

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 05/09/03; Decision Issued: 05/19/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5690



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5690

Hearing Date: May 9, 2003
Decision Issued: May 19, 2003

PROCEDURAL HISTORY

On December 18, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

On October 13, 2002 you conducted a partial strip search on three detainees. The search was conducted on the rec. yard at [Facility] in the presence of other detainees and within sight of the general public. The location of the search indicates poor judgment on your part and unsatisfactory job performance as a supervisor.

On January 16, 2003, 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 11, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 9, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
One Witness

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for unsatisfactory job performance.

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 employs Grievant as a Corrections Lieutenant. He has worked for the Department for 14 years including two years as a Lieutenant. No evidence of prior disciplinary action against Grievant was introduced.

On October 13, 2002, Grievant was working as the shift supervisor at the Agency's Facility. He was standing inside the mess hall looking into the backyard of the Facility. Three detainees were standing approximately 40 yards away from him in the middle of the yard. They had their backs to Grievant and Grievant could see what appeared to be cigarette smoke rising above the detainees. Grievant concluded they may possess contraband tobacco. Grievant walked outside the building and approached the three detainees. Several other detainees standing near the three detainees began moving away. When Grievant approached the three detainees, he ordered them to strip. They unzipped their jumpers and lowered them to their knees. Grievant instructed the detainees to place their hands inside their skivvies and pull them forward in order to dislodge any contraband that the detainees may have been hiding. He then escorted the detainees into the building and to the shower and bathroom of the detainee living quarters. Grievant then instructed the detainees to remove their boots and open the bottoms of their jumpers. No contraband fell from the bottom of the detainee's jumper pant legs.

The partial strip search occurred in the back yard where other detainees were present and could observe the search. Approximately 200 yards in front of the Facility is a road open to the general public. Someone driving on the road could have observed the search, but no evidence was presented suggesting anyone actually observed the search.

Following the incident, one or more of the detainees complained about the search. The Agency investigated the complaint and concluded that disciplinary action was warranted.

CONCLUSIONS OF POLICY

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.

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work 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.

Grievant was responsible for the care of detainees and the security of the Facility and public. He was the shift supervisor responsible for operating the Facility. He should have known that conducting a partial strip search in an area within view of other detainees and the general public could unnecessarily create the risk of humiliation and embarrassment. The Agency has met its burden of proof.

Grievant contends that he ordered them to strip in the yard because if he had moved them inside and then begun the search, the detainees would have had the opportunity to dispose of the contraband. Grievant’s argument may have been persuasive had he presented evidence of other corrections employees making similar decisions within that Facility or within other Agency institutions. Without such evidence, the Agency’s concerns about detainee privacy are un rebutted.

Grievant contends his partial search of detainees in the back of the Facility is not materially different from the type of searches conducted at the front of the building when detainees return to the Facility. Detailed evidence was not presented regarding what procedures the Agency’s follows to search detainees returning to the Facility. The Hearing Officer has no factual basis to compare the Agency’s practices for searches in the front of the building with Grievant’s search behind the building.

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 file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

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