



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11563

Hearing Date: October 19, 2020
Decision Issued: November 6, 2020

PROCEDURAL HISTORY

On April 29, 2020, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On May 18, 2020, 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 July 27, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 19, 2020, a hearing was held by remote conference.

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. He has been employed by the Agency for approximately 13 years. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued February 15, 2019.

Corrections Officers working at the Facility were informed during pre-shift meetings to inform supervisors if they notice anything unusual.

Cell doors were supposed to be shut except for when a pod had cell breaks. During a cell break, the Control Booth Officer was supposed to open the cell doors for approximately a minute to allow inmates to enter or exit their cells.

On March 15, 2020 at approximately 2:50 p.m., a fight occurred between several inmates in Pod A2. As part of the Agency's investigation, it viewed video of Pod A2. Investigators observed that the cell doors inside Pod A2 were left open from approximately noon until 4:13 p.m. Grievant was working as the Floor Officer on March 15, 2020. Grievant was in the Unit Manager's office at the time of the fight.

The Control Booth Officer decided to leave the cell doors open in Pod A2 from noon until 4:13 p.m. Only the Control Booth Officer could open and close cell doors. The Control Booth Officer closed the cell doors to Pod A1 and Pod A3 but left the cell doors

open for Pod A2. She did this because she was confused about in which building she was working. The practice in another building was to leave open the cell doors in the second Pod. The Control Booth Officer mistakenly thought she was working in that building.

Grievant was responsible for making security checks. He was to go to each cell and make sure the door was secured and that if an inmate was in his cell that the inmate was safe. Grievant made rounds in Pod A2 at 2:04 p.m., 3:32 p.m., and 4:45 p.m. During that time, he should have noticed that the cell doors were left open for extended periods of time. Grievant did not ask the Control Booth Officer to close the cell doors.

Grievant returned to the Housing Unit at 2:47 p.m. and entered the Unit Manager's office where he remained until 2:59 p.m.

The Lieutenant Assistant Watch Commander testified that a security check was to be followed by another security check no later than an hour later.

The Warden testified that a Floor Officer should know that cell doors should be shut except when opened for cell breaks to allow inmates to enter or exit their cells.

The Control Booth Officer received disciplinary action for leaving the cell doors open.

Grievant did not testify or call any witnesses.

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

"[I]nadequate or unsatisfactory job performance" is a Group I offense.² 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.

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

On March 15, 2020, Grievant was working as a Floor Officer in the Building. He entered Pod A2 several times and observed the cell doors open for longer than on minute. He should have notified the Control Booth Officer to close the cell doors. He did not make rounds within a one hour time period. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

Grievant asserted that he told the Control Booth Officer to close the cell doors. The Control Booth Officer testified Grievant did not notify her that the cell doors needed to be closed. The Agency presented evidence that if Grievant told the Control Booth Officer to close the cell doors, he should have informed a supervisor when she failed to do so.

Grievant asserted that he was not in the Building when one of the rounds was supposed to have been made and responsibility for that round fell onto another employee. Grievant did not present evidence to support this assertion.

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. 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 I 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.

³ Va. Code § 2.2-3005.

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.