



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11575

Hearing Date: October 27, 2020

Decision Issued: October 30, 2020

PROCEDURAL HISTORY

On April 24, 2020, Grievant was issued a Group II Written Notice of disciplinary action for violating a safety rule by failing to follow policy. During the Second Step of the grievance process, the Agency reduced the disciplinary action to a Group I Written Notice for unsatisfactory work performance.

On May 17, 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 August 18, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 27, 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. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant completed firearms training in January 2019 and April 2019. His training included instruction about the importance of keeping unrestrained inmates away from a corrections officer's weapon.

On January 30, 2020, Grievant was one of three corrections officers transporting an Inmate in a van. Grievant and the other two officers were returning the Inmate to the Facility. The Inmate was in restraints. Grievant was armed with a weapon. He was responsible for overseeing the two other officers as they escorted the Inmate from the van into the Facility. The Facility also had low security inmates who worked outside of the Facility and were not restrained. Approximately eight to ten low security inmates were standing near the Facility entrance.

Once the van was parked in front of the Facility entrance, Grievant and the two officers began to remove the restrained inmate. The low security inmates had not left the Facility entrance. While Grievant was supervising the unloading of the Inmate, Grievant was within approximately 50 feet of the eight to ten unrestrained low security

inmates. Any of those inmates could have attempted to take Grievant's weapon if they decided to do so. An armed inmate would have posed a security threat to staff and offenders.

The Major observed Grievant and suspected he was carrying his weapon. She walked to Grievant and verified Grievant was carrying his weapon on his waist.

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.

On January 30, 2020, Grievant was in possession of a loaded weapon while approximately 50 feet away from unrestrained inmates. Grievant's action was contrary to the training he received. He created a risk of harm if one or more unrestrained offenders chose to attempt to take his weapon. The Agency has presented sufficient evidence to support the issuance of 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"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

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

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

³ Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that he was following the practice that staff at the Facility had been following. Following an unsafe practice along with other employees is not in itself a mitigating circumstance. Mitigating factors might include circumstances where an employee presented evidence that the employee was instructed specifically by a supervisor to engage in an unsafe practice. Another example would be if an employee expressed concern about following an unsafe practice and no action was taken in response to his concern. Grievant did not testify during the hearing. There is insufficient evidence to conclude that mitigating circumstances existed to further mitigate the disciplinary action.

During the Step Process, the Agency reduced the Group II Written Notice to a Group I Written Notice but did not revise the original Group II Written Notice. Accordingly, the Agency is ordered to amend the Group II Written Notice to indicate the reduction to a Group I Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for unsatisfactory performance 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 EDR before filing a notice of appeal.