

Issue: Group II Written Notice with suspension (failure to follow instructions); Hearing Date: 03/05/08; Decision Issued: 03/06/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8800; 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: 8800**

Hearing Date: March 5, 2008  
Decision Issued: March 6, 2008

**PROCEDURAL HISTORY**

On August 28, 2007, Grievant was issued a Group II Written Notice of disciplinary action with a one workday suspension for failure to follow proper procedure.

On September 27, 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 14, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 5, 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 Officer at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant's Post Order states his job summary as:

Be responsible for observing and supervising inmates in the Unit. Maintain security, custody, and control of your assigned area. Maintain control of all doors and access doors. Monitor surveillance equipment. Know, understand, and follow the provisions set forth in the IPOs related to Inmate Personal Property, Inmate Movement, Use of Force, Control of Contraband, Institutional Counts and Emergency Procedures. Maintain control of your assigned area.

As part of Grievant's post orders, he was expected to:

9. Make security inspections of area every (30) minutes, to be responsible for sanitation and prepare Inspections/Maintenance reports. \*\*\*

17. Ensure that all logbooks are kept properly. All incidents are to be entered in your logbook as soon as feasible, the facts clearly and succinctly recorded, and proper reports prepared by end of shift.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 7.

In order to complete a security inspection, a corrections officer must walk to each cell in a housing wing, look through the cell door window, and observe the inmate.

On June 27, 2007, Grievant entered the Housing Wing at 4:06 p.m. He handed out mail to inmates and then left the wing at 4:22 p.m. Grievant wrote in the logbook that he conducted a security round at 4:13 p.m. even though he had not actually conducted a security round.

On July 30, 2007, Grievant wrote in the logbook that he conducted a security round at 11:59 a.m. and at 12:35 p.m. Grievant was not in the Housing Wing at those times. He did not enter the Housing Wing until 12:45 p.m.<sup>2</sup>

### **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>

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.<sup>6</sup> The Agency’s policy governing Grievant’s work duties was set forth in his Post Order. Grievant’s Post Order required him to conduct a security round every 30 minutes and to record that action in the logbook for his post. Grievant did not conduct security rounds every thirty minutes on June 27, 2007 and July 30, 2007 and he did not correctly record his actions in the logbook for those days. Grievant’s actions were contrary to established written policy thereby justifying the Agency’s issuance to him of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an Agency may suspend an employee up to ten workdays. Since Grievant was suspended for only one workday, his suspension must be upheld.

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<sup>2</sup> The Agency’s Investigator viewed the video tape for those two days and observed the Housing Wing during the relevant times. He noted that Grievant did not make security rounds during the times Grievant claimed to have made those rounds. Grievant did not dispute this fact.

<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(XI)(B)(1).

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.

Grievant contends the disciplinary action should be mitigated because (1) the punishment is too harsh and (2) the Facility was short-staffed thereby placing additional pressure on him to complete his tasks. Discipline that is too harsh is not, in itself, a basis to mitigate the disciplinary action. Only if the discipline is too harsh and exceeds the limits of reasonableness would there be a basis to mitigate the disciplinary action. In this case, Grievant failed to comply with the Agency’s policy thereby justify the issuance of a Group II Written Notice. Because the Standards of Conduct authorize a suspension of up to 10 workdays upon the issuance of a Group II Written Notice, a suspension of one workday does not exceed the limits of reasonableness. A lack of adequate staffing is not a basis to mitigate the disciplinary action in this case. An Agency witness testified that if Grievant was unable to complete a security round, he could have made a notation in the logbook explaining why he had not conducted the security round. Instead, Grievant wrote in the logbook that he completed a security round when in fact he had not done so. In light of the standards 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 II Written Notice of disciplinary action with a one-day suspension 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:

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<sup>7</sup> Va. Code § 2.2-3005.

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.