

Issues: Group III Written Notice (weakening of security), Suspension, Transfer and Demotion; Hearing Date: 07/15/10; Decision Issued: 07/16/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9367; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9367**

Hearing Date: July 15, 2010

Decision Issued: July 16, 2010

**PROCEDURAL HISTORY**

On February 19, 2010, Grievant was issued a Group III Written Notice of disciplinary action with a five-day suspension, demotion, disciplinary pay reduction, and transfer for refusal to obey instructions that could result in a weakening of security.

On March 16, 2010, 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 July 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 15, 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 employed Grievant as a Corrections Sergeant at one of its Facilities.

The Inmate told the Corrections Officer that a cell phone and alcohol would be delivered into the institution during the Christmas holidays of 2009 by inmates entering the institution. The Corrections Officer told Grievant what the Inmate told her. Grievant did not tell this information to higher ranking employees such as the Major, the Assistant Warden or the Warden. Because Grievant did not relay the information to any of his superiors, Agency managers were unaware of the potential and serious pending breach of security.

### **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>1</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

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

warrant removal.”<sup>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

The Agency contends that Grievant should receive a Group III for, "refusal to obey instructions that could result in a weakening of security". The Agency has not identified a specific person who gave a specific instruction to Grievant on a particular date. The Agency has not established that Grievant knew of that instruction and then refused to obey that instruction. The Agency has not established that Grievant refused to obey an instruction that could result in a weakening of security. There is no basis to uphold a Group III Written Notice of disciplinary action against Grievant. In addition, there is no basis to transfer, demote, or reduce Grievant's compensation.

Failure to follow a written policy can be a Group II offense. The Agency has not presented any written policy or post order showing that Grievant was obligated to report the information to his supervisor.

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>4</sup> In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant received training on a regular basis as part of his employment informing him of his obligation to report to his superiors any possible serious security breaches. The entry of the cell phone into the institution would be a serious breach of security. Grievant failed to notify the Major, the Assistant Warden, or Warden of the information he learned from the Corrections Officer. The Agency has established that Grievant's job performance was inadequate or unsatisfactory.

Attachment 2 to the Agency's Standards of Conduct provides:

Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) Similarly, in rare circumstances, a Group I may be considered a Group II were the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

An inmate with a cell phone can plan, coordinate, and engage in criminal activity outside of the control of the Agency. An inmate with a cell phone poses a risk to the public, Agency security employees, and other inmates. An inmate in possession of a cell phone inside an institution represents the material breach of security. Grievant knew or should have known that the risk of a cell phone being smuggled into the institution was such a significant possible breach of security that he was obligated to immediately inform a supervisor of that risk. Grievant failed to do so. Grievant's failure was so significant as to have a truly material adverse impact on the Agency's ability to monitor the inmates creating the greatest risk to the Agency. The Agency has presented a sufficient basis to elevate the Group I Written Notice to a Group II Written Notice.

Upon the issuance of a Group II Written Notice of disciplinary action, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's five work days suspension must be upheld.

Grievant argued that he informed the Institutional Investigator and the Special Agent of the information about a cell phone he received from the Officer. Both the Institutional Investigator and the Special Agent denied this allegation during the hearing. Even if the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, Grievant knew or should have known through his training and experience of his obligation to report the information to a superior. The Institutional Investigator and the Special Agent were not within Grievant's chain of command.

Grievant argued that the Agency was out of compliance because it failed to timely process his grievance. Even if the Hearing Officer assumes for the sake of argument that the Agency failed to timely process Grievant's grievance, there is no policy that would justify a further reduction in the disciplinary action. There is no basis to grant Grievant relief based on any untimely response by the Agency to Grievant's grievance.

*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>5</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

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<sup>5</sup> *Va. Code § 2.2-3005.*

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 III Written Notice of disciplinary action with transfer, demotion, and suspension is **reduced** to a Group II Written Notice of disciplinary action with a five work day suspension. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position at the Facility where he worked as a Corrections Sergeant prior to his transfer. The Agency is directed to reverse the disciplinary pay reduction and provide Grievant with **back pay** as if such pay reduction had not occurred.

## 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>6</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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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