

Issue: Group III Written Notice with demotion (failure to provide adequate supervision);
Hearing Date: 06/01/04; Decision Issued: 06/04/04; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 718



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 718

Hearing Date: June 1, 2004
Decision Issued: June 4, 2004

PROCEDURAL HISTORY

On March 9, 2004, Grievant was issued a Group III Written Notice of disciplinary action for with demotion¹ to Corrections Officer Senior:

On February 28, 2004, during your 12 hour shift, you failed to make rounds in Housing Unit 4, Bravo Pod (Death Row). There were 26 death row inmates (one on 15 minute watch) and there is no documentation that you provided proper supervision on the pod during the 12 hour shift. Your failure to make rounds as required constitutes refusal to obey instructions that could result in a weakening of security. As a supervisor responsible for that area, you failed to adequately supervise the security of death row. This is a totally unacceptable situation. Your actions were a serious breach of security that cannot be tolerated at a level 5 maximum-security prison. Therefore, you will be demoted to Corrections Officer Senior and transferred to [another Facility] effective April 9, 2004.

On March 26, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant

¹ The Written Notice does not specify whether Grievant received a salary reduction or the amount of any such reduction.

and he requested a hearing. On May 5, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion for failure to adequately supervise a death row housing pod.

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 Sergeant until his demotion to Corrections Officer Senior. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

Grievant worked as a housing unit supervisor for Housing Unit 4.² Housing Unit 4 has four inmate living quarters, called pods. Pods A and B are located on the bottom floor. Pods C and D are located on the top floor. Inmates placed in segregation are located in 4A. Inmates facing awaiting death sentences are located in 4B. Approximately 27 inmates were awaiting death sentences on February 28, 2004.

² The Facility keeps long term inmates with life sentences and death sentences. It is a Level 5 (out of 6) Facility.

Grievant is responsible for supervising corrections officers. His duties include looking at log books in order to verify that corrections officers are properly making timely log book entries to record their supervision of inmates.

On June 30, 2003, the Captain sent Grievant and other housing unit supervisors a memorandum stating, in part:

Effective July 1, 2003, each Housing Unit Supervisor will be required to make two 30-minute rounds on each pod daily, which will be a total of two hours a day. *** This procedure does not exempt Supervisors from making regular/standard round on each pod.³

On February 22, 2004, an inmate in death row committed suicide. Agency managers learned that other inmates on death row intended to commit suicide. Corrections Officers working on pod 4B became responsible⁴ for checking on death row inmates every 15 minutes by looking into their cells and writing in a log book the current time and what the inmate was doing at that time. Grievant was responsible for making rounds within pod 4B to verify that corrections officers were completing 15 minute checks. As part of his rounds, he was also expected to talk to corrections officers and resolve any problems that may have existed and also speak with inmates who had questions or concerns.

On February 28, 2004, failed to make any rounds of Housing Unit 4B during his 12 hour shift. He conducted a count at 23:45 but conducting a count is not the same as making a round.

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.

DOCPM § 5-10.7(C) states, "The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the

³ Agency Exhibit 4. Grievant's post orders also provide that he is to "Conduct hourly rounds in each assigned pod." Given staff shortages, the Agency did not strictly enforce the requirement for hourly rounds.

⁴ Corrections Officers were obligated to check on death row inmates every 30 minutes prior to the change to every 15 minutes.

agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this procedure."

In the Agency's judgment, Grievant's failure to make rounds within Housing Unit 4B constitutes inadequate supervision justifying a Group III Written Notice with demotion. Based on the evidence that Grievant was responsible for supervising the death row housing pod, Grievant knew a death row inmate had committed suicide a week earlier, the evidence is sufficient to support the Agency's judgment. Death row inmates are the most dangerous inmates in the Facility and present a significant risk of causing injury to themselves or to others.

Grievant argues that staffing shortages prevented him from conducting rounds in 4B. He contends his duties required him to provide supervision and also assume some duties normally performed by corrections officers in pods C and D located upstairs in the housing unit. Although the evidence is clear that the Facility is always understaffed, the expectation of at least two rounds per shift for housing supervisors is reasonable and Grievant could have carried out those rounds on February 28, 2004 despite his other duties.⁵

Grievant argues that because he conducted a count at 23:45 on February 28, 2004 that he completed at least one round. The evidence showed that conducting a count is not the same as making a round. When conducting a count, security personnel focus on looking into cells to verify the presence of inmates and counting those inmates quickly enough to avoid delaying the Institution from determining the total number of inmates in the Facility. When conducting a round, security personnel observe inmates but also may stop to speak with inmates to address problems or speak with other security personnel to address problems. A round is not conducted with the same level of focus and intensity as is a count. Although Grievant conducted a count on February 28, 2004, that count did not substitute for a round.

Grievant contends the heightened level of security in the death row pod as not announced until March 2, 2004. He believes that he was not properly informed of the heightened level of security necessary for pod 4B. The evidence showed that Grievant knew of the suicide on February 22, 2004. His subordinates knew of the 15 minute check requirement that arose within two days of the suicide. Grievant knew or should have known that the Agency increased its scrutiny of death row inmates. Thus, it is appropriate for the Agency to have expected him to understand the importance of completing his rounds. Grievant presented an email⁶ and argued that the email showed

⁵ Grievant contends he was so busy with his other duties that he could not make a round in the death row pod. Assuming for the sake of argument that Grievant was as busy as he claims, he was unable to account for his activities from approximately 3:30 a.m. to 4:45 a.m. During that time period, Grievant could have made at least one round in pod 4B while inmates were locked in their cells sleeping. He made none during his 12 hours shift.

⁶ Grievant Exhibit 2.

that the 15 minute checks were not announced until March 2, 2004. This email states that “**Until Further Notice** – Continue a 15 minute check on the **Entire Bravo Pod.**” (Emphasis original.) This email refers to a continuation of the policy of conducting 15 minute checks. It does not begin that policy. Witness testimony that the 15 minute check requirement began within 48 hours of the suicide was credible.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing

officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.⁷

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.