

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. 9512; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9512

Hearing Date: March 4, 2011

Decision Issued: March 7, 2011

PROCEDURAL HISTORY

On August 31, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to properly conduct a count of inmates.

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 she 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. She has been employed by the Agency for approximately 18 years. The purpose of her position is:

Maintaining security, custody, and control over inmates at the institution and while in transport, by observing and initiating corrective actions/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.¹

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

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

¹ 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 6, 2010, Grievant was working in the medical treatment area of the Facility. When the time for count was called, Grievant walked through the medical treatment area and counted the number of inmates present. Grievant did not make sure that the inmates stood in one location as she counted the inmates. She wrote down on the Count Sheet the number of inmates she counted. Officer A was supposed to assist Grievant with the count. He stood near a podium in the medical treatment area while Grievant counted inmates. He did not count inmates. He wrote down a number on the inmate Count Sheet. Grievant called the person responsible for receiving count information and told that person the number of inmates counted in the medical treatment area. Grievant knew that Officer A had not counted any inmates.

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

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁵ “[I]nadequate or unsatisfactory job performance” is a Group I offense.⁶ A significant factor in determining whether an employee should receive a Group I Written Notice or a Group II Written Notice is the degree to which the employee intended to engage in the behavior giving rise to disciplinary action.

Local Operating Procedure 410.2 governments Count Procedures at the Facility. This policy provides that:

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(XI)(B)(1).

⁶ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

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. ***

All staff must be especially alert for movement of offenders during a count. Such movement must be strictly controlled.

When the facts of this case are considered as a whole, the best description of Grievant's behavior is that of an employee who engaged in unsatisfactory job performance. Grievant's work performance was inadequate because she did not require inmates to stop moving during the count, she conducted the count by herself, and she did not report to a supervisor Officer A's failure to conduct the count. Grievant attempted to comply with count policy. Grievant did not intend to disregard the policy. She simply inadequately performed some of the Agency's expectations enumerated in its count policy.

Grievant may not have required all inmates to remain stationary while she counted them as inspected under Agency policy, however, the degree to which Grievant failed to do so cannot be determined by the Hearing Officer. The Agency did not provide a copy of the videotape as an exhibit. Grievant should have conducted the count with the assistance of Officer A. Grievant on the other hand, is not responsible for the actions of Officer A. There is no reason for the Hearing Officer to believe that Officer A had any intentions of participating in the count. Grievant's failure to inform a supervisor of Officer A's behavior was not a violation of the Count Policy. In short, there is insufficient evidence to raise the level of disciplinary action from a Group I offense to a Group II offense.

Grievant argued that the Agency took disciplinary action against her based on her behavior on August 7, 2010. The evidence shows that the Agency took disciplinary action against her based on her behavior on August 6, 2010.

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

⁷ Va. Code § 2.2-3005.

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice 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 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

[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

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