



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11638

Hearing Date: April 19, 2021
Decision Issued: May 10, 2021

PROCEDURAL HISTORY

On June 24, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy or instructions.

On July 21, 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 December 21, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 an Assistant Warden at one of its facilities. He has been employed by the Agency for approximately 14 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant began working at the Facility on April 16, 2019. His employee work profile required him to oversee management and operations of the Facility including:

Oversees daily operations of Housing Units, Support Buildings and associated areas (including Food Service and Medical).

Grievant was responsible for supervising building unit managers.

Grievant transferred to another Facility on March 9, 2020 and reported to work there on March 10, 2020.

The Warden began working at the Facility on February 10, 2020. Grievant reported to the Warden. Grievant and the Warden met frequently.

Although the Facility was short-staffed, corrections officers were supposed to be working on Pod floors at all times and conducting rounds throughout the Pod. Floor officers were supposed to conduct security checks every 28 minutes with the gap between security checks not exceeding 40 minutes.

On February 27, 2020 at 7:45 a.m., the Pod Log Book states, “no floor officer.” At 10:20 a.m., the Log Book states, “No Floor Officers.” At 2:39 p.m., the Log Book states, “[Grievant] on 3 lower conducting [security check].” At approximately 5:04 p.m., a late entry was made in the Log Book for 2:39 p.m., stating, “No floor officer on 3 lower.”

On February 29, 2020, the Pod Log Book states at 7 a.m., 7:30 a.m., and 8 a.m., “No rounds being done.” At 9:50 a.m., Grievant and another warden entered the Pod to talk to an offender.

Grievant took no action in response to the absence of floor officers from the Pod and absence of floor officer rounds on February 27, 2020 and February 29, 2020.

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

“[I]nadequate or unsatisfactory job performance” is a Group I offense.² In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for overseeing the management and operations of the Facility. The Pod Log Book showed that no floor officer was present on February 27, 2020 at 7:45 a.m., 10:20 a.m., and at 2:39 p.m. Grievant entered the Pod at 2:39 p.m. and should have read the Log Book showing no floor officer was present at 7:45 a.m. and 10:20 a.m. He should have recognized that no floor officer was present at 2:39 p.m. The Pod Log Book showed that no rounds were being done on February 29, 2020 at 7:00 a.m., 7:30 a.m., and 8:00 a.m. Grievant entered the Pod at 9:50 a.m. and should have read the Look Book showing rounds were not being done. Grievant either read the Log Books and took no action or failed to read the Log Books in order to take action. Grievant

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

should have identified the absence of floor officers and rounds not being done as expected and contacted the Unit Building Manager or other supervisors to hold them accountable for failing to ensure the Pod was being operated as required. Grievant did not notify the Warden that floor officers were not present and rounds were not being done in the Pod. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency asserted that Grievant should receive a Group II Written Notice. The Agency failed to identify any specific policy provision or the date and time and nature of a supervisor's instruction that Grievant failed to follow. There is no basis to issue a Group II Written Notice in this case.

Grievant argued that he should not have received disciplinary action and at most should have received a verbal or written counseling. The Agency has identified a basis for disciplinary action as a Group I Written Notice.

Grievant argued that the Agency failed to properly issue the Written Notice and failed to provide proper procedural due process. Although the Written Notice contains incorrect dates, the Agency corrected those dates during the Step Process. The Agency placed Grievant on notice of its allegations against him and any defect in the Agency's due process was cured by the hearing process.

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 II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

³ Va. Code § 2.2-3005.

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.

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.