

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 01/06/16; Decision Issued: 01/12/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.10712; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 01/18/16; EDR Ruling No. 2016-4294 issued 01/29/16; Outcome: Remanded to AHO; Remand Decision issued 02/01/16; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10712

Hearing Date: January 6, 2016
Decision Issued: January 12, 2016

PROCEDURAL HISTORY

On July 22, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

On August 20, 2015, 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 she requested a hearing. On November 9, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 6, 2016, a hearing was held at the Agency's office.

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. 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 Office at one of its facilities. She has been employed by the Agency for approximately 17 years. No evidence of prior active disciplinary action was introduced during the hearing.

On June 10, 2015, Grievant was working as the master control officer beginning at 5:50 p.m. She was responsible for filling out a Daily Issue Log for Security Equipment/Weapons. The purpose of the Daily Issue Log was to record when employees removed and returned weapons from the armory. She also was responsible for filling out a Master Control log to record events occurring throughout the day relating to her post.

On June 10, 2015 at 5:50 a.m., Officer W went to the master control post where Officer H was working. Officer W obtained an AR-15 from Officer H and took the weapon to Tower 3. Officer H completed the Daily Issue Log to show removal of the AR-15. At approximately, 12:35 p.m., Officer B assumed Officer W's post duties in Tower 3 thereby becoming responsible for the AR-15. Near the end of his shift, Officer B left Tower 3 and took the AR-15 to master control to return the weapon to the armory. Officer H was ending his shift in master control as Grievant assumed her post in master control. Either Grievant or Officer H received the weapon from Officer B. Neither Grievant, nor Officer H filled out the Daily Issue Log to show that the AR-15 had been

returned. Grievant recorded on the Master Control log that “[Officer B] returns weapons and equipment from tower 3. Tower 3 closed.”¹

On June 15, 2015, the Agency discovered that an AR-15 had a bullet in the chamber even though it has been turned into the master control officer. The Agency wanted to determine when the weapon was returned and which master control officer received the weapon. The Agency reviewed the Daily Log Sheets completed by master control officers and discovered that the Daily Log Sheet on June 10, 2015 had not been completed. Sometime after June 15, 2015, Officer H entered information into the Daily Log Sheet indicating that he had received the AR-15 on June 15, 2015.

CONCLUSIONS OF POLICY

The Agency’s Written Notice was poorly drafted and created confusion² regarding what actions or inactions of Grievant rose to the level requiring disciplinary action.

The Written Notice states, “on 6/10/15 you had inaccurately recorded the serial number of an AR-15 weapon.” *** Specifically, on the evening of 6/10/15 you [recorded] on the Master Control log sheet that you had received AR-15 serial number STO-12384 from Officer [B] but the Tower Inventory Sheet for that date and shift reflects that AR-15 STO-12590 was the weapon which had been in the Tower.” No credible evidence was presented showing Grievant wrote the serial number of any AR-15 weapon. On June 10, 2015 at 5:55 p.m., Grievant wrote on the Master Control Log that, “Officer [B] returns weapons and equipment from tower 3. Tower 3 closed.” Grievant did not write the serial number. The Agency did not present the Tower Inventory Sheet for the AR-15 STO-12590.

The Written Notice states, “In a meeting I held with you on this subject on July 8, 2015, you admitted that you did not check the serial number of subject weapon which you issued and received, and that your log book entries were incorrect.” Grievant did not issue the AR-15 on June 10, 2015. Grievant wrote in the Master Control Log that Officer B returned equipment but did not claim that she received the equipment. Grievant’s admission that she received the AR-15 was based on her review of documents and not a recollection of the events occurring almost a month earlier. She later recanted the admission and now asserts she did not complete the Daily Issue Log because she did not receive the weapon and that Officer H was the one who actually received the weapon before he left the Facility. Grievant’s assertion is consistent with Officer H’s behavior of later signing the Daily issue Log to indicate he received the weapon.

¹ Agency Exhibit 5.

² Grievant presented evidence showing that she was not the employee responsible for receiving an AR-15 with a bullet in the chamber even though the Agency did not claim she was responsible for such behavior.

The Agency has not met its burden of proof in this case to show that Grievant engaged in behavior justifying its disciplinary action. The discipline must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

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 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 provide a copy of all of your appeals to the other party, EDR, 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.

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.³

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 10712-R

Reconsideration Decision Issued: February 1, 2016

RECONSIDERATION DECISION

The Office of EDR issued Ruling 2016-4294 remanding this matter to the Hearing Officer.

The Hearing Officer's practice is not to identify testimony of specific witnesses as lacking credibility unless doing so is necessary to resolve the grievance. Now that the matter has been remanded to the Hearing Officer, it is necessary to specifically address Officer H's lack of credibility.

The Warden testified that Grievant admitted to her that she received the weapon and failed to record the serial number on the Daily Issue Log. The Agency believes this admission should determine the outcome of this case.

Grievant retracted her admission. It is not necessary for Grievant to have testified under oath that she retracted her admission because it was not made under oath to the Warden and the reliability of her admission to the Warden is doubtful.⁴ Grievant's job was to receive weapons and write each weapon's serial number on the Daily Issue Log. She performed these duties frequently and as a matter of routine. The assertion that Grievant would be able to identify one of several AR-15s with a specific serial number and remember that she failed to record that weapon on a specific date (June 10, 2015) twenty-eight days earlier is difficult for the Hearing Officer to believe. On July 8, 2015, Grievant was speaking to the Warden who held a position of power and who was critiquing her work performance. How this dynamic affected Grievant's thinking is unknown. Given that she routinely recorded receipt of weapons in the Daily Issue Log and she wrote in the Master Control Log that the weapon had been returned,

⁴ Even if Grievant had not retracted her admission, the Hearing Officer would have concluded her admission was unreliable.

she may have assumed it was returned to her and not to Officer H. The Hearing Officer does not believe that Grievant's admission was based on any present recollection of the events of the afternoon of June 10, 2015. Hence, her admission is meaningless.

The EDR Ruling states that, "[t]he hearing officer found that another officer ("Officer H"), rather than the grievant, in fact received the weapon on its return." The Hearing Officer did not make such a finding. In fact, the Hearing Officer wrote, "[e]ither Grievant or Officer H received the weapon from Officer B."

In order to meet its burden of proof, the Agency must show that Grievant (and not Officer H) received the AR-15 and failed to record the weapon's serial number in the Daily Issue Log. The Agency relies on the testimony of Officer H. Grievant called Officer H as a witness. The Hearing Officer gives little weight to Officer H's testimony. His demeanor during portions of his testimony reflected that of an employee desiring to adopt his perception of the Agency's position rather than providing an accurate account of events he witnesses.

When Grievant asked Officer H if he received the AK-15, Officer H responded, "I believe you did" referring to Grievant. Officer H testified that when he met with the Warden, the Warden showed him the blank Daily Issue Log and the one he filled in after June 10, 2015. Grievant asked Officer H if he could explain "why did you sign it (the AR-15) back in?" Officer H said, "No, I sure can't. I'm not sure." Officer H could not identify the date he completed the Daily Issue Log. When the Agency's Representative asked him "why would you sign that you checked them in", Officer H said he was "trying to help her out, I guess." The Hearing Officer does not believe that Officer H would have recollection of a specific transaction involving Grievant occurring 28 days earlier yet be unable to remember the date he completed the Daily Issue Log and explain why he took the action. Officer H's testimony that Grievant received the AR-15 is not reliable. At best, the evidence shows that either Grievant or Officer H received the AK-15 on June 10, 2015. The Agency did not meet its burden of proof. The disciplinary action issued to Grievant must be reversed.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer