

Issue: Group III Written Notice with termination (gross negligence resulting in injury to inmate); Hearing Date: 10/30/07; Decision Issued: 11/09/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8722; Outcome: No Relief, Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8722

Hearing Date: October 30, 2007
Decision Issued: November 9, 2007

PROCEDURAL HISTORY

On July 18, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence resulting in serious injury to an inmate. On August 6, 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 he requested a hearing. On October 3, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 30, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 employed Grievant as a Corrections Lieutenant at one of its Facilities until his removal effective July 19, 2007. Grievant's prior work performance had been satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency uses a Doublecell Assessment Form to evaluate whether an inmate may be placed in a cell with another inmate. On December 29, 2004, the Agency completed a Doublecell Assessment Form for Inmate H. The form presents a series of questions and provides an opportunity for comment.

In response to the question, "Is the present offense assaultive?", the "yes" box is checked and the words, "rape-kidnapped" are written.

In response to the question "Has the inmate demonstrated a history of assaultive behavior?", the "yes" box is checked and the words, "rape as a juvenile" are written.

In response to the question, "Is the current offense/s sexual in nature?", the "yes" box is checked.

In response to the question, "Does the inmate have a history of convictions for sexual offenses?", the "yes" box is checked.

In response to the question, "Does the inmate have a history of institutional sexual offenses under DOP 861?", the "yes" box is checked and the words, "210 charge history" are written. Department Operating Procedure 861 is the Agency's policy governing disciplining inmates for offensive behavior while incarcerated. The charge 210 refers to an inmate exposing his genitals to others.

In response to the question, "Does the inmate have a history of being a victim/victimizing?", the "yes" box is checked and the words, "beaten by father CPSI" are written.

With respect to the suitability of Inmate H to be placed in a cell with another inmate, the Agency concluded that he could be placed in a double cell but only with restrictions. The reason for the restriction was explained as, "victimizer; beaten by father; several 210 charges."

The Warden testified that when inmates are considered victimizers, she prefers to place those inmates in single cells or in double cells with other victimizers. By placing victimizers together, each inmate's propensity to victimize is blunted by the other inmate's propensity to victimize. The Warden would attempt to avoid placing a victimizer with a non-victimizer in a double cell because of the risk that the non-victimizer would be injured.

In the latter months of 2006, the Warden met with her staff to develop a cell change request procedure because she believed too many inmates were being moved in housing units without apparent reason. She also explained that a change was necessary to avoid problems such as the one that occurred in 2004 when an inmate was moved to another cell and was killed by another inmate. As a result of this meeting, the Facility issued Institutional Operating Procedure 425.4. This policy was available to Facility staff.

In January 19, 2007, the Warden drafted a memorandum to the inmate population at the Facility advising them of the changes that resulted from implementation of IOP 425.4. She posted a memorandum in various locations of the Facility to notify inmates and security staff of the change in procedure. The memorandum outlined the procedure for cell change requests as follows:

The offender shall submit an Offender Cell Change Request Form to the Housing Unit Supervisor for review indicating the reason for moving. The offender should know whether the request is emergency or non-emergency.

If an immediate move is necessary, the offender may be placed in special housing for immediate safety and security of the offender(s) and the institution.

Any routine, non-emergency requests shall be submitted to the Housing Unit Supervisor for review. The form will then be turned over to the Housing Unit Counselor for review and screening. The counselor will screen the offender's GCA/ESC and his infractions during the past six months. This form will be turned over to the Housing Review Committee for final review and action.

The Records Office Manager will make the move if a cell is available and as soon as practical.

If the Housing Unit Supervisor determines that an offender is manipulating cell changes, the offender will be notified in writing that he will no longer be moved at his request. If the Records Office determines that an offender has developed a pattern of changing his smoking preference to manipulate cell changes, the offender will be notified in writing that his smoking preference will no longer be considered when making cell assignments for him.

Please address any questions concerning this process to your Housing Unit Supervisor or Counselor.¹

On April 9th or 10th, 2007, Inmate P submitted a written form to Grievant asking that Inmate P be moved to a cell in which Inmate H resided. Grievant was working as the Housing Unit Supervisor of the building. Grievant decided to grant the request and on April 13, 2007, Grievant permitted Inmate P to move to Inmate H's cell.² Grievant did not obtain approval from anyone else working at the Facility.³ He did not know or review Inmate H's background prior to his decision. He did not comply with the Agency's policy governing inmate cell changes.

