Issues: Group III Written Notice with termination (gross negligence); Hearing Date: 01/18/07; Decision Issued: 04/02/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8492; Outcome: Employee granted partial relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8492

Hearing Date: January 18, 2007
Decision Issued: April 2, 2007

PROCEDURAL HISTORY

On September 1, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence. On September 11, 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 14, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 18, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 employed Grievant as a Corrections Lieutenant at one of its Facilities. The purpose of his position was, "Supervision of daily shift and first line supervisor of correctional officers."[1] Grievant's work schedule was from 6 p.m. until 6 a.m. He was employed by the Agency for more than 10 years. No evidence of prior active disciplinary action against Officer B was introduced during the hearing.

One of Officer B's and Officer S's most important duties was to provide a physical count of inmates. Under the Facility's Local Procedure 410.2, *Count Procedures,* the, "accuracy of maintaining a reliable count is of such importance that it supersedes all other institutional functions." This procedure also states:

> All formal counts and intermediate counts shall be conducted by two (2) Certified Correctional Officers. The count sheet will be verified and signed by both counting officers upon completion of the physical count.[2]

[1] Grievant Exhibit 13.

[2] Local Directive 410(IV)(D).

In order to conduct a count, the "counting officers must actually see an offender's flesh, observe movement, or hear the offender speak."[3] "To the greatest extent possible, counting officers should … not know the assigned number of inmates prior to counting."[4]

Inmate counts were to be conducted every hour. Security checks were to be conducted every half hour.

The Facility consists of several buildings. Inmates reside in Dorm A and Dorm B. Two officers are needed to properly enter the dorm. One officer cranks the door open to enable the second officer to enter the dorm. A segregation unit is attached to one of the dorm buildings. One officer can use a key to enter the segregation unit without the assistance of another officer. The Facility also has a kitchen where inmates work to prepare meals. Inmates working in the kitchen are supposed to be supervised while working.

On August 30, 2006 at 2:20 a.m., the Superintendent arrived at the Facility. He entered his office at 2:23 a.m. and began watching a security monitor enabling him to see several posts of the Facility compound. He observed Officer B sitting at the dorm post. While sitting at the dorm post, Officer B could see partially into each dorm.

Grievant, Officer S, and Officer M were at the front gate post. While Grievant worked at the front gate post, he could not observe how well corrections officers located at the dorm post or kitchen post performed their duties.

At 2:33 a.m., Officer B wrote in the log book that "Rounds made all appears ok." Officer B did not make any rounds at that time. At 3:00 a.m., Officer B wrote in the log book that "Rounds made all appears ok." Officer B had not made any rounds at that time.

At 3:05 a.m., Officer S left the front gate post and walked to the dorm post where Officer B was working. At 3:12 a.m., Officer B let Officer S into Dorm A to wake up an inmate cook for duty in the kitchen. Officer S completed that task in less than a minute. At 3:30 a.m., Officer S let the rest of the inmate workers out of their dorms to work in the kitchen. At 3:30 a.m., Officer S wrote in the log book that, "Rounds were made all ok [inmate] in kitchen." Officer B and Officer S had not made rounds at that time.

At 4 a.m., Officer B and Officer S were completing count sheets but no count was made. Officer S wrote in the log book at 4 a.m., "Count started by [Officer S] [Officer B]

A Dorm 65
B Dorm 71
Kitchen 01

[3] Local Directive 410(IV)(5).

[4] Local Directive 410(IV)(G).

Jail 00
137 total"

At 4:05 a.m., Officer B went to the front gate post and left the inmates locked in the kitchen. Officer S remained in the hill post but did not make rounds. At 4:05 a.m., Officer S wrote in the log book, "Count cleared."

On a prior occasion, the Major had instructed Grievant to go to the kitchen each morning at 4 a.m. to observe the inmates working in the kitchen.[5] On August 30, 2006, Grievant did not report to the kitchen to observe the inmates.

At 4:40 a.m., Officer B left the front gate post and went to the kitchen.

At 4:45 a.m., the Superintendent entered the dorm post. He observed four count sheets already prepared in anticipation of the 5 a.m. count. Officer S had written on the form the date, area counted, number of inmates present, and then signed each count sheet. Officer B also had signed the count sheets. The only blank space unfilled on each count sheet was the time. The Superintendent collected and kept the count sheets. Officer S and Officer B used other count sheets to complete the 5 a.m. count.

