

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 02/04/16;
Decision Issued: 02/24/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10733; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10733

Hearing Date: February 4, 2016
Decision Issued: February 24, 2016

PROCEDURAL HISTORY

On June 16, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On July 10, 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 November 20, 2015, the Office of Employment Dispute Resolution issued Ruling 2016-4244 qualifying the matter for hearing. On December 7, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 4, 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?
5. Whether Grievant's reassignment from the Work Center to the Main Unit was adverse and disciplinary?

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.

Grievant worked at a Facility with a Main Unit and a Work Center. On April 18, 2015, Grievant was the Officer in Charge of the Work Center. He learned that an offender might try to bring contraband into the Facility. He identified three offenders who might be bringing in contraband to the Work Center. Grievant conducted a strip search of the offenders in the men's bathroom without assistance from other male employee. Grievant found contraband on the inmates. Two inmates had "spice". Marijuana is referred to as "spice." The third inmate had \$210.

Grievant was obligated to write an internal incident report to reflect obtaining the contraband. Grievant did not write an internal incident report until May 10, 2015. He mentioned finding "spice" on the inmate.

The local Commonwealth's Attorney declined to prosecute the inmates for possession of the contraband because Grievant did not follow the Agency's policy requiring two employees to conduct a strip search.

Conducting a strip search was an unusual incident at the Facility and Grievant should have completed an internal incident report to document the incident. Grievant did not file an incident report on April 18, 2015. The Assistant Warden met with Grievant in May 2015 to discuss the strip search. She instructed Grievant to write an incident report. On May 10, 2015, Grievant wrote an incident report.

Following the disciplinary action, Grievant was moved from the Work Center to the Main Unit.

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

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴

DOC Operating Procedure 445.1 governs Employee, Visitor, and Offender Searches. Section B(2) states that, “[s]trip searches shall be conducted by trained DOC employees of the same gender as the offender being searched.” Section B(3) states, “[o]ne corrections officer and one other DOC employee, both of whom are of the same gender as the offender, shall accompany the offender into an appropriate area where privacy can be ensured. NO person of the opposite gender of the offender shall be present or witness the strip search.”

On April 18, 2015, Grievant conducted a strip search of an inmate without having another male DOC employee present. Grievant violated the Agency’s Operating Procedure 445.1. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

It was not necessary for Grievant to conduct the strip search by himself. He could have sought assistance from another male employee at the Work Center.

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)(C)(2)(a).

Grievant could have detained the inmates while he asked for a male DOC employee from the Main Unit to come to the Work Center to assist him.

Grievant argued that he was trying to do his job by reducing contraband into the Facility. Although Grievant's strong work ethic is admirable, the Agency's expectation was that he perform his duties in accordance with Agency policy.

Grievant alleged that the Agency moved him from the Work Center to the Main Unit as a form of punishment. Grievant did not present sufficient evidence to establish this claim.

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.

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 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

⁵ Va. Code § 2.2-3005.

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.