

Issue: Group III Written Notice (gross negligence); Hearing Date: 12/07/09; Decision Issued: 12/14/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9231; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9231**

Hearing Date: December 7, 2009  
Decision Issued: December 14, 2009

**PROCEDURAL HISTORY**

On June 18, 2009, Grievant was issued a Group III Written Notice of disciplinary action for security negligence.

On July 15, 2009, 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 November 18, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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. Grievant began working for the Agency in February 2007. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Institution had two inmates with the same first and last names but different middle initials (hereinafter, Inmate I and Inmate O). Inmate I needed to be transported to a local hospital for hernia surgery. An employee incorrectly scheduled Inmate O to be transported to the hospital on June 9, 2009. Inmate O's name was placed on a manifest to show that several hours later he was to be taken from his cell through a series of gates and into the sally port where he would be placed on a bus that would take them to the hospital. Within two hours after Inmate O's name was incorrectly placed on the manifest, the error was detected, and the manifest was corrected to show that the inmate to be transported was Inmate I. Although the manifest had been corrected and Inmate O told Facility staff that he did not need surgery, he was taken through gate 19C<sup>1</sup> and to the intake building.

The Watch Commander gave the correct face sheet and gate pass to the Sergeant working along with Grievant at the sally port. When Inmate O was brought from the intake building to the sally port, the Sergeant failed to compare the inmate's

---

<sup>1</sup> Grievant usually verified an inmate's identity at gate 19C. Because Agency staff had taken Inmate O to the intake building, Grievant was unable to follow his normal routine. His obligation to verify the identity of the inmate, however, did not change simply because Inmate O was taken directly to the intake office.

identification card with the face sheet showing that the inmate to be escorted was Inmate I. The Sergeant indicated to Grievant that the inmate was ready to be passed through the sally port. Grievant failed to compare Inmate O's identification with the face sheet. As a result, Grievant put Inmate O onto the bus and moved the bus from inside the Facility to outside of the Facility.<sup>2</sup> Corrections Officer C got on the bus. Although she was supposed to verify that the correct inmate was being transported, she failed to do so. When Inmate O reached the hospital, a member of the medical staff spoke with Inmate O and determined that the wrong inmate had been sent to the hospital.

## 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>

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

Grievant's post order required that he:

Properly identify inmates for transportation to and from the institution by visual comparison of the inmate and a picture identification card or locator card. Have the inmate state his full state name, number, and verify the same with the manifest, gate pass, and medical or institutional records.

---

<sup>2</sup> Inmate O did not tell Grievant that he was the wrong inmate to be transported because he was frustrated with other Agency staff who did not believe his contention that he was not to be taken to the hospital.

<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).

Grievant failed to compare the face sheet with Inmate O's identification card prior to letting Inmate O board the vehicle. Because Grievant failed to comply with his post order, the wrong inmate left the Facility.

The Agency contends a Grievant engaged in security negligence because he permitted the wrong inmate to exit the Facility. The Agency's judgment that Grievant engaged in a Group III offense is supported by the evidence. The degree of risk of danger to the public is materially greater for an inmate who is outside of the walls of an institution than for an inmate located inside the institution. In particular, Inmate O was exposed to members of the hospital medical staff and could have engaged in inappropriate behavior in their presence especially given that he was angry because Agency staff had inappropriately removed him from the Facility. Had Inmate O remained inside the Facility he would have posed no risk to the public. The Agency's judgment is consistent with "violating a safety rule where there is a threat of physical harm" which is a Group III offense.

*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>6</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. The Hearing Officer agrees. Grievant's supervisor, the Sergeant, told Grievant that Inmate O was ready to be placed on the bus for transport. Although Grievant was obligated to independently verify the identity of the person to be transported, it was understandable that he would rely upon the judgment of his supervisor. The inconsistent application of disciplinary action is a basis for mitigation. Corrections Officer C had the same obligation under her post orders as did Grievant to verify that the correct inmate was on the bus. She failed to do so but received only a Group I Written Notice. The Agency could have issued Corrections Officer C a Group II Written Notice for failure to follow written policy. Instead, the Agency was lenient in her punishment when compared to Grievant. Accordingly, mitigating circumstances justify a reduction of the disciplinary action against Grievant from a Group III Written Notice to a Group II Written Notice.

---

<sup>6</sup> *Va. Code § 2.2-3005.*

## DECISION

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

## 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  
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.<sup>7</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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