

Issues: Two Group II Written Notices (failure to follow policy) and Termination due to accumulation; Hearing Date: 10/22/10; Decision Issued: 11/01/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9437; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9437**

Hearing Date: October 22, 2010  
Decision Issued: November 1, 2010

**PROCEDURAL HISTORY**

On July 19, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to comply with policy. On July 19, 2010, Grievant was issued a Group II Written Notice of disciplinary action for losing a key. Grievant was removed from employment effective July 19, 2010.

On August 6, 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 she requested a hearing. On October 6, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 22, 2010, a hearing was held at the Agency's 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 Officer at one of its Facilities. The purpose of her position was to "[p]rovide security and supervision of adult offenders." Grievant had prior active disciplinary action. On July 8, 2009, Grievant received a Group III Written Notice of disciplinary action with suspension.

Grievant received training regarding how to conduct properly a shakedown of an offender. She was taught first to stand behind the inmate. She was instructed to begin the shakedown by placing her hands at the inmate's neck and then moving her hands down each section of the inmate's body to determine whether the inmate had concealed weapons or contraband. Grievant never received instruction indicating that it would be appropriate to sit down while shaking down an inmate.

On May 7, 2010, Grievant was responsible for conducting shakedowns of inmates as they passed through her area. She sat in a chair while performing shakedowns for several inmates. Because she was sitting in a chair, Grievant was unable to thoroughly complete the shakedown of all of the inmates she was expected to supervise. Grievant's behavior was identified by another Corrections Officer who recognized that her technique was inappropriate and complained to a supervisor. Grievant's behavior was confirmed using the Agency's video recording surveillance cameras.

The Facility does not permit its employees to bring medication with them in to the secured area of the Facility and carry it with them while they work. Since some employees may find it necessary to take medication during their shifts, the Facility provides 16 metal boxes for employees to use to keep medication. The boxes hang from a wall and resemble letter boxes. An employee wishing to use one of the metal boxes requests and receives a key to a particular box. The employee is supposed to place his or her medication into the box, lock the box with the key, and retain the key in his or her possession throughout the shift. If an employee were to lose his or her key and an inmate found the key, the inmate could gain access to the medication in the lockbox.

On June 1, 2010, Grievant brought her prescription medication to the Facility, obtained a key, and locked the medication in the lockbox. When Grievant took her break in the morning, she unlocked the metal box, removed her medication, and placed the key on top of the stack of boxes. She returned to work but forgot to take the key with her. Another employee found the key on the floor and reported the incident to the Chief of Security. At the end of her shift, Grievant realized the key was missing and she called Master Control to see if anyone had turned in her key. She then wrote an incident report to inform the Facility's managers regarding what had happened.

### **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 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>

"[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.

On May 7, 2010, Grievant was responsible for searching inmates in a manner consistent with her training. Grievant sat down while searching several inmates. Her

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

<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).

actions were contrary to the training she had received from the Agency regarding the correct way to perform a shakedown. Grievant's behavior was unsatisfactory performance thereby justifying the issuance of a Group I Written Notice of disciplinary action. The Agency argued that Grievant should receive a Group II Written Notice for her actions on May 7, 2010. The Agency did not produce a written policy or establish any other means by which to elevate the disciplinary action from a Group I to a Group II Written Notice. Grievant's behavior is best characterized as inadequate or unsatisfactory job performance.

"[F]ailure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.<sup>5</sup> DOC Operating Procedure 430.3 is the Agency's policy "for uniform system of installation, maintenance and control of keys and locking devices that [the Facility]." Section IV(B) provides, "All keys except those allowed for inmate use, shall be handled and carried in a manner to ensure that offenders do not have access to, or close scrutiny of them." Inmate workers had access to the area where Grievant lost her key. Had an inmate found the key, he could have obtained anything left in the lockbox. On June 1, 2010, Grievant placed her key on top of the stack of metal boxes thereby failing to carry her key in a manner to ensure that offenders did not have access to it. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

An employee with an active Group III Written Notice may be removed from employment upon the accumulation of an additional Written Notice. With the disciplinary action issued as part of this grievance, Grievant has received an additional Group I Written Notice and Group II Written Notice. Accordingly, Grievant's removal must be upheld.

*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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

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<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

<sup>6</sup> *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for incorrectly searching and an inmate is **reduced** to a Group I Written Notice for unsatisfactory job performance. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failing to properly secure a key is **upheld**. Grievant's removal is **upheld** based upon the accumulation 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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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