

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 03/10/08;
Decision Issued: 03/11/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8804; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8804

Hearing Date: March 10, 2008
Decision Issued: March 11, 2008

PROCEDURAL HISTORY

On August 30, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a post order.

On September 28, 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 February 14, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 10, 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. The purpose of her position is to "[p]rovide security and supervision to adult offenders."¹ Grievant has been employed by the Agency for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

On August 6, 2007, Grievant worked her regular shift which ended at approximately 6:15 p.m. She was drafted to work additional hours and was instructed to report to Housing Unit 3 to work as the Floor Officer. At approximately 9:45 p.m., Grievant and another corrections officer counted the inmates in the Housing Unit. They reported their count to the Watch Commander. The count cleared meaning that all of the inmates at the Facility were accounted for. The Captain notified Corrections Officer S to inform Grievant that two inmates inside the Housing Unit needed to be escorted from the Housing Unit to the medical unit. The inmates were to receive medicine. At approximately 10 p.m., Grievant escorted at least three inmates from the Housing Unit through the Left Entry Door outside of the building and onto the main walkway of the Facility. Shortly after Grievant left the Housing Unit, Inmate B mixed in with several inmates conducting laundry duties. These inmates approached Corrections Officer S who was working in the Control Booth and asked to be let out of the Housing Unit. Corrections Officer S opened the Right Entry Door and let the inmates including Inmate B out of the Housing Unit. Inmate B was not authorized to leave the Housing Unit and Corrections Officer S should have known not to open the door for Inmate B to leave.

¹ Agency Exhibit 4.

Grievant did not see Inmate B leave the Housing Unit through the Right Entry Door because she had already left the Housing Unit through the Left Entry Door. A large concrete stairway blocks the view between the Left and Right Entry Doors.

Grievant walked the inmates down to the medical unit where the inmates received their medication. After approximately 20 minutes, Grievant and the inmates returned to the Housing Unit. At 1:30 a.m., Grievant and another Corrections Officer conducted a count. Grievant realized that Inmate B was missing and reported that to the Watch Commander. The Facility security staff began searching for the inmate and ultimately found him. Because of the blood found on the razor wire and walls, Agency Security Staff concluded that Inmate B had attempted to escape. Corrections Officer S was removed from employment for permitting Inmate B to leave the Housing Unit without authorization.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Grievant's Post Orders require that she control inmate movement while working as a Floor Officer. At the time Inmate B left the Housing Unit through the Right Entry Door, Grievant was no longer in the Housing Unit and had no control of or involvement in the decision to permit Inmate B to leave the Housing Unit. Grievant was escorting inmates to the medical center in accordance with the Captain's instructions. Corrections Officer S was solely responsible for the decision to permit Inmate B to exit the Housing Unit. Grievant did not engage in any inappropriate behavior and there is no basis to take disciplinary action against her.

The Agency argues Grievant was aware of some confusion caused by having too many inmates on the floor prior to her leaving the Housing Unit and Grievant should have reported her concerns. The evidence showed, however, that Grievant reported her concerns to the Sergeant.⁵ Thus, Grievant satisfied the Agency's expectation of her work performance.

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

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

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

⁵ Grievant told the Sergeant that there were too many offenders on the pod.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.⁶

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.

⁶ Grievant sought to be reimbursed for a period of work suspension. The Written Notice, however, does not specify that she was to be suspended.

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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.