

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 02/02/16; Decision Issued: 02/16/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10729; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR Ruling Request received 02/29/16; EDR Ruling No. 2016-4314 issued 03/04/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/29/16; DHRM Ruling issued 03/10/16; Outcome: Request denied (no policy violated cited).**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10729

Hearing Date: February 2, 2016
Decision Issued: February 16, 2016

PROCEDURAL HISTORY

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

On August 19, 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 he requested a hearing. On December 7, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 2, 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 Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

One of Grievant's responsibilities included issuing an AR-15 to the officer working in Tower 3. Grievant was supposed to take the AR-15 from the armory, identify the serial number on the weapon, record the weapon's serial number on a Daily Issue Sheet and give the weapon to the officer assigned to Tower 3.

On June 10, 2015, Grievant gave an AR-15 ending with the serial number 90 to the Tower 3 Officer. The Daily Issue Sheet showed that at 5:50 a.m. an AR-15 ending with the serial number 84 was checked out by the Tower 3 Officer. Another officer wrote down the serial number ending in 84 by "prefilling" the form. Grievant wrote his initials on the Daily Issue Sheet to indicate he had given the AR-15 with the serial number ending in 84 to the Tower 3 Officer. He had not actually given that AR-15 to the officer.

Several days later, the Agency discovered that a live round was in the AR-15 with the serial number ending in 84. The Agency wanted to identify the persons involved in creating the safety risk so it began reviewing Daily Issue Sheets completed by employees working in Grievant's post. The Agency discovered that Grievant had given the AR-15 with the serial number ending in 90 to the Tower 3 Officer but initialed

on the Daily Issue Sheet that he had given the AR-15 with the serial number ending in 84.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁴ 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 identifying and recording which weapon he had given to the Tower 3 Officer. On June 10, 2015, issued an AR-15 with the serial number ending 90 to the Tower 3 Officer. He wrote his initials on the Daily Issue Sheet to indicate that he had given the AR-15 with the initials ending in 84 to the Tower 3 Officer. Grievant caused the Daily Issue Sheet to inaccurately reflect which weapon was given to the Tower 3 Officer. His behavior was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant argued that his behavior did not rise to the level requiring disciplinary action. Although the Agency could have issued him a written counseling, it chose to take disciplinary action. The Agency has established that Grievant acted contrary to the Standards of Conduct and, thus, the Agency’s decision to issue disciplinary action was consistent with policy.

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

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

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

⁵ Va. Code § 2.2-3005.

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 other employees engaged in similar behavior but were not punished. Grievant did not present sufficient evidence to establish this argument and did not present sufficient evidence to show that Facility Managers were aware of and ignored behavior similar to his. In light of the standard set forth in the Rules, 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 I Written Notice of disciplinary action 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:

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.