

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 10/27/10; Decision Issued: 10/29/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9432; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9432

Hearing Date: October 27, 2010
Decision Issued: October 29, 2010

PROCEDURAL HISTORY

On July 7, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

On July 20, 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 October 12, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 27, 2010, a hearing was held at the Agency's office.

APPEARANCES

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

Grievant worked as a Control Room Officer inside the Building. His Post Order required that he be "alert and observant of your entire area at all times."¹ Inmates resided in the Building's two dorms, Dorm A and Dorm B. The Building contained a Control Room with windows designed to enable the officer sitting inside the Control Room to see inside the dorms, the Metal Grill Gate, the interior hallways and the Front Entry Door.

Grievant was responsible for observing the Floor Officer who worked in the dorms and other parts of the Building. He was responsible for letting people in and out of the Building by pushing a button on his control panel that would unlock the Front Entry Door. He was also responsible for letting people pass through a gate inside the Building referred to as the Metal Grill Gate. When either the Front Entry Door or the Metal Grill Gate was unlocked, a light would activate on Grievant's control panel. The locking system controlling the Metal Grill Gate and the Front Entry Door prohibited both doors from being unlocked at the same time. In other words, Grievant could only permit a person to pass through the Metal Grill Gate while the Front Entry Door was locked and vice versa.

¹ Agency Exhibit 5.

The Metal Grill Gate and the Front Entry Door did not always close properly. Unless they were shut firmly, the gates could appear closed and locked on Grievant's Control Panel yet someone could push the doors open and pass through them.

Several offenders living in Dorm B worked in a kitchen located in another building within the Facility. The Floor Officer would escort these offenders from Dorm B and out of the Building into the yard. The Floor Officer was responsible for observing the offenders enter the building containing the kitchen. Offenders were not permitted to exit the Building and walk to the kitchen without being observed by a corrections officer.

On June 29, 2010, Grievant was working as the Control Room Officer in the Building. At approximately 5:05 a.m., the Offender left Dorm B and walked to the Metal Grill Gate. Although the gate appeared to be closed and locked, it was not locked. The Offender pushed the gate open and walked through. The Offender walked down the hall next to the Control Room where Grievant was sitting. The Offender walked to the Front Entry Door. Although the door appeared to be closed and locked, it was not locked. The Offender pushed the Front Entry Door open and walked into the yard. Grievant did not observe the Offender as he passed through the Metal Grill Gate, walk down the hall next to the Control Room, and pass through the Front Entry Door. The Offender walked from the Building to the building containing the kitchen without being observed by a corrections officer.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁵ 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.

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

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

At 5:05 a.m., very few activities were taking place in the Building. Grievant was expected to be alert and observe offender movement within the Building. Grievant did not observe the Offender as he walked out of his dorm and through the Metal Grill Gate. Grievant did not observe the Offender as he walked down the hall next to the Control Room. As the Offender walked down the hall, the Offender would have been within three to six feet of Grievant. Grievant did not observe the Offender as he pushed through the Front Entry Door and exited the Building. If Grievant had been alert to his surroundings, he would have been able to see the Offender leave the dorm and exit the Building. Grievant's failure to observe the Offender constitutes unsatisfactory work performance thereby justifying the issuance of a Group I Written Notice.⁶

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.

Grievant argued that the Group I Written Notice was too harsh and should be reduced to a counseling memorandum. Grievant argued that the reason the Offender was able to exit the Building was because of the malfunctioning Metal Grill Gate and Front Entry Door. The lights on his control panel did not indicate that the doors were unlocked. Although Grievant is correct that had the gates been working properly the Offender would not have been able to leave the Building, Grievant's duty to be alert and observe offender movement was not contingent upon gates working properly. Grievant was obligated to be alert regardless of how the gates were working. Had Grievant been alert on June 29, 2010, he would have observed the Offender exiting the Building. The fact that the Offender was able to exit the Building because of malfunctioning gates is not a mitigating circumstance causing the Agency's disciplinary action to exceed the limits of reasonableness. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

⁶ Grievant argued that he was making entries in a log book and did not see the Offender walked past him. Grievant did not testify to this fact and there is no evidence upon which the Hearing Officer can rely to support the assertion.

⁷ *Va. Code § 2.2-3005.*

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.⁸

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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