

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 03/04/11;  
Decision Issued: 03/07/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9511; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9511**

Hearing Date: March 4, 2011

Decision Issued: March 7, 2011

**PROCEDURAL HISTORY**

On August 25, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to comply with established written policy.

On September 23, 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 February 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 4, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representative  
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 this position is:

Maintains security, custody, and control over inmates at the institution involving transport, by observing and initiating corrective action/or disciplinary actions for inappropriate behavior. Supervise inmates daily activities and observes, recording their behavior and movement to ensure their safe and secure confinement. Ensure participation in mandated Treatment Programs in support of the Facilities Mission Statement.<sup>1</sup>

Grievant has been employed by the Agency for approximately 5 years. No evidence of prior active disciplinary action was introduced during the hearing. Agency supervisors and managers perceive Grievant has a "good officer".

Counting inmates is one of the most important functions performed at the Facility. "Formal counts" are performed four times a day. All inmate movement must stop at the Facility while corrections officers count the number of inmates in each section of the Facility. Two corrections officers take turns counting the inmates in each section. Before an inmate can be counted, a corrections officer must walk through the area to which he or she is assigned and observe each inmate. After counting the number of

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<sup>1</sup> Agency Exhibit 3.

inmates, the corrections officer signs a “count sheet” to indicate the number of inmates counted. If the count total of each officer agrees, one of the corrections officers calls in the count to the institutional count recorder. If the total number of inmates counted matches the institution’s census, the “count is cleared”.

On August 7, 2010, Grievant reported to the medical section of the Facility to assist another officer with the count of inmates in that area. He did not walk to the medical area and physically observe and count each offender there. Grievant signed a count sheets showing that he counted inmates.

Grievant received training at the Academy and that the Facility regarding how to properly conduct a count.

### **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>

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.<sup>5</sup> Local Operating Procedure for 10.2 provides that:

Two Certified Officers conducting the count will move through the Dormitory and count each offender independently. They must see flesh, movement, or hear the offender speak before counting him. Every effort shall be made to ensure that a live person is counted. When two officers are assigned to a building or area, both must have the entire area independently of one another.

On August 7, 2010, Grievant was responsible for counting inmates but he failed to do so thereby acting contrary to policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

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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(XI)(B)(1).

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.

Grievant contends that the disciplinary action should be mitigated because he believes the Agency has inconsistently disciplined its employees. Grievant did not present evidence of another employee at the Facility who received lower discipline than did Grievant after failing to begin a count but signing count sheets indicating he or she had counted. Grievant has not presented evidence of similarly situated employees receiving lesser disciplinary action than he received.

Grievant argues that other employees at the Facility had caused an incorrect count but did not receive any disciplinary action. This argument fails. Grievant was not disciplined for causing a miscount; he was disciplined for not counting at all. His failure to properly count may have subsequently resulted in a miscount, but the reason for the discipline was not that an incorrect count occurred, but rather that he failed to conduct a count.

Grievant argues that the disciplinary action should be mitigated based on Case No. 9475.<sup>7</sup> In that case, a corrections officer working at a facility in the same region as Grievant’s Facility received a Group I Written Notice. The facts of that case, however, are materially different from the facts of Grievant’s case. In Case No. 9475, the corrections officer attempted to conduct a count but failed to carry out that count properly because the corrections officer failed to notice that an inmate remained in his bed with the sheets pulled over his head. In Grievant’s case, Grievant failed to attempt a count. Grievant was not similarly situated with the corrections officer in Case No. 9475.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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<sup>6</sup> Va. Code § 2.2-3005.

<sup>7</sup> Hearing Officer decisions do not serve as administrative precedent.

## 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:

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