

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 12/05/11;
Decision Issued: 12/06/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9709; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9709

Hearing Date: December 5, 2011
Decision Issued: December 6, 2011

PROCEDURAL HISTORY

On May 24, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On June 20, 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 November 9, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 5, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

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. He has been employed by the Agency for approximately seven years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On March 15, 2011, Officer K was searching officers entering the Facility. She noticed that Grievant had a handcuff key on his duty belt. She told Grievant that he could not bring the handcuff key into the facility. Grievant ignored Officer K. Officer K repeated her statement to Grievant.

On March 17, 2011, Officer K attended the shift briefing and again observed that Grievant had a handcuff key on his duty belt. Officer K informed the Captain. Grievant drafted an incident report stating:

I have a personal restraint key because they took the restraint key out of [building] 2 residential and it takes forever to find one when you want to lock or remove restraints. I am aware of others having cuffs and keys and did not realize it was a problem.¹

CONCLUSIONS OF POLICY

¹ Agency Exhibit 5.

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

Institutional Operating Procedure 430.3 governs Key Control and Locking Devices at the Facility. Under this policy, daily issue keys are “[r]ings of keys that are issued on a regular basis to authorized staff in order to accomplish daily facility operations. Daily issue keys may include security and general keys.” The procedure under this policy is for the facility to “establish a central key control location for the management of the key control system, storage of records, and related key control and lock material.” The policy provides that, “[n]o personal handcuff or leg iron keys are permitted inside the facility.”⁵

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁶ Agency policy 430.3 prohibits personal handcuff keys. On March 17, 2011, Grievant possessed a personal handcuff key at the Facility contrary to policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow established 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....”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 of the existence of the rule that the employee is accused of violating, (2) the agency has

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 Agency Exhibit 7.

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁷ *Va. Code § 2.2-3005.*

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 the level of discipline is too harsh and he has no prior active disciplinary action. The EDR Rules do not authorize hearing officers to mitigate disciplinary action simply because it is too harsh. An employee must show that the discipline exceeds the limits of reasonableness. In this case, Grievant failed to comply with the Facility's policy. The Agency was authorized under its standards of conduct to issue a Group II Written Notice because Grievant failed to comply with policy. Accordingly, the Agency's action is consistent with policy and does not exceed the limits of reasonableness. Grievant does not have prior active disciplinary action. That fact alone does not form a basis to mitigate disciplinary action under the EDR Rules.

Grievant argued that the Agency failed to timely issue disciplinary action because the incident occurred on March 17, 2011 and the written notice is dated May 24, 2011. The Standards of Conduct requires that the Agency timely issue disciplinary action. Nothing in the Standards of Conduct authorizes the Hearing Officer to reverse disciplinary action simply because it is untimely. If the Hearing Officer assumes for the sake of argument that the Agency failed to timely issue disciplinary action in this case, the outcome remains unchanged.

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 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.