

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 01/12/11;  
Decision Issued: 01/18/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9475; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9475**

Hearing Date: January 12, 2011  
Decision Issued: January 18, 2011

**PROCEDURAL HISTORY**

On July 14, 2010, Grievant was issued a Group I Written Notice of disciplinary action for failing to conduct an accurate count of offenders.

On August 4, 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 December 14, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 12, 2011, 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 employs Grievant as a Corrections Officer at one of its Facilities. The purpose of his position is to "provide security over adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement."<sup>1</sup> Grievant had no active prior disciplinary action.

Several times a day, the Facility conducts a count of all inmates at the Facility to determine whether any inmate has escaped. An institutional count is one of the most significant events at the Facility because it enables security staff to determine whether the public is at risk from an escaped inmate. Grievant received training regarding count procedures from the Agency when he joined the Agency and several times every year. In August 2009, he was counseled regarding his failure to conduct an appropriate/accurate count of offenders in his area.

On June 10, 2010, Grievant and Officer N conducted a count of inmates in a section of the housing unit for which they were responsible. One inmate was lying in his bed covered with a sheet and Grievant and Officer N failed to count that inmate. Grievant reported an incorrect number as his count. As a result, the Institution was unable to clear its count. This meant that the institution's security staff had to determine whether an inmate was missing or may have escaped. Corrections officers who were working could not be relieved of their posts by the oncoming shift of corrections officers

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<sup>1</sup> Agency Exhibit 4.

until the institution's count cleared. A recount was conducted approximately 54 minutes later, and the inmate Grievant had not counted was identified as part of the recount.

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

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>5</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 June 10, 2010, Grievant was responsible for counting the inmates in his section of the housing unit. He failed to count all of the inmates which resulted in an inaccurate count for the institution. Grievant's job performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant argued that when he blew his whistle to begin the count, all of the inmates stood up to be counted with the exception of the one inmate who remained in his bed with the sheets pulled over his head. The inmate's behavior was contrary to the Agency's policies governing inmate behavior. The inmate later received a disciplinary charge for failing to stand during count. Although the inmate's behavior explains why Grievant's count was inaccurate, it does not excuse Grievant's inaccurate count. Part of Grievant's responsibility was to determine whether inmates were disregarding their responsibility to stand during count.

Grievant argued that the Agency should not have had the Lieutenant Colonel serve as both the investigator and the decision-maker regarding the level of disciplinary action to take. Grievant has not presented any policy that would prohibit this dual role.

*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

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

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

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

“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.

Grievant contends the disciplinary action should be mitigated because Officer N did not receive a written notice even though Officer N also miscounted the inmates. The evidence showed that Officer N had not been previously counseled regarding an inaccurate count of offenders. Grievant, however, had received previous counseling for conducting an inaccurate count. Officer N was counseled regarding his inadequate job performance on June 10, 2010 just as Grievant was counseled for his first inaccurate count.

Grievant objected to a comment made by the Lieutenant Colonel. The Lieutenant Colonel expressed his opinion that employees who join the Agency after having careers in law enforcement did not last with the Agency for more than a few years. Grievant was offended by the statement because it suggested he would not be successful with his career as a Corrections Officer. Although the Lieutenant Colonel's statement may have offended Grievant, it does not form a basis to alter the outcome of this case. In light of the standard set forth in the Rules, 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 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.

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<sup>6</sup> 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 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.