

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 03/10/10; Decision Issued: 03/11/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9274; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9274

Hearing Date: March 10, 2010
Decision Issued: March 11, 2010

PROCEDURAL HISTORY

On August 20, 2009, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance because he failed to timely serve charges on inmates.

On August 21, 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 February 8, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 10, 2010, 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 Sergeant at one of its Facilities. No credible evidence of prior active disciplinary action against Grievant was introduced during the hearing.¹

Two inmates tested positive for illegal drugs. Their actions constituted offenses under the Agency's Operating Policy 861. Officer K wrote charges against the inmates. The charges were written by Officer K on July 4, 2009 at 2 p.m.² Officer K gave the charges to Grievant so that Grievant could serve them on the inmates. Grievant knew he was expected to serve the charges on a timely basis. He got busy and failed to serve the charges. As a result of Grievant's failure to timely serve the charges against the inmates, the inmates were not sanctioned for testing positive for illegal drugs.

Grievant did not deny serving the charges. He was very honest during the Agency's investigation and apologized for failing to serve the charges.

Grievant has had more extensive training than most Sergeants at the Facility because he took a hearings officer's training course which was more advanced than the

¹ The Agency alleged that Grievant had prior active disciplinary action, however, the Agency failed to produce a copy of the Written Notice.

² Grievant had instructed Officer K to write the charges against the inmates.

training of other employees. Also, Grievant had taken in-service training focused on the application of Operating Procedure 861.1.

When Agency managers intended to take disciplinary action against an employee, the Agency's practice was to give that employee a written statement showing the nature of the allegation and the date on which the Agency intended to hold a disciplinary fact-finding hearing. The written statement enabled the employee to prepare for the fact-finding hearing.

Grievant was not given a written statement identifying the allegations against him and notifying him of the date of the disciplinary fact-finding meeting. As a result, Grievant was not able to adequately prepare for the disciplinary fact-finding meeting. When the fact-finding meeting was held, Grievant was given a Group I Written Notice forming the basis of this grievance.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

Operating Procedure 861.1 requires that an inmate charge be served by midnight of the following work day. Grievant failed to comply with Operating Procedure 861.1 because he did not serve the inmate charges by midnight of the following day. Grievant failed to comply with written policy thereby justifying the issuance of a Group II Written Notice. The Agency decided to mitigate the disciplinary action and to issue a Group I Written Notice for unsatisfactory work performance. Accordingly, the issuance of a Group I Written Notice must be upheld.

DOC Operating Procedure 135.1, Standards of Conduct defines due process as:

Prior to any pre-disciplinary or disciplinary actions, employees must be given an oral or written notification of an offense, and explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond. DOC must provide a clear and descriptive explanation of the offense in a manner that ensures that the employee understands the facts

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

presented and will be able to present mitigating factors or denial of the charge.

Grievant argues that the Agency failed to provide him with adequate procedural due process. For example, the Facility's practice was for employees to be given a written statement regarding what discipline an employee may be facing and the date and time of the hearing. Grievant was not given a written notice of the allegations against him. He was instructed to meet with the Colonel but not told that the meeting would be a disciplinary fact finding meeting that would result in disciplinary action by the Agency against him.

Grievant's argument fails. To the extent the Agency failed to comply with procedural due process, Grievant's denial of procedural due process has been cured by the Step Process and the grievance hearing. Grievant had the opportunity to prepare and present his evidence to support his position during the Step Process. Grievant was given ample opportunity prior to the hearing to present whatever documents and testimony he wanted to present to the Hearing Officer. There is no basis to alter the disciplinary action against Grievant because the Agency failed to provide Grievant with procedural due process as required by DOC Operating Procedure 135.1.

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...."⁶ 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 other employees engaged in similar behavior but were not disciplined. Insufficient evidence was presented to support this allegation. Sufficient details surrounding such incidents were not presented and the Hearing Officer cannot conclude that the Agency inconsistently disciplined employees who failed to serve charges on inmates.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁶ *Va. Code § 2.2-3005.*

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.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.