

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow written policy); Hearing Date: 01/10/07; Decision Issued: 01/11/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8478; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8478

Hearing Date: January 10, 2007
Decision Issued: January 11, 2007

PROCEDURAL HISTORY

On October 6, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow written policy regarding count procedures. He was removed from employment based on the accumulation of disciplinary action.

On October 12, 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 December 7, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 10, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

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 employed Grievant as a Corrections Officer at one of its Institutions. The purpose of his position was, "[p]rovides security over inmates at the institution and while in transit. Supervises their daily activities and observes and documents their behavior and movement in order to ensure their safe and secure confinement."¹ Grievant had active prior disciplinary action consisting of a Group II Written Notice issued on September 5, 2006 for failure to follow established written policy and abuse of State time, and a Group III Written Notice issued January 10, 2003 for failure to follow established written policy regarding a key ring.²

Grievant works in a Level II Facility where the inmates reside in dorms rather than in cells. Each dorm has several rows of beds for inmates. At least four times per day, all of the inmates in the facility are counted as part of what is called a Formal Count. Before a count is started, all inmates are required to stand in front of their beds. Two corrections officers go to the end of a row of beds. The first officer watches the

¹ Agency Exhibit 5.

² Agency Exhibit 6.

inmates to make sure they do not move away from their beds while the second officer walks down the row counting inmates. Once the second officer finishes counting the row, that officer stays in one place and watches the inmate to make sure they do not move while the first officer counts the inmates in the row just counted. Once both officers have finished counting the inmates in the row, they compare their totals. If they reach the same number of inmates in the row, they proceed to the next row and repeat the procedure.

On August 21, 2006 at approximately 8:40 p.m., Grievant and Officer K were counting inmates in a dorm. They counted one row of inmates. While counting the second row, an inmate in that row hit an inmate standing beside him. Grievant called a 10-33 radio call for an emergency and other officers responded to the area. After the disturbance was quelled, Grievant and Officer K resumed their count at the same point where they had stopped counting because of the fight.

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.”³ 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.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁶ Local Operating Procedure 410.2 addresses Count Procedures. This policy provides that: “[i]f a major disturbance should occur, the officer must start the count over, rather than carry on from the point of distraction.”⁷ While Grievant was counting the second row in a dorm, a major disturbance occurred when one inmate punched another inmate. After the disturbance was quelled, Grievant resumed his count at the point where the disturbance occurred rather than starting the count over. Grievant acted contrary to Local Operating Procedure 410.2 because he did not start the count over following the disturbance.⁸ Accordingly, the Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ Agency Exhibit 7.

⁷ Agency Exhibit 4.

⁸ Grievant knew or should have known of the details of the policy because of his training and experience. In particular, Grievant’s in-service training included reviews of proper count procedures.

“An additional Group II offense should normally result in removal.”⁹ With the Written Notice issued as part of this grievance, Grievant has accumulated two Group II Written Notices thereby justifying his removal from employment.

Grievant argues that stress arising as part of his personal life unduly influenced his judgement with respect to his work activities. Aside from Grievant’s assertion, no other evidence was presented establishing a causal relationship between the stress Grievant was experiencing and his failure to comply with the written count procedures. Insufficient evidence exists for the Hearing Officer to conclude that the stress in Grievant’s personal life caused his lapse of judgment resulting in the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal based on the accumulation 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:

⁹ DOC Operating Procedure 135.1(XI)(C)(2).

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.