Every hour after the Superintendent arrived at the Facility, Officer M received calls from other officers in the Facility reporting the number of inmates located in various parts of the Facility. Officer M concluded the count had cleared and reported that information to the Grievant. The count cleared for each hour the count was taken.

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."[6] 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."[7] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[8]

Gross Negligence

[5] The Facility experienced problems with the preparation of breakfast and the Major wanted Grievant to ensure the kitchen was operating effectively. The Major had authorized another Lieutenant to stop checking the kitchen on his shift, but had not yet decided that Grievant could stop checking.

[6] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

[7] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[8] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

The Agency contends Grievant engaged in gross negligence because (1) he did not have all of his posts manned as required by post orders, (2) he let an officer vacate for 35 minutes a security post (kitchen) that had inmates present, (3) he knew that security rounds and count could not take place in the housing unit with only one officer on the dorm post, and (4) he failed to check the kitchen at 4 a.m. as previously instructed.

DOC Operating Procedure 135.1, *Standards of Conduct,* does not define "gross negligence." Virginia law recognizes three degrees of negligence, (1) ordinary or simple, (2) gross, and (3) willful, wanton and reckless. Ordinary or simple negligence is the failure to use "that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another."[9] Gross negligence is defined as "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another. It must be such a degree of negligence as would shock fair minded men although something less than willful recklessness." "Willful and wonton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another."[10]

Although Grievant disregarded his duties, his behavior was not so egregious as to "shock fair minded men." There is no basis to conclude his behavior was gross negligence. The Agency's issuance of a Group III Written Notice cannot be sustained.

A supervisor is not responsible for the inappropriate behavior of a subordinate merely because that employee reports to the supervisor. A supervisor can be disciplined only if an Agency can show misbehavior on the part of the supervisor.

Grievant failed to ensure that his subordinates conducted counts properly. He engaged Officer B in conversation for approximately 35 minutes when Officer B should have been supervising inmates in the kitchen.[11] Grievant failed to go into the kitchen at 4 a.m. as previously instructed by his supervisor.

---

[9] *Griffin v. Shively*, 227 Va.317, 32, 315 S.E.2d 212-13 (1984).

[10] *Griffin*, 227 Va. at 321, 315 S.E.2d at 213, quoting *Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971).

[11] Although Grievant contends he and Officer B were discussing inmate charges, the evidence showed that discussion and the processing of inmate charges would have taken only a few minutes. In addition, the Superintendent observed Grievant and Officer B laughing and they appeared to the Superintendent to be engaged in personal conversations. The Hearing Officer does not believe Grievant had a legitimate business reason to keep Officer B away from the kitchen post.

Grievant's work performance was inadequate with respect to his supervision. He failed to follow a supervisor's instructions thereby justifying the issuance of a Group II Written Notice. A suspension of up to ten workdays is appropriate upon the issuance of a Group II Written Notice. Accordingly, Grievant's Written Notice must be reduced to a Group II Written Notice with a ten workday suspension.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

Mitigation

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…."[12] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the Agency inconsistently applied disciplinary action because it lightly punished other employees engaging in behavior as serious as Grievant's behavior. To show an agency has inconsistently applied disciplinary action, an employee must show that the agency treated similarly situated employees in an inconsistent manner. Grievant has not presented evidence to show similarly situated employees were treated differently from how he was treated. There is no basis to mitigate the disciplinary action against Grievant.

Retaliation

[12] *Va. Code § 2.2-3005.*

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[13] (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant contends the Agency retaliated against him because on April 21, 2006, he filed a complaint with the Agency's Equal Employment Opportunity Office alleging discrimination based on race, color, and religion. Grievant has established that he engaged in a protected activity and that he suffered a materially adverse action because of his job loss. Grievant has not established a connection between the protected activity and the adverse action. The Agency issued disciplinary action against Grievant because the Agency believed he had engaged in behavior justifying disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice with a ten workday suspension.

The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less a ten workday suspension and less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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:

[13] *See* Va. Code § 2.2-3004(A)(v*)*. Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

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 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.[14]

[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

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