

Issue: Group I Written Notice (failure to follow procedure); Hearing Date: 09/20/06;
Decision Issued: 10/02/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8418; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8418

Hearing Date: September 20, 2006
Decision Issued: October 2, 2006

PROCEDURAL HISTORY

On April 18, 2006, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow proper procedure and inspect a transportation vehicle. On May 17, 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 August 22, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 20, 2006 a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Senior at one of its Facilities. The purpose of his position is:

To provide security over inmates at the institution and while in transport; supervises their daily activities and observes and records their behavior and movement to ensure their safe and secure confinement.¹

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 8, 2006, an Inmate was ill and needed to be transported from the Facility to the Hospital. Grievant and Officer S obtained a Transportation Van in order to take the Inmate to the Hospital. Officer S drove the vehicle while Grievant supervised the inmate inside the Van. During the trip, the Inmate vomited inside the Van. Grievant observed the Inmate vomit. Once they reached the Hospital, Grievant took the Inmate inside so the Inmate could be treated by medical staff. Grievant remained with the Inmate to provide security. From inside the Hospital, Grievant looked through several windows and observed Officer S backing the Van. He observed a yellow post bend

¹ Agency Exhibit 6.

backwards as if hit by the Van. When Officer S rejoined Grievant, Grievant asked her if she hit the post. Officer S responded that she did not hit anything when backing the Van.

Two other officers drove a State car to the Hospital. After the Inmate received treatment, the two officers took control of the Inmate and placed him in the Transportation Van. They drove the Transportation Van back to the Facility. Grievant and Officer S traveled back to the Facility in the State car that the two officers used to travel to the Hospital. After the two officers reached the Facility and removed the Inmate from the Van, neither reported the Van damage nor the vomit inside the Van to a supervisor. Grievant and Officer S also failed to report the damage and vomit inside the Van to a supervisor.

On April 14, 2006, the Institutional Safety Officer received information from an employee in the maintenance shop to indicate that a Transportation Van had some damage that had not been reported and had "puke and blood in the area where the inmate is carried." A maintenance shop employee entered the van and noticed a "very unpleasant odor" caused by the Inmate's vomit.

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

"[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's Post Orders listed one of his General Duties to include:

Report any damaged, missing, or malfunctioning equipment or property to the supervisor.

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).

⁵ DOCPM § 5-10.15(B)(4).

His Specific Post Duties included:

Check all equipment before going on transportation trips. Check security van or bus before and after each trip for contraband and to see if the vehicle is in proper working order. Report any damage or other problems to the supervisor.

When an inmate vomits in a transportation vehicle, it creates a problem regarding how to dispose of the waste. If the waste is not disposed of it can cause the vehicle to smell badly and prevent others from using the vehicle until the vehicle is cleaned. When the Inmate vomited in the vehicle, he created a problem with the vehicle. Grievant was obligated to report problems to his supervisor. Grievant observed the problem but failed to report it to his supervisor as required by his post order.

Grievant observed the Van backing up and a yellow pole bending in response to the backing. It would be a reasonable inference on his part that the Van may have been damaged by hitting the pole. Officer S told him she did not damage the Van. Given that Grievant did not actually see any damage to the Van because he was inside the Hospital and could not leave the Inmate to check the Van, Grievant was not responsible for reporting damage to the Van even though the Agency has asserted otherwise.

Although the Agency has not established Grievant's obligation with respect to reporting damage to the Van, it has established his obligation to report to a supervisor that the Inmate vomited in the Van. Accordingly, Grievant's work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant contends he could not report the vomit and vehicle damage to the oncoming officers because he was inside the hospital with the inmate. Grievant's assertion is true. However, his obligation was not to report the problems to the oncoming officers but to his supervisor. Grievant failed to do so.

Grievant contends he was not the last person in possession of the Van and, thus, the two corrections officers who returned the vehicle should have reported the vomit and damage to the supervisor. Grievant's assertion is correct. The two officers who returned the vehicle should have reported the matter to the supervisor. Grievant should have reported this information as well.⁶ Nothing in the Post Order relieves Grievant of his reporting obligation simply because another employee with a duty to report also reported the information.

Grievant contends the disciplinary action should be mitigated. *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

⁶ The two officers told Agency managers that they did not know about the vomit because no one told them about it.

rules established by the Department of Employment Dispute Resolution....”⁷ 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

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

⁷ Va. Code § 2.2-3005.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.