On April 20, 2007, Inmate P reported to Agency staff that he had been raped by Inmate H. Inmate P was transported to a hospital for examination. Following an Internal Affairs investigation, the Agency concluded Inmate H committed forcible sodomy and sexual assault on Inmate P.

CONCLUSIONS OF POLICY

¹ Agency Exhibit 4.

² In addition to the Inmate P, Grievant permitted four other inmates to change cells.

³ Grievant was not working as the Watch Commander or Support Commander that day.

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.”⁴ 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.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

Group III offenses include, "gross negligence on the job that results in the escape, death, or serious injury of a ward of the State or the death or serious injury of a State employee."⁷ The DOC Standards of Conduct does not define the phrase "gross negligence". The Hearing Officer will look to Virginia law for guidance.

Virginia law recognizes three degrees of negligence: (1) ordinary or simple, (2) gross, (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.” *Griffin v. Shively*, 227 Va. 317, 321, 315 S.E.2d 212-213, (1984). 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.” *Griffin*, 227 Va. 321, 315 S.E.2d 213, quoting *Ferguson v. Ferguson* 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971). “Willful and wanton negligence is acting consciously in disregard of another person’s rights or acting with reckless indifference to the consequences, with the individual aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.” *Griffin*, 227 Va. 321, 315 S.E.2d 214; *Friedman v. Jordan* 166 Va. 65, 68, 134 S.E.186, 187 (1936).

Institutional Operating Procedure 425.4 sets forth the Facility’s Operating Procedure for Cell Assignments. Section IV(G)(2) provides:

(c) Any routine, non-emergency requests will be submitted to the Housing Unit Supervisor for review. The form will then be turned over to the Housing Unit Counselor for review and screening. The counselor will screen the offender’s GCA/ESC and his infractions during the past six months. This form will be turned over to the Housing Review Committee for final review and action. ***

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

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

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁷ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(15).

(e) The Warden, Assistant Warden, or Administrative Duty Officer shall be the final authority on all double cell assignments/changes.

Inmates at the Facility are all convicted felons. The Facility houses maximum-security inmates and has a death row section. Many of the inmates are inherently violent, inherently dangerous, and serving lengthy sentences. The location, placement, and movement of inmates at the Facility is a continuous security concern with respect to the public, corrections officers, and other inmates. Grievant knew or should have known that almost any inmate at the Facility was capable of extreme violence for any reason at any given time. The Agency recognized this risk to human life and established policies to minimize that risk by establishing a prudent process for assigning inmates to cells. The Doublecell Assessment Form reveals that Inmate H had a history of sexual assaultive behavior prior to being incarcerated. He continued his sexual behavior in prison by exposing himself to staff on several occasions. He could only be placed in a double cell with restrictions.

Grievant disregarded the Agency's policies designed to protect other inmates from inmates like Inmate H. This disregard contributed to the profound effect on Inmate P that resulted from being raped. Grievant's behavior amounted to a complete neglect of Inmate P's safety. His actions rise to the level of gross negligence within the context of the Agency's Standards of Conduct. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an Agency may remove an employee from employment.

Grievant argued that Inmate P asked for the cell change and knew Inmate H prior to the move. This argument does not affect the outcome of this case. Inmate P may not have known of Inmate H's offense history and did not have the opportunity to view the Agency's Doublecell Assessment Form. No evidence was presented showing that Inmate P had the ability to distinguish the risk of sexual assault associated with Inmate H from the risk associated with any other dangerous inmate in the Facility. Moreover, as a ward of the Commonwealth, Inmate P was not in a position to act independently regarding his cell placement.

Grievant argued the Agency did not engage in progressive discipline because he was not counseled prior to the issuance of the Group III Written Notice. Although the Agency's Standards of Conduct encourage progressive discipline, it does not obligate Agency managers to counsel employees prior to the issuance of Written Notices.

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...."⁸ 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

⁸ *Va. Code § 2.2-3005.*

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 he was not aware of the procedure. Although Grievant may not have actually been aware of the procedure, he should have known of the procedure. One of his primary duties as a Corrections Lieutenant was to be aware of Agency policies and to apply those policies. In addition, he was obligated to enforce those policies with respect to his subordinates and inmates. Grievant worked as the Housing Unit Supervisor and the procedure directs inmates to address their questions to him. In light of the standard set forth in the *Rules*, 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 III Written Notice of disciplinary action with removal 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
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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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