

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 01/13/09; Decision Issued: 01/15/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8994; 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: 8994

Hearing Date: January 13, 2009

Decision Issued: January 15, 2009

PROCEDURAL HISTORY

On July 7, 2008, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On August 4, 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 November 24, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 13, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 provide security over inmates at the institution and while in transport; supervises their daily activities and observes and records their behavior and movement to ensure their safe and secure confinement.

Grievant's Employee Work Profile requires that she:

Carries out all duties and responsibilities in accordance with supervisor instructions, written post orders, and divisional and institutional operating procedures.

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Inmates whose behavior is so poor that they cannot be kept with the other inmates in general population are placed in the segregation unit at the Facility. The houseman for the segregation unit is an inmate who resides in a cell in the segregation unit and is considered by Agency security staff to be the segregation inmate most capable of working outside of his cell, but remaining inside the segregation unit. Because the segregation unit houseman is a segregation employee, he poses

additional security risks to the security staff working in the segregation unit. The Agency requires two officers to be working on the segregation wing when the houseman leaves his cell.

The Facility's segregation unit consists of an East wing of 20 cells and a West wing of 20 cells. One corrections officer sits in a control booth located between the two wings and is responsible for letting inmates out of their cells and controlling who enters either of the segregation unit wings. When the Facility is fully staffed, two corrections officers work in the West wing and two corrections officer work in the East wing along with the control booth officer. The Facility is often short staffed, and does not have two corrections officers working on both the East and West wings. Often the Facility has only one officer working on each wing. When it is necessary for an inmate to be let out of his segregation cell and into the common area of his wing, the Chief of Security has authorized the officer from the other wing to come over to the inmate's wing while the inmate is out of his cell. The result is that the officer assigned to the inmate's wing and the officer from the other wing are both present to supervise the segregation inmate.

On May 23, 2008, Grievant was working in the control booth. It became necessary to clean one of the wings of the segregation unit. Grievant explained to the Sergeant that the segregation unit was short staffed and it would be difficult for her to ensure that cleaning was done. The Sergeant told Grievant to do what she had to do to get the job done. He left the building to work in another area of the Facility as he had been directed to do by his supervisor. Grievant opened the cell door of the segregation houseman to let him out into the common area of the wing to begin cleaning. Only one corrections officer was working in that wing when the houseman was cleaning.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁴ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

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

Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant's post order set forth the Agency's expectations for her job performance as a control booth officer. Post Order 92 governed Grievant's position on May 23, 2008. Item 45 of the post order provides:

Ensure that two officers are on the floor if the houseman is out working.
No exceptions, and inmate is shaken down entering or exiting his cell.

On May 23, 2008, Grievant opened the cell door of the houseman in the segregation unit and let him out of his cell to clean. At the time Grievant did so, she knew there was only one corrections officer on the floor where the houseman was cleaning. Because the houseman in the segregation unit is among the most dangerous of inmates at the Facility, Grievant placed the one floor officer at additional risk of injury from the houseman. Grievant acted contrary to her post order thereby making her work performance unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

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..."⁵ 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 for several reasons. First, Grievant contends the Agency was understaffed and it was necessary for her to permit the houseman to clean in the presence of only one floor officer. This argument fails. The Agency presented evidence that it had authorized Grievant to bring over briefly the officer from the wing opposite to where the houseman was working and have that officer work with the one officer already working in the wing where the houseman was cleaning. Second, Grievant contends the Sergeant told her to do whatever she could do to get the job done. This argument is untenable. Although the Sergeant told Grievant to get the job done however she could, he did not authorize Grievant to disregard her post orders. Grievant should not have expected the Sergeant to order her

⁵ *Va. Code § 2.2-3005.*

to violate her post orders. Indeed, if she construed the Sergeant as ordering her to violate her post orders, that would be a matter she should have brought to the Watch Commander's attention. Third, Grievant contends the Agency has inconsistently disciplined its employees. She presented evidence of an incident where a control booth officer in the segregation unit did the same thing she has been disciplined for doing. That control booth officer and the officer working with him received written reprimands rather than written notices. Merely because an Agency differently disciplines employees does not make that action an inconsistent disciplining of employees thereby justifying mitigation. The incident Grievant referenced occurred five years earlier and was under a different Facility Warden. Once an Agency decides to counsel an employee regarding a specific issue, it does not mean that the Agency must forever only counsel all employees engaging in similar behavior. In this case, Grievant had notice from her post orders that there were no exceptions under which the houseman was to be out of his cell without two officers present. The Hearing Officer has no reason to believe that Grievant was singled out for disciplinary action in this case. 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 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 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
600 East Main St. STE 301
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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.