

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 03/27/08;  
Decision Issued: 03/28/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 8799; 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: 8799**

Hearing Date: March 27, 2008  
Decision Issued: March 28, 2008

**PROCEDURAL HISTORY**

On July 11, 2007, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory work performance

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 February 26, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 27, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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 Captain at one of its Facilities. He has been employed by the Agency for approximately 23 years. The purpose of his position is, "[s]upervision of daily shift of security and administrative operations."<sup>1</sup> No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On May 24, 2007, Grievant was working as the Watch Commander of the Facility. The Inmate was taken to the medical unit for his appointment. After the medical appointment, the Inmate was escorted from the medical unit through the upper common area and was to be moved to the lower 200 pod due to the inmate's threats against security personnel. As he was being escorted, the Inmate dropped down on his knees and stated that he was not going to move. Corrections Officer L, Corrections Officer J, Corrections Officer G, and the Lieutenant picked up the Inmate and carried him to his cell. The Inmate was examined by the LPN as required by policy when force is used on an inmate.<sup>2</sup>

As a result of the Inmate's behavior, the Lieutenant drafted an Internal Incident Report, a Physical Force Report, and a Behavioral Observation Report/Referral.

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<sup>1</sup> Agency Exhibit 4.

<sup>2</sup> DOC Operating Procedure for 420.1(IV)(A)(7) provides, "Offenders and employees who are involved in a use of force incidents shall be given immediate medical examinations and appropriate treatment, as determined by medical staff."

Corrections Officer L drafted a Physical Force Report indicating that he had grabbed the offender's left arm and left leg to move the Inmate. Corrections Officer J drafted a Physical Force Report indicating that he had assisted the other officers in moving the Inmate by controlling the Inmate's left leg. Corrections Officer G drafted a Physical Force Report indicating that he grabbed the legs of the Inmate and assisted the other officers in taking the offender to the lower 200 pod. The LPN drafted an Internal Incident Report indicating that she had examined the Inmate and found no evidence of injury although the Inmate complained of bruises and scratches on his arms and wrists and of chest pain.

The Lieutenant called the Grievant and informed him of the Inmate's behavior. The Lieutenant presented Grievant with copies of all of the reports written by the Lieutenant and the three Corrections Officers and the LPN. Grievant did not report the matter to the Major or Assistant Warden.

### **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>3</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>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>5</sup>

"[I]nadequate or unsatisfactory job performance" is a Group I offense.<sup>6</sup> In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Implementation Memorandum 038.1 governs "Reporting Serious or Unusual Incidents" at the Facility. An incident is defined as, "an actual or threatened event or occurrence outside the ordinary routine that involves the life, health and safety of employees, volunteers, guests, or offenders (incarcerated or under Community Supervision), damage to state property, or disrupts or threatens security, good order and discipline of a facility or organizational unit." "When an incident occurs in the housing unit, the Building Supervisor will be responsible to obtain the Internal Incident Reports, Use of Force Reports (if necessary), securing a copy of the charge, medical

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

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

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

report, pre-hearing detention notice and handwritten copy of the Incident Report. This paperwork will then be forwarded to the Watch Commander. The Watch Commander will review the documents for accuracy and completion. If the draft is appropriate, it will be forwarded to the Major of the shift. If the package is not complete, the Watch Commander will ensure its completion and submit it to the Major of the shift. The Watch Commander must submit each completed package prior to the end of the shift."

On May 24, 2007, an incident occurred involving the Inmate. The incident was outside the ordinary routine. It involved the safety of employees and the Inmate. It threatened security, good order, and discipline at the housing unit. The incident was reported to Grievant. Grievant did not forward the necessary paperwork to the Major thereby failing to comply with the Agency's written policy. Failure to follow established written policy is a Group II offense. After considering Grievant's work history and the nature of the offense, the Agency chose to issue Grievant a Group I Written Notice. That Group I Written Notice must be upheld.

Grievant argues that the Inmate's behavior did not give rise to a use of force by security personnel. Because there was no use of force, it was not necessary for him to complete a Serious Incident Report and submit that report to the Assistant Warden, according to Grievant. Grievant's argument fails for two reasons. First, the Inmate's desire was to remain in one place and not be moved. The security officers forced the Inmate to move from his location into a cell by picking up the Inmate and carrying the Inmate to the cell. In short, the Inmate was physically forced from one location of the Facility to another. Second, the Lieutenant and three Corrections Officers drafted reports entitled "Physical Force Report." The LPN drafted an Internal Incident Report and describe the nature of the incident as "Use of Force". The behavior of these five employees suggests that the standard for defining use of force within the Facility had been satisfied with respect to the Inmate's behavior. Accordingly, force was used to move the Inmate for one location of the Facility to another.

Grievant argues that the Agency should have engaged in progressive discipline by first issuing him a counseling memorandum instead of issuing a written notice. Although the Standards of Conduct encourages agencies to use progressive discipline, agencies are not obligated to issue written counseling before issuing written notices.

Grievant argues that the Agency failed to timely issue the Written Notice following the date of the offense, May 24, 2007. This argument fails. The Assistant Warden did not learn of Grievant's omission until June 20, 2007. He promptly investigated the matter and then issued the Written Notice on July 11, 2007. His actions were timely.

*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

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<sup>7</sup> *Va. Code § 2.2-3005.*

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**.

### **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>

[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

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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.