

Issue: Group III Written Notice with Termination (failure to follow policy and safety violation that could have resulted in weakening of security); Hearing Date: 03/21/16; Decision Issued: 04/08/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10771; 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: 10771

Hearing Date: March 21, 2016

Decision Issued: April 8, 2016

PROCEDURAL HISTORY

On January 6, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to obey post order and procedures that could result in a weakening of security.

On February 2, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 17, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 21, 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 employed Grievant as a Corrections Officer at one of its Facilities. Grievant had prior active disciplinary action. On April 1, 2015, Grievant received a Group III Written Notice for failure to retrieve and log-in a 12 gauge shot gun and 10 rounds of ammunition from the Roving Patrol officer.

On December 27, 2015 at 11:30 p.m., Officer L received a handgun with 36 rounds of ammunition, shotgun with 10 rounds of ammunition, ballistic vest, and keys to a vehicle. He assumed his post as Roving Patrol with these items. His post involved driving a vehicle around the Facility's perimeter.

At 1:30 a.m. on December 28, 2015, Officer L left the shotgun and ammunition in the vehicle and went to the master control office. Grievant was working as the master control officer. Officer L turned in the handgun and rounds, the vest, and keys to the vehicle. He did not return the shotgun and 10 rounds of ammunition. Grievant wrote on the Weapons/Ammo Checkout Log that at 1:30 a.m. he received the shotgun and 10 rounds. The shotgun actually remained locked in a gun rack in the vehicle. At 5:47 a.m. an officer observed the shotgun in the vehicle and notified the Captain. The Captain and another officer walked to the vehicle and retrieved the shotgun and rounds.

The Captain questioned Grievant about the incident. Grievant explained that he must have gotten "side tracked by letting someone [through] the gates."

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

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

Leaving a shot gun unattended in a vehicle posed a limited but material security risk to the Agency. If an inmate or visitor were to find the weapon, it could be used to harm employees and effectuate an inmate escape. The Agency imposed requirements on its employees to track the location of such weapons. Grievant’s behavior was consistent with violating safety rules where there is a threat of physical harm, a Group III offense. Accordingly, 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. The Agency’s decision to remove Grievant must be upheld.

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”⁴ 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

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 Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the disciplinary action should be reduced because of the medication he was taking. Grievant began taking medication to treat an illness. Grievant presented a doctor's note saying:

Possible common side effects of this medication include but are not limited to:

- Dizziness
- Drowsiness
- Fatigue
- Nausea

He also presented evidence that one of the medications he was taking had the side effect of loss of memory.

Grievant's evidence is not persuasive to establish a basis to mitigate the disciplinary action. Grievant's documents show that his medication could have caused loss of memory but he did not show that it caused loss of memory in this case. Grievant's behavior appears to be one of inattentiveness rather than a loss of memory, drowsiness, fatigue or nausea. In addition, Grievant has an active Group III for same offense and at that time he was not on those medications. 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 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 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.