

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: March 5, 2002; Decision Date: March 7, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5391



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5391

Hearing Date: March 5, 2002
Decision Issued: March 7, 2002

PROCEDURAL HISTORY

On September 24, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

Group II: "Failure to Follow Established Written Procedure." On August 26, 2001; while working in the SMU Control and operating security doors, [Grievant] failed to follow post orders to ensure section doors and all adjacent doors are closed. [Grievant] admitted to having three (3) security doors open in SMU at the same time which violated Security Post Order #41.

On October 12, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 12, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 5, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Agency Party Designee
Agency Counsel
Major
Captain
Assistant Warden Operations
Food Operations Manager B
Regional Director
Institutional Training Officer
Three Corrections Officers
Warden

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action.

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. 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 employed Grievant as a Corrections Officer Senior. He was a good employee. No evidence of any prior disciplinary action was presented.

Some inmates at the Agency's Facility reside in a segregation unit. These inmates are among the most dangerous in the corrections system. A series of doors prevent inmates from escaping. If a visitor were to walk from outside the unit and into a cell, he would encounter the following barriers. The visitor would have to pass through a locked fence surrounding the unit. Next, he would have to open a locked metal door (Door One) allowing entry into the building. A few feet away from the entrance door is a second door (Door Two) opening into a small room. The small room has a metal door (Door Three) connecting the room with a wing of approximately 24 cells. Each cell has a locked metal door (Door Four). All of these doors and the fence gate are controlled by the corrections officer located in the control room. The door allowing entry into the control booth is located between Doors One and Two.

On August 26, 2001, Grievant was working in the maximum-security segregation unit. He was assigned to work post 42, which is called the floor officer. One of the inmates had made unfounded complaints against him. Because he feared continued unfounded complaints from that inmate, Grievant switched positions with another corrections officer while the inmates were being fed. Grievant worked the control booth position, which was governed by Post Order 41. An inmate left another building and brought a hot plate of food to the unit. He left the plate at the control booth between Door One and Door Two. Grievant opened Door Two and Door Three so that the floor officer could take the hot plate from the control booth area to an inmate's cell. Grievant was concerned that the officer might burn his hands holding the hot plate so he left two doors open at the same time to allow a quick transfer of the plate. While Door Two and Door Three were open, the Major and Captain arrived outside the unit and sought entry through Door One. Grievant immediately opened Door One. As the Major and Captain walked in, the Major noticed that Door Two was open as well. He knew this was contrary to proper procedure so he quickly walked through Door Two and looked to his right to see that Door Three was also open. The Major believed proper procedures had not been followed and he instructed the Captain to write a report. Upon receiving the report, the Major forwarded the report up the chain of command with his recommendation for disciplinary action.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. DOCPM § 5-10.16(B)(1). Post Order 41 requires the corrections officer to "ensure only one (1) door is opened at a time."¹ Grievant opened three doors and allowed them to remain open at the same time. His actions were contrary to his instructions and assigned work thereby justifying the issuance of a Group II Written Notice.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance.

¹ Agency Exhibit D.

DOCPM § 5-10.13(B). The Warden testified that after considering the facts of the case and Grievant's work performance, he believed the Group II should be reduced to a Group I.² The Hearing Officer agrees.

Grievant contends that the disciplinary action resulted from the Agency's decision to retaliate against him. Grievant presented evidence that earlier in the morning, the Captain spoke with Grievant regarding Grievant's comments during muster and told Grievant, "If you ever grandstand at my formation again I will cut you off at the knees." Grievant also presented evidence that a Lieutenant in his chain of command had evaluated him improperly.

Grievant has not established that the Agency retaliated against him. If the Hearing Officer assumes for the sake of argument that Grievant's allegations of mistreatment by the Agency are true, Grievant has not shown retaliation. The Major was the person who initiated the disciplinary action based on his observation of the security breach. None of Grievant's evidence shows that the Major had any motive or desire to treat Grievant improperly or differently from any other employee. Even if the Captain's "cut off at the knees" comment is sufficient to establish retaliation by the Captain, the Major did not know of the Captain's comments until four days after the security breach. The Major was not influenced by any dispute between Grievant and the Captain.

Grievant contends that he was assigned to post 42 on August 26, 2001 and only temporarily assumed post 41. He argues he should be judged by the standards set under Post Order 42 and not Post Order 41. Grievant's argument fails. The evidence showed that when an officer begins performing the duties of another post, that officer assumes responsibility for complying with the post order for that post. By assuming responsibility in the control room, Grievant assumed responsibility for not having more than one door open at a time as required by Post Order 41.

Grievant argues that since no inmate escaped, there is no basis to discipline him. This argument is untenable because it is not necessary for the Agency to show that an inmate escaped in order to show that Grievant should be disciplined.

Grievant contends that he was justified in having three doors open because Grievant had to open two doors to prevent another corrections officer from burning his hands on a hot food tray that the officer was carrying and Grievant had to open the third door immediately because the Major and Captain sought entry. Grievant's argument cannot be supported because there is no policy exception that would permit more than one door being open at a time. The Major testified that even if an inmate were stabbing

² As the second step respondent, the Warden wrote Grievant a letter stating, "In reference to your complaint of receiving a Group II disciplinary action, I have reviewed your file. I am therefore, reducing your disciplinary action from a Group II to a Group I.

a corrections officer, there would be insufficient reason to have three doors open at a time.

Prior to the events giving rise to this grievance, Grievant observed an interchange between the Captain and another corrections officer working the control booth, post 41. When the Captain observed the officer with the entry door open and the control booth door open at the same time (two doors open), the Captain verbally admonished the officer by saying "Remember, only one door open at a time." Grievant argues he is being punished more severely if he is given more than a verbal warning. Grievant's argument is not supported by the evidence. Grievant has not established that the Agency has singled him out for punishment. All his evidence shows is that on one occasion, the Captain did not initiate disciplinary action for one corrections officer. In Grievant's case, the discipline was initiated by the Major, not the Captain, and the degree of Grievant's security breach was greater – three doors open rather than two doors open. Indeed, since Grievant overheard the Captain's instruction that only one door should be open, it confirms that he should have known not to have three doors open at any time.

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.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific

requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer