

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 08/14/06; Decision Issued: 08/15/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8398; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8398

Hearing Date: August 14, 2006
Decision Issued: August 15, 2006

PROCEDURAL HISTORY

On March 8, 2006, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. On April 6, 2006, 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 24, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 14, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

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. 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 began working at the Facility on April 5, 2004. The purpose of his position is, "[p]rovide security and supervision of adult offenders."¹ No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Inmates living in the segregation housing unit must be checked by corrections officers every 30 minutes to make sure they are all right. A corrections officer looks into the inmate's cell and if the inmate is not in distress, the corrections officer writes his or her initials and the time of the observation in a log kept on the front door of the inmate's cell. Corrections Officers often make rounds to check a series of inmates in cells on the same floor or tier. Corrections Officers are instructed to make only contemporaneous entries into the log books. In other words, when a cell check is made, it must be recorded at the time the check was performed and cannot be recorded in the log at a later time.

On February 23, 2006, Grievant was in the process of making his rounds in the segregation housing unit and checking inmate status. He was pushing a cart with items for inmates. At 9:09 a.m., he checked the first inmate and then wrote the time and his

¹ Agency Exhibit 2.

initials on the log on that inmate's door. He went to the second inmate. He observed the inmate and spoke with the inmate. The inmate asked for toiletries. Grievant turned to cart to see if he had what the inmate was seeking. Since he did not have the items the inmate sought, Grievant informed the inmate that he would return to bring the item and, then, Grievant moved to the next cell. Grievant failed to write on the log the time he observed the inmate before he moved to the next cell.

Approximately a half hour later, Grievant was relieved of his post so he could take a 30 minute break. Officer R assumed Grievant's post. Officer R began her rounds. She went to the door of the inmate who had asked Grievant for toiletries. She noticed that no entry had been made into the log within the 30 minute time sequence. She notified the Sergeant. The Sergeant took the log and circled the blank space where Grievant should have written the time. The Sergeant used a pen with red ink. Officer R made her log entries beginning on the line below the blank space circled in red ink.

After taking about 28 minutes of his break, Grievant returned to his post. At approximately 10:10 a.m., he noticed that the log book for the inmate had a blank circled with red ink. He wrote the time 9:10 a.m. in the blank because that was the time he had made the cell check.

The Lieutenant instructed the Sergeant to counsel Grievant regarding making log entries. Grievant met the Lieutenant in his office. They discussed the log entry. Grievant left the office and was a few feet out the doorway when he said, "this is bullsh-t!". The Sergeant overheard Grievant's comment and called for Grievant to speak with him. The Sergeant said to Grievant, "What did you say?" Grievant responded, "this is bullsh-t."

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁵ 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.

Grievant was expected to make an entry into the inmate’s log book at 9:10 a.m. when he observed the inmate. Grievant was expected to record time contemporaneously rather than after an event occurred. At approximately 10:10 a.m., he wrote the time 9:10 a.m. in the inmate’s log. When Grievant was counseled for his work performance, he expressed contempt for his supervisor’s actions by using profanity.⁶ Based on these facts, the Agency has presented sufficient evidence to uphold its issuance to Grievant of a Group I Written Notice for inadequate or unsatisfactory job performance.

Grievant contends the Facility’s practice permitted employees to make late entries into log books. The evidence showed that a late entry of a minute or two might be permitted but an entry written nearly an hour later would not be permitted. Grievant’s late entry was too late. This is especially true given that the Sergeant circled the blank space to emphasize the omission.

Grievant asserts his profanity was not directed at the Sergeant and, thus, should not form the basis of disciplinary action. The “this” in “this is bullsh-t” refers to the supervisory action taken by the Sergeant. In the context of this case, there is little difference between profanity directed at the Sergeant, in name, and profanity directed at the Sergeant’s action. In either case, it would be reasonable for the Sergeant to take offense.

Grievant contends the Agency cannot issue him a Written Notice because it previously issued to him a Notice of Improvement Needed/Substandard Performance for the same behavior. Nothing in the Agency’s Standards of Conduct creates a prohibition against “double jeopardy.” In other words, the Agency is free to issue a Written Notice as a form of discipline and also consider the behavior identified by the Notice when evaluating an employee’s work performance.

Grievant argues the Agency inappropriately considered negative information in Grievant’s employee “fact file” when determining whether to take disciplinary action.⁷ Agencies are free to consider an employee’s prior work performance when determining

⁵ DOCPM § 5-10.15(B)(4).

⁶ The Written Notice states Grievant used the phrase twice. Contrary to the Agency’s assertion, only the first use of the phrase formed a basis for disciplinary action. The second use by Grievant resulted from Grievant being instructed by his supervisor to restate what he had said. Since one use of the phrase is sufficient to justify disciplinary action, the Agency’s focus on a second use is harmless error.

⁷ The Agency did **not** treat information in the fact file as if it were prior active disciplinary action used to support disciplinary action based on the accumulation of Written Notices.

whether disciplinary action is warranted. Grievant's fact file reflected his prior work performance and the Agency was justified in reviewing the file.

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 Employment Dispute Resolution...."⁸ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." 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 file an administrative review request within **15 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

⁸ Va. Code § 2.2-3005.

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 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.