

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 06/23/10; Decision Issued: 06/24/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9354; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9354

Hearing Date: June 23, 2010
Decision Issued: June 24, 2010

PROCEDURAL HISTORY

On October 26, 2009, Grievant was issued a Group II Written Notice of disciplinary action with a two work day suspension for failure to follow a supervisor's instructions.

On November 10, 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 June 2, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 23, 2010, 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 this position is to, "provide security and supervision of adult offenders at this facility."¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant reported to the Sergeant who reported to the Lieutenant. The Lieutenant served as the Shift Commander during her shift.

On September 1, 2009 at approximately 5 a.m., the Sergeant was informed by the Lieutenant that Officer S had an argument with Grievant over the telephone during which threats were made by Grievant according to Officer S. The Sergeant called Grievant by telephone and asked him what had transpired between him and Officer S. Grievant explained what had happened. The Sergeant instructed Grievant to write a report of everything that he had just told the Sergeant and to turn it in to the Sergeant before Grievant left for the day. Grievant told the Sergeant that he would write a report and give it to the Shift Commander. The Sergeant instructed Grievant that the report needed to be written before Grievant left and turned in to the Sergeant. Grievant again stated that he would turn in the report to the Shift Commander. The Sergeant then called the Lieutenant regarding the telephone conversation he had with Grievant. The Lieutenant told the Sergeant to call Grievant again and ensure that Grievant understood

¹ Agency Exhibit 5.

that he was to write the report and turn it in to the Sergeant before he left for the day. The Sergeant then called Grievant and repeated the instruction that Grievant was to write the report and turn it in to the Sergeant before he left for the day. Grievant complained that he did not have enough time to write the report and that he was not going to write the report that morning. The Sergeant again instructed Grievant to write the report before he left and said that he would have another employee relieve Grievant from his post so that Grievant could write the report. Grievant told the Sergeant "I don't want to talk to you, I want to talk with the Shift Commander". The Sergeant called the Lieutenant and explained to her that Grievant wanted to speak with her². The Lieutenant spoke with Grievant and told Grievant to write the report before he left for the day and to give it to the Sergeant.

After Grievant was relieved from his post, he wrote a report of his encounter with Officer S. At approximately 6:15 a.m., Grievant walked to the Shift Commander's office where the Sergeant was waiting to review Grievant's report. Grievant asked Lieutenant C where he wanted the report. Lieutenant C did not respond. The Sergeant advised Grievant that the Sergeant needed the report. Grievant turned around and stated "that's not my choice, I'm going to put it in the [Lieutenant's] box". Grievant then placed the report in the mailbox of the Lieutenant.

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

"[F]ailure to follow a supervisor's instructions" is a Group II offense.⁶ Grievant was instructed by the Supervisor and the Lieutenant to write a report and give that report to the Sergeant before Grievant left for the day. Grievant wrote a report but knowingly and intentionally refused to give that report to the Sergeant as instructed. Grievant thereby acted contrary to a supervisor's instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for

² The Lieutenant was the Shift Commander at that time.

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).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

failure to follow a supervisor's instructions. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's two workday suspension must be upheld.

Grievant argued that the Supervisor and the Lieutenant did not instruct him to turn in the report to the Sergeant. Grievant's argument fails. Both the Sergeant and the Lieutenant testified that they instructed Grievant to turn in the report to the Sergeant. Their testimony was credible.

Grievant argued that the Agency's action against him may have been motivated by racial bias. There was no credible evidence presented to support this allegation. The allegation remains Grievant's personal speculation.

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...."⁷ 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. In light of this standard, 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 II Written Notice of disciplinary action with a two work day 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.

⁷ Va. Code § 2.2-3005.

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.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].

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.