

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 06/04/07; Decision Issued: 07/20/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8597; Outcome: Agency Upheld in Full; **Administrative Review: HO** **Reconsideration Request received 07/27/07; Reconsideration Decision issued 08/06/07; Outcome: Original Decision Affirmed; Administrative Review: EDR** **Ruling Request received 07/27/07; Outcome pending; Administrative Review:** **DHRM Ruling Request received 07/27/07; Outcome pending.**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8597**

Hearing Date: June 4, 2007  
Decision Issued: July 20, 2007

**PROCEDURAL HISTORY**

On January 8, 2007, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions. On January 30, 2007, 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 she requested a hearing. On April 24, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 4, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUES**

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 Sergeant at one of its Facilities. The purpose of her position is to, "provide first-line supervision to correctional officers."<sup>1</sup> No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Inmates reside in the Housing Unit. The Housing Unit is divided into four pods. Each pod contains 42 cells. Two pods are upstairs and two pods are downstairs. A control room officer and a floor officer work on each floor.

An employee heard the sound of a cell phone ringing in the Housing Unit. Agency Managers were concerned that an inmate was in possession of a cell phone. Cell phones were not permitted inside the Facility and if an inmate possessed a cell phone, he would be in possession of contraband. One of the pods in the Housing Unit was placed on lock down. This meant inmates were locked in their cells at all times and there was no inmate movement in the common areas of the pod. In order to find a cell phone, security staff had to search each inmate's cell in the pod. This is called a "shakedown". Two security staff are needed to search a cell. From approximately 3

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<sup>1</sup> Agency Exhibit 3.

a.m. to 5 a.m. on December 11, 2006, security staff on the night shift shook down five cells.

On December 11, 2006, Grievant was working as the Housing Unit Sergeant. She was responsible for supervising all four pods in the Housing Unit. At approximately 9 a.m. that day, the Captain instructed Grievant to shakedown cells in the pod in order to locate the cell phone. The Captain gave Grievant a list of cells she could shakedown but did not specify a minimum number of cells to search. At 5 p.m. on December 11, 2006 towards the end of Grievant's work shift, the Captain called Grievant and asked how many cells she had searched. Grievant had not searched any cells in the pod.

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

"[F]ailure to follow a supervisor's instructions" is a Group II offense.<sup>5</sup> Grievant was instructed by her supervisor, the Captain, to search cells in the pod. She could have satisfied his instruction by having one or more cells searched. Instead, none of the cells were searched during Grievant's shift. Grievant failed to follow the Captain's instruction thereby justifying the issuance of a Group II Written Notice. The Agency reduced the level of discipline to a Group I Written Notice.

Grievant argues she should not have been disciplined because it was not possible for her to shakedown cells and perform her other work duties. Grievant argues she did not have a sufficient number of staff to complete the Captain's instruction. Although the Captain sent two additional correctional officers to assist Grievant, Grievant argues the Captain quickly reassigned those officers to other tasks rendering them unavailable to shakedown cells.<sup>6</sup>

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

<sup>6</sup> The Captain denied that the two corrections officers were unavailable to help Grievant.

Grievant's argument fails. The evidence showed that two security staff were necessary to properly shake down a cell. Grievant supervised two control booth officers and two floor officers. She could have taken one correctional officer to assist her in searching cells. Even if the Hearing Officer assumes for the sake of argument the two additional correctional officers sent by the Captain to assist Grievant were utilized elsewhere, Grievant continued to have a sufficient number of corrections officers to enable her to shakedown cells.

Grievant argues she had to perform duties in addition to her routine duties. For example, she had to obtain holiday packages for inmates. Although the Captain sent another employee to notify Grievant that she did not need to obtain holiday packages because he would do so for her, apparently Grievant did not hear or understand that employee's statements to her. Thus, Grievant performed the additional duty of picking up holiday packages and taking them to the Housing Unit.

Grievant knew or should have known that locating a cell phone in a prison was more important than routine duties such as delivering mail or unusual duties such as picking up and delivering holiday packages. An inmate in possession of a cell phone poses a security threat to the Facility. Resolving a security threat should take priority over all other duties. Grievant could have searched one cell in order to comply with the Captain's instruction. Over an approximately 8 hour period, Grievant did not search any cells.

*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...."<sup>7</sup> 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. 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**.

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<sup>7</sup> *Va. Code § 2.2-3005.*

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>8</sup>

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

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8597-R**

Reconsideration Decision Issued: August 6, 2007

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant has not identified any incorrect legal conclusion.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant argues that Institutional Policy number 441 was not followed. She does not identify how the policy was not followed. She does not express the significance of any failure to follow the policy.

The Hearing Officer issued an order compelling the appearance of Captain A. Captain A did not appear at the hearing. Participation in grievance hearings is



voluntary. Grievant did not argue at the hearing that the Hearing Officer should draw an adverse inference from the fact that Captain A was not present.

Grievant argues that Captain C ordered her to begin a shakedown at 9 a.m. but that the assistance he sent did not arrive until much later. This argument is without merit. Grievant should have conducted at least one cell shakedown even if Captain C had not sent any employees to assist her.

Grievant contends the portion of the testimony of the Sergeant was not true. She also restates some facts regarding the Sergeant. Assuming for the sake of argument the Grievant's assertions are true, the outcome of this case is not affected. Grievant was instructed by Captain C to shakedown cells. She failed to do so thereby acting contrary to that instruction.

Grievant has not established any of the five elements necessary to show newly discovered evidence. Accordingly, Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

