

Issue: Group III Written Notice with Termination (gross negligence); Hearing Date: 02/22/16; Decision Issued: 03/14/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10749; 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: 10749

Hearing Date: February 22, 2016
Decision Issued: March 14, 2016

PROCEDURAL HISTORY

On November 9, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence on the job that could have resulted in the escape, death, or serious injury of an inmate.

On November 24, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 4, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 22, 2016, a hearing was held at the Agency's office.

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. 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 employed Grievant as a Corrections Officer at one of its facilities. Grievant had prior active disciplinary action. On January 14, 2014, Grievant received a Group II Written Notice.

On October 22, 2015, Grievant was working as the "kitchen officer" at the Facility. Grievant was responsible for supervising Offender A and a Second Offender. She went out of the kitchen with Offender A and the Second Offender and walked approximately 50 feet to the refrigeration unit. The temperature inside the refrigeration unit was approximately 39 degrees Fahrenheit. A freezer unit was located several feet from the refrigeration unit. Grievant focused her attention on the Second Offender who entered the freezer unit.

Offender A was inside the refrigeration unit. Grievant did not realize Offender A was inside the unit. She did not look inside to see if anyone was inside the unit. Grievant placed the lock on the door to the refrigeration unit. By placing a lock on the door to the unit, Grievant prevented Offender A from exiting the unit. Grievant returned to the Kitchen without Offender A.

Offender A could not open the door to the unit because it was locked from the outside. The door had two hinges. He took a cart and slammed it against the hinge of the door. Offender A was able to detach the bottom hinge connecting the door to the unit. He pushed the bottom of the door outward and then crawled through the opening

to exit the unit. Offender A approached the Sergeant. Offender A was sweating, breathing heavily, and appeared to the Sergeant to be upset. Officer A told the Sergeant that Grievant locked him in the unit. Offender A was locked in the unit for approximately seven minutes. Offender A had no visible signs of injury. He was escorted back to the housing unit. The Agency estimated the costs to repair the door at more than \$1,500.

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

Grievant’s Post Order required that she, “[p]rovide constant surveillance, security, and control of all recreation activities within the kitchen area, ensuring that only authorized persons and properties are allowed to enter and/or exit your area of control; prevent escapes, unruly behavior, bodily injury, property damage, and the introduction of contraband. *** Maintain constant observation, assist, direct, and control the movement and activities of offenders in your area of control.”⁴

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ On October 22, 2015, Grievant failed to maintain constant observation of Offender A. He was able to remain in the refrigeration unit without Grievant’s knowing his whereabouts. Grievant’s behavior was contrary to her post order thereby justifying the Agency’s decision to issue her a Group II Written Notice for failure to follow written policy⁶.

A basis exists to elevate the Group II offense to a Group III offense. In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. In this case, Grievant locked Offender A inside the refrigeration unit. He

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 Agency Exhibit 9.

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁶ A post order represents the Agency’s policy governing a specific post.

remained in there for approximately seven minutes without being discovered. He could have suffered serious injury from the cold temperature and isolation had he remained in the refrigeration unit for a significant period of time.⁷ The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she was expected to supervise too many offenders and needed assistance from other correctional staff. Grievant did not call any witnesses to testify on her behalf. No credible evidence was presented to support her argument.

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"⁸ 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 removal 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

⁷ Facility count was scheduled for approximately an hour after the incident. At that time, it is likely Offender A's absence would have been discovered had he not escaped from the refrigeration unit.

⁸ *Va. Code § 2.2-3005.*

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.