

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 08/28/08; Decision Issued: 08/29/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8923; 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: 8923

Hearing Date: August 28, 2008
Decision Issued: August 29, 2008

PROCEDURAL HISTORY

On February 22, 2008, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for leaving a weapon in a public restroom contrary to written policy.

On March 18, 2008, 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 July 24, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 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 of adult offenders." No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On February 12, 2008, Grievant was assigned to work a post at a local Hospital to provide security with respect to inmate patients.¹ She was in uniform and had been assigned a handgun. She went to the restroom in the Hospital. The restroom was accessible by Hospital staff, inmate medical patients, and members of the public visiting the Hospital. Grievant walked out of the restroom but left her loaded handgun and speed loader in the restroom. The weapon and speed loader were found by two Hospital employees. Several minutes after leaving the restroom, Grievant realized she did not have her weapon. She returned to the area where she had left the weapon. A Hospital employee returned the weapon and speed loader to Grievant.

¹ Grievant regularly made "transportation runs" where she would transport inmates from the Institution to the Hospital and remain with the inmates while they receive medical treatment.

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

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁵ Virginia Department of Corrections Operating Procedure 411.1 governs Offender Transportation. Section IX(A) of this policy provides, “[a]t a minimum, the transporting officer(s) should be equipped with an appropriate revolver and appropriate ammunition.” Section IX (G) provides, “[f]irearms & less than lethal weapons will be secured in the appropriate holster or secure storage device when not actively in use.” By leaving a handgun and speed loader in the restroom, Grievant failed to have the weapons secured in a holster or storage device. Her actions were contrary to established written policy thereby justifying the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an employee may receive a suspension for up to 10 workdays. Grievant's five workday suspension must be upheld.

Grievant questions why she was not immediately removed from her transportation post once the Agency discovered this security breach. The Supervisor at the Hospital permitted Grievant to continue working her transportation post. Approximately two days later, the Assistant Warden received an email notifying him of the incident. He immediately removed Grievant from transportation duties. How long the Agency took to remove Grievant from her transportation duties does not affect the outcome of this case. It is not a basis to reverse disciplinary action.

Grievant contends the Agency took other disciplinary action against her although the actions were not stated in the Written Notice. No evidence was presented to substantiate these allegations.

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....”⁶ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

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 Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁶ *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.⁷

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with five workday 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:

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:

⁷ The Agency issued Grievant a Group II Written Notice with five day suspension after mitigating the offense. The Agency could have issued more severe discipline.

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.⁸

[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

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