



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11590

Hearing Date: April 12, 2021

Decision Issued: May 3, 2021

PROCEDURAL HISTORY

On May 22, 2020, Grievant was issued a Group III Written Notice of disciplinary action with a two workday suspension for failure to follow policy and falsifying records.

On June 17, 2020, 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 September 21, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 12, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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. He has been employed by the Agency for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

The Building had two floors. The bottom floor had a north and a south side. The top floor had a north and a south side. A stairwell connected the two floors.

The Facility required a formal count of inmates several times per day including at 11:30 a.m.

Conducting inmate count is among the most important tasks performed by a Corrections Officer. It is one of the core responsibilities to ensure the safety of the public and the inmate population. To complete a count, two Corrections Officers take turns counting the inmates in a location and then compare their separate counts to confirm their counts are accurate. If the counts match, each Corrections Officer signs the count sheet which is then given to the Control Room Officer. Offender movement is supposed to cease during count. A Corrections Officer must see the offender's flesh and observe movement

or hear the offender speak in order to count that inmate. Grievant received training regarding how to properly count inmates.

In some instances, Corrections Officers would follow count procedures correctly but inaccurately count the number of inmates. If count errors were made, the Corrections Officers would recount the inmates. The Agency did not discipline employees for making this type of error because the employees followed the count procedure. Miscounts occurred at the Facility one or two times per week.

On April 11, 2020, Grievant and Officer L were conducting count in the Building. They started on the bottom floor. They took turns counting on the north and south sides. They compared notes after counting each side.

Grievant and Officer L walked upstairs to the top floor. When they were at the north side of the top floor, Grievant ran down to the end of the dorm, turned around, and ran back to where Officer L was standing. Grievant did not count the inmates as he ran down the dorm and returned. Officer L recognized that Grievant had not properly counted inmates in the north side of the top floor. Officer L asked Grievant if he had counted and Grievant told Officer L he knew the number from a previous count. Officer L refused to continue with the count because he knew Grievant had not properly counted the inmates and he could not confirm what he knew could not be accurate. Another Corrections Officer signed the count sheet with Grievant.

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.”¹

Operating procedure 410.2 governs Count Procedures and states as its purpose:

This operating procedure develops an effective mechanism for formal and informal counts in order to determine at all times the total number of and location of offenders assigned to any Department of Corrections facility.

Section I(C) provides:

During formal and informal counts, all movement of offenders must cease from the time the count starts until it is cleared as correct. ***

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

The counting officers must actually see an offender's flesh and observe movement or hear the offender speak.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.² On April 11, 2020, Grievant failed to properly count inmates. He was responsible for counting each inmate by observing the offender's flesh and movement or hearing the offender speak. He did not do so when he ran down and back of the north and south side dorms on the second floor of the Building. Conducting count was one of Grievant's core responsibilities to ensure the safety of the public and the inmate population. Grievant's behavior amounted to more than simply an unintended action such as a routine miscount. Grievant's behavior was intentional and served to undermine the legitimacy of the count function. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to two workdays. Accordingly, Grievant's two workday suspension must be upheld.

Grievant argued that the Agency's policy did not specify how fast an employee could count inmates. Grievant argued he counted all of the inmates but did so very quickly. This argument is not persuasive for several reasons. First, Officer L did not observe Grievant counting inmates while Grievant ran down the dorm and back. He observed Grievant's behavior and was in a position to form an opinion regarding whether Grievant counted inmates. Second, the video of Grievant supposedly counting on the top floor does not suggest he was counting. The video presented showed a series of images rather than continuous motion. Several of the images show Grievant with his head down and not looking at inmates. He does not turn his head to the side or otherwise focus on any particular inmates. Grievant appears to slide when he reaches the end of the dorm. Nothing in his demeanor reflects the behavior of someone counting inmates.

The Agency alleged Grievant falsified records, namely the count sheet for the bottom floor. The Agency claimed Grievant did not count inmates on the bottom floor but wrote that he counted inmates thereby falsifying records. The Agency pointed out that Grievant's statement established his falsification. The Agency also presented a video supposedly showing Grievant failing to properly count the bottom floor. The Agency did not establish this allegation for two reasons. First, the Hearing Officer finds that Officer L was the most credible and persuasive witness who testified about how the count was conducted in the Building. Officer L testified that he and Grievant properly conducted the count for the north and south side of the bottom floor. Second, the Agency's video is of such poor quality that the Hearing Officer cannot determine the identity of any Corrections Officers and what actions Grievant took while counting inmates on the bottom floor.

Because Grievant properly counted inmates on the bottom floor, Grievant did not falsify any records relating to the bottom floor. There is no basis to characterize Grievant's

² See, Virginia Department of Corrections Operating Procedure 135.1.

behavior as a group III offense. It remains a Group II offense for failing to properly count inmates.

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”³ 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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with a two workday suspension is **reduced** to a Group II Written Notice. Grievant’s two workday suspension 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.

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.

³ Va. Code § 2.2-3005.

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.