

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 02/12/07; Decision Issued: 02/13/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8517; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8517

Hearing Date: February 12, 2007
Decision Issued: February 13, 2007

PROCEDURAL HISTORY

On July 27, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow written policy. On August 28, 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 January 23, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 12, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witness

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. She began working for the Agency in June 2005. Grievant's prior work performance was satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

The Gun Turret Post is located on top of building in the Facility approximately 25 feet above ground. From that post, the Gun Turret Officer can observe inmates walking outside of the buildings in the Facility yard.

On July 5, 2006, Grievant was ordered to assume the Gun Turret Officer Post 62. Grievant arrived at the post at approximately 2:45 p.m. and relieved Officer Y. As part of relieving Officer Y, Grievant took a launcher weapon and ammunition held by Officer Y. Grievant also assumed responsibility for Officer Y's shotgun and harness. Grievant was supposed to wear the harness and attach the shotgun to the harness. In the event Grievant dropped the shotgun, the harness would prevent the shotgun from falling to the ground. In the event of an inmate disturbance, Grievant could use the shotgun to shoot a warning shot and, if necessary, use the weapon for public safety.

At approximately 3:15 p.m., the Captain walked out of a building and began walking toward the building, above which Grievant was working her post. He walked for approximately one and a half minutes to two minutes looking at Grievant and observing

her behavior. Grievant was leaning over the rail speaking to inmates below her. Inmates were in the process of moving among buildings located within the Facility. The Captain observed that Grievant was not holding the shotgun. He observed the shotgun approximately 25 feet away from Grievant and leaned up against the rail. The Captain realized that Grievant was not acting in accordance with her post order.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁴ Post Order 62 sets forth the Agency’s policy applicable to the Gun Turret Officer.⁵ This Order provides:

Gun Control/Gun Turret Officer will use the weapon to prevent assaults, disturbances, inmate fights, destruction of state property, enforcement of unauthorized areas marked by red lines, etc. This requires that the Gun Control/Gun Turret Officer may fire the weapon based on his/her professional judgment. ***

The Gun Officers should position themselves in a manner to prevent inmate access to the weapon attached to the security weapons harness and in their hands whenever any inmate movement is occurring.⁶

On July 5, 2006, inmates were moving in the area directly in front of Grievant’s post. She observed the movement. She did not have her shotgun attached to her

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁵ Grievant had worked the post on a prior occasion. She also had read Post Order 62 within the prior 3 months in accordance with the Facility’s practice of having officers acknowledge having read their post orders at least every three months. She acknowledged having read the post order on July 5, 2006. See Agency Exhibit 4.

⁶ Agency Exhibit 4.

security harness and she was not holding the shotgun in her hands during the inmate movement. Grievant failed to comply with Agency policy thereby justifying the issuance of a Group II Written Notice.

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....”⁷ 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 disciplinary action should be mitigated because it is too harsh for the offense and because of her favorable work performance and the absence of any prior active disciplinary action. The *Rules* expressly remove the Hearing Officer’s authority to act as a “Super-Personnel Officer” who steps into the shoes of Agency Managers and determines the appropriate level of discipline based on the Hearing Officer’s preference. Instead, the Agency must give deference to Agency’s consideration of the appropriate level of discipline. In this case, the Agency has considered mitigating circumstances and concluded that it should issue to Grievant a Group II Written Notice instead of a Group II Written Notice with a ten work day suspension. The Agency’s discipline does not exceed the limits of reasonableness. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.⁸

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

⁷ *Va. Code § 2.2-3005.*

⁸ Grievant also objected to the Agency having initially represented to her that the matter would be a Group I Written Notice for unsatisfactory job performance. During its fact finding process the Agency mistakenly wrote Grievant a memorandum indicating that the charge against her was a Group I Written Notice. As the fact finding conference was about to occur, the Assistant Warden told Grievant of the error and indicated to her she could delay the conference until a new charge was written. Grievant elected to proceed rather than wait for a new charge. The Agency did not violate its policies by correcting the error.

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
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].

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer