



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11652

Hearing Date: March 26, 2021
Decision Issued: April 15, 2021

PROCEDURAL HISTORY

On September 11, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On October 10, 2021, 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 8, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 26, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 was introduced during the hearing.

On March 25, 2020, Grievant was working in a Building with an A and B dorm. The Building had a Landing, Basement, Dorm, and Holding Cell. Grievant was working with Officer 2 at their post on the Landing.

At 3 a.m., Grievant and Officer 2 were supposed to conduct a formal count of inmates within the Basement, Dorm, and Holding Cell. Grievant was required to see the flesh of an inmate in order to count that inmate.

An Inmate was in the Holding Cell because of the Inmate's risk of suicide. A Corrections Officer was seated near the Holding Cell. That officer was expected to constantly observe the Inmate.

Grievant and Officer 2 began a formal count at 3 a.m. on March 25, 2020. They did not enter the Basement and did not see the three inmates in the Basement. They counted the other areas but did not go to the Holding Cell.¹

Grievant and Officer 2 filled in a “Living Unit Count Slip” showing they counted inmates at 3 a.m. on March 25, 2020. They reported counting nine inmates in A-Dorm, 55 inmates in B-Dorm, one inmate in the Holding Cell, and three inmates in the Basement.

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.” 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”²

Operating Procedure 410.2 governs Facility Counts and Movement Control. Section I(B) states, “Corrections Officer should not allow themselves to be distracted while in the process of counting by anything other than an emergency. *** During night count, the Counting Officer must see and observe movement or hear the offender speak. Lights or flashlights should be used judiciously to minimize disturbing a sleeping offender, but enough light must be used to ensure the actual presence of the offender.”

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.³ On March 25, 2020, Grievant was responsible for counting the inmates in the Basement. Grievant did not enter the Basement and did not see and observe movement or hear the inmates in the Basement. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.⁴

Grievant argued he completed the count correctly. The evidence showed he did not enter the Basement to count inmates and, thus, Grievant did not complete the count correctly.

¹ The Agency alleged Grievant’s method of counting inmates was improper and not thorough. Grievant asserted but did not establish that he called the Officer sitting in front of the Holding Cell and heard the voice of the inmate in the Holding Cell.

² See, Virginia Department of Corrections Operating Procedure 135.1.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

⁴ Grievant asserted during the hearing that there may not have been any inmates in the Basement. If true, there would remain a basis for disciplinary action because Grievant reported counting three inmates in the Basement.

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 Human Resource Management ...”⁵ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency took disciplinary action against him because he attempted to transfer to another Facility on September 10, 2020. The evidence showed that Grievant was notified of possible disciplinary action against him on March 29, 2020 with the Agency’s Due Process Notification. The Hearing Officer cannot conclude that the Agency took disciplinary action against Grievant because Grievant sought to transfer to another location.

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

⁵ Va. Code § 2.2-3005.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.