

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 06/02/11; Decision Issued: 06/06/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9569; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9569

Hearing Date: June 2, 2011
Decision Issued: June 6, 2011

PROCEDURAL HISTORY

On January 7, 2011, Grievant was issued a Group II Written Notice of disciplinary action with a one-day suspension for failure to follow policy.

On January 27, 2011, 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 April 26, 2011, the EDR Director issued Ruling No. 2011-2955, 2011-2956 consolidating this grievance with a grievance filed by another Grievant. On May 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 2, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
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. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Inmates at the Facility must be counted several times a day. Corrections Officers count inmates in a housing unit. They start at different locations in the housing unit and independently count each inmate. At the conclusion of their counts, they compare the numbers counted. If they count the same number of inmates, they report that information to another employee who also receives count information from Corrections Officers counting in other housing units. If the numbers reported equal the Facility's census, the count clears. Properly counting inmates is essential to the Facility's mission to account for its inmates.

Grievant received training regarding the proper procedure to count inmates. He knew that in order to count an inmate under the Agency's Operating Procedure 410.2, he had to actually see an offender's flesh, observe movement, or hear the offender speak.

Inmates residing in the Facility's Segregation Unit are permitted to leave their cells for one hour per day, five times a week and go to a cage located on a patio outside the housing unit. Two doors separate the housing unit from the patio. Each door has a large window enabling a corrections officer inside the housing unit to see the inmates in the cages.

On July 28, 2010, five inmates had been escorted to and secured in the five cages on the patio. At the time Grievant was required to count inmates, he went to one end of the Housing Unit and walked past each cell. He looked inside to determine whether he could see an inmate's flesh, an inmate's movement, or hear an inmate's voice. If he observed any of these, he counted an inmate as being present in the cell. If an inmate was not inside his cell, Grievant looked at a sheet of paper posted outside of the cell to determine the inmate's location. With respect to the five inmates who were outside in the cages, Grievant counted them present because the sheets on those inmates' cell doors showed that they were in the cages on the patio. Grievant did not go to the observation doors, look through the window and into the cages to observe whether the five inmates were present, were moving, or were vocal.

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 ... comply with applicable established written policy" is a Group II offense.⁴ DOC Operating Procedure 410.2 governs Offender Counts. Section IV(B)(2)(c) provides that, "Counting Officers must actually see an offender's flesh, observe movement, or hear the offender speak." Grievant received training of this policy and was aware of his obligation to see an offender's flesh, observe movement, or hear the offender speak. On July 28, 2010, Grievant could have walked to one of the observation doors and observed the five inmates in the cages in order to properly count them. Instead, Grievant counted the five offenders located in the recreational cages as being present even though he had not observed them. Grievant's actions were contrary to Agency written policy.

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...."⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

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).

⁵ Va. Code § 2.2-3005.

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.

There are several reasons why the disciplinary action against Grievant should be reduced from a Group II Written Notice with suspension to a Group I Written Notice. First, Facility security staff had adopted the practice of using the sheet on each inmate's cell door to count inmates in the cages. Second, supervisors at the Facility were aware of the practice and took no action to correct that practice. Third, the practice to disregard the Policy with respect to inmates in the cages had been in place for at least a decade.

It is not appropriate to mitigate the disciplinary action to corrective action below a Group I Written Notice because Grievant was aware of the policy, was able to comply with the policy regardless of any Facility practice, and no supervisor had prevented Grievant from complying with the policy. In light of the standard set forth in the Rules, the Hearing Officer finds mitigating circumstances exist to reduce the disciplinary action from a Group II Written Notice with suspension to a Group I Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a one-day suspension is **reduced** to a Group I Written Notice of disciplinary action. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.