provision applied to the application of handcuffs when an inmate is inside his cell. Grievant was not applying clinical restraints referred to in paragraph 1.

⁷ It is not clear that the Agency’s Operating Procedure 420.2 effective May 1, 2018 has the same requirement contained in its policy effective May 1, 2015. The policy in effect on February 28, 2018 was the policy effective May 1, 2015.

If security or other staff observes an incident of self-injurious, suicidal, or dangerous behavior, the following will immediately occur:

- a. Remove any materials by which the offender has harmed or may harm self or others
- b. Notify the Shift Commander of the offender's behavior

In this case, the Inmate was in possession of an ink pen he could use to harm himself but he was not actually in the process of harming himself. There was sufficient time for Grievant to contact a supervisor to obtain approval for the cell entry. Thus, Operating Procedure 730.5 did not authorize Grievant to act without approval from a supervisor.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁸ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"⁹ cause of the alleged adverse action by the employer.¹⁰

Grievant engaged in protected behavior because he filed a grievance challenging the Agency's failure to hire him as a Lieutenant. Grievant asserted that Lieutenant G was aware of that grievance. Grievant suffered an adverse employment action because he received disciplinary action. Grievant has not established a connection between his protected activity and the adverse employment action. The Agency did not take disciplinary action as a pretext for retaliation.

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"¹¹ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁸ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁹ This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

¹⁰ See, *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

¹¹ Va. Code § 2.2-3005.

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 II Written Notice of disciplinary action 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.

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 EEDR before filing a notice of appeal.