

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 01/20/11;
Decision Issued: 01/24/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9481; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9481

Hearing Date: January 20, 2011
Decision Issued: January 24, 2011

PROCEDURAL HISTORY

On July 8, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction and failure to follow written policy.

On July 29, 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 27, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 20, 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?
5. Whether the Agency retaliated against Grievant?

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. He has been employed by the Agency for approximately 19 years. With the exception of the facts giving rise to this disciplinary action, Grievant's work performance has been satisfactory to the Agency. He has worked as a Field Training Officer and had perfect attendance in 2010. Grievant reported to the Housing Unit Manager.

The Housing Unit consists of several sections called pods in which inmates reside. On June 3, 2010, Grievant was working as the Floor Officer on one of the pods. The pod has 43 cells to house 86 inmates. In the common area of the pod was a television for inmates to view. Near the television were five tables for inmates to sit and watch the television.

On June 3, 2010, the housing unit pod was in lockdown. This meant that inmates were locked in their cells at all times except when they were permitted to leave their cells to take showers. Grievant was supposed to make rounds in the housing unit pod every 30 minutes. To make a round, Grievant was to walk in front of each of the 43 cells, look inside to observe the inmates in the cell, and then walk to the next cell. Completing a round should require no more than five minutes.

At 8:28 pm., Grievant went to the control booth to obtain the TV remote. He took the remote and selected a channel to watch on the television. He stood next to the table in the pod and looked upward towards the TV and watched the television until 8:37 p.m. He then walked to the control booth and spoke with the control booth officer for approximately one minute. At 8:38 p.m., Grievant returned to the area where the television was located and resumed watching television. Grievant stood while he watched television. Periodically, Grievant would turn his head to the side to observe the behavior of inmates who were entering or exiting the shower area. On occasion, an inmate would approach him and asked him a question. Grievant continued watching the television until 9:32 p.m. when Sergeant M came to the pod to assist Grievant with conducting inmate count.

The television was not supposed to be on when the pod was in lockdown. An inmate complained to the Housing Unit Manager that the television was on when it was not supposed to be on and that an officer was watching the television. The Housing Unit Manager reviewed the Agency's videotape and observed Grievant watching television and not making a round. She confronted Grievant and told him that he should not be watching television. Grievant told her that he would not let it happen again. She instructed Grievant to file an incident report. Grievant did not file an incident report. The Housing Unit Manager reminded Grievant of her instruction for him to file an incident report. Grievant never filed an incident report as instructed.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴ Grievant’s Post Order states that:

Rounds of the entire pod will be made every thirty (30) minutes; report all discrepancies to your supervisor and document your findings.⁵

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

A Post Order represents the Agency's policy governing a specific post. On June 3, 2010 from 8:38 p.m. until 9:32 p.m., Grievant did not conduct a round. Grievant failed to comply with the Agency's established written policy. Grievant's supervisor, the Housing Unit Manager, instructed Grievant to write an incident report regarding the allegation that he was watching television on June 3, 2010. Grievant failed to comply with that instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow established written policy and failure to follow a supervisor's instruction.

Grievant argued that other corrections officers sometimes watch television while working. The evidence supports this assertion; however, none of Grievant's witnesses indicated that any officers were permitted to watch television for an extended period of time such that they were excused from making rounds.

Grievant argued that although he was watching the television, he was also observing the Inmates to ensure their proper supervision as they went from their cells to the showers and back. Although supervising inmates was one of Grievant's job responsibilities, Grievant was not free to ignore another one of his job responsibilities, namely, conducting rounds.

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..."⁶ 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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁷ (2) suffered a

⁵ Agency Exhibit 3.

⁶ Va. Code § 2.2-3005.

⁷ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

materially adverse action⁸; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁹

Grievant argued that the Housing Unit Manager targeted him for disciplinary action because of a previous conflict regarding his handling of inmate laundry. The Hearing Officer will assume for the sake of argument that Grievant engaged in a protected activity. Grievant has suffered a materially adverse action because he received disciplinary action. Grievant has not established a causal link between the adverse action and the protected activity. The disciplinary action arose because of an inmate complaint and not at the direction of the Housing Unit Manager. The Agency did not take disciplinary action as a pretext or excuse for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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:

⁸ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.