

Issue: Group III Written Notice with Termination (violating safety rule resulting in bodily harm); Hearing Date: 04/20/12; Decision Issued: 04/23/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9797; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9797

Hearing Date: April 20, 2012
Decision Issued: April 23, 2012

PROCEDURAL HISTORY

On January 6, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for his confrontation with an inmate on November 20, 2011.

On January 17, 2012, 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 March 20, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 20, 2012, 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?

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 employed Grievant as a Corrections Officer at one of its Facilities. He had been employed by the Agency of for approximately 12 years prior to his removal effective January 6, 2012. The purpose of Grievant's position was to, "provide security over adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording the behavior and movement to ensure their safe and secure confinement."¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On November 20, 2011, Grievant, Officer P, and the Control Booth Officer were working in a pod of the Housing Unit. The "segregation" pod consisted of approximately 44 single person cells. The Agency placed inmates in those cells because they were especially violent or disruptive. The Agency imposed a safety rule requiring that inmates in the segregation pod could not leave their cells unless their hands and legs were placed in restraints. Grievant was collecting laundry and walked past the Inmate's cell. As Grievant attempted to collect laundry from the Inmate, the Inmate threw urine into Grievant's face. Grievant became angry and wanted to confront the Inmate. Grievant yelled to the Control Booth Officer to open the Inmate's cell. The Control Booth Officer pushed the button on her display panel to open the Inmate's door.²

¹ Agency Exhibit 3.

² The Control Booth Officer did not know that the Inmate had not been placed in restraints.

Officer P was standing near Grievant and observed Grievant's actions. Officer P told Grievant not to open the cell door because the Inmate was not in restraints. Grievant recognized his mistake and tried to stop the door from opening. He yelled to the Control Booth Officer not to open the door. The Control Booth Officer believed Grievant was asking her again to open the cell door. Her display panel alternated between red and green lights which indicated to her that the door was not opening properly. Grievant was not able to keep the door from opening and the Inmate exited his cell without first being restrained. The Inmate "came out swinging". The Inmate began hitting Grievant. Officer P attempted to grab the Inmate to stop the Inmate from hitting Grievant. The Inmate hit Officer P several times. Officer P wrestled with the Inmate until the Inmate threw Officer P to the floor. Officer P was injured as his right elbow hit the floor. The Control Booth Officer observed the flight and called to the Inmate to stop and reenter his cell. The Control Booth Officer fired a blank round from her weapon as a warning to the Inmate. The Inmate continued to fight. The Control Booth Officer warned the Inmate again and then fired a non-lethal round towards the Inmate but hit Officer P in the leg. The Inmate continued to fight. The Control Booth Officer warned the Inmate again and then fired a non-lethal round towards the Inmate but hit Officer P in the head. The Inmate stopped fighting and reentered his cell as other corrections officers entered the pod in response to the Control Booth Officer's call for assistance.

As a result of the fight, Officer P and Grievant suffered painful injuries and were absent from work while their injuries healed.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

"Violating safety rules where there is a threat of physical harm" is a Group III offense.⁶ The Agency established a safety rule of requiring inmates in segregation at the Facility to be placed in hand and leg restraints before leaving their cells because of the extreme danger they posed to employees. Grievant violated that safety rule when he instructed that the Inmate's door be opened in order for Grievant to confront the Inmate who had thrown urine on him. The Agency has presented sufficient evidence to

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ DOC Operating Procedure 135.1(V)(D)(2)(g).

support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

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 consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the discipline was too harsh and that he had learned his lesson and would not repeat the mistake. This case is unfortunate. It is clear that Grievant made an error and then attempted to correct it but was unable to do so. Grievant suffered several injuries preventing him from working. It is clear that Grievant has learned his lesson and is unlikely to repeat his mistake. The fact that Grievant is unlikely to repeat his mistake is not, in itself, a mitigating circumstance. The discipline is not too harsh because it is consistent with the severity of Grievant's behavior and consistent with the discipline authorized under the Standards of Conduct. The Hearing Officer is not a super-personnel officer who can substitute his disciplinary preference once an Agency's meets its burden of proof. In this case, the Agency has established that Grievant violated a safety rule which resulted in physical harm thereby justifying the issuance of a Group III Written Notice. The Hearing Officer must give deference to the Agency's selection of punishment in this case.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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:

⁷ *Va. Code § 2.2-3005.*

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.