

**Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 01/10/17;  
Decision Issued: 01/25/17; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10912;  
Outcome: No Relief - Agency Upheld.**

IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,  
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 10912

**DECISION OF HEARING OFFICER**

HEARING DATE: JANUARY 10, 2017

DECISION DATE: JANUARY 25, 2017

**I. PROCEDURAL BACKGROUND**

The grievant initiated this matter by the filing of his Form A on October 7, 2016 challenging the issuance of a Group I Written Notice. The Office of Employment Dispute Resolution appointed me as Hearing Officer effective November 29, 2016. I conducted a prehearing conference on December 6 by telephone conference call. I entered a Prehearing Order, setting the matter for hearing on January 10. I further directed the grievant be allowed to review, prior to the hearing, the Rapid Eye video in the possession of the agency reflecting the subject events. The hearing was held on January 10 and lasted approximately one hour.

**II. APPEARANCES**

The agency was represented by an attorney. It presented one witness and four collective exhibits. Additionally, the agency exhibited a video reflecting the subject events.

The grievant represented himself. He testified and presented no additional evidence or exhibits.

**III. ISSUE**

Whether the agency acted appropriately in issuing the grievant a Group I Written Notice for failure to follow established policy?

#### **IV. FINDINGS OF FACT**

On June 28, 2016 the grievant was working for the agency as a Corrections Officer. According to the duty roster, he was assigned to Pod A-4 as a Restrictive Housing Unit Officer. The agency had a problem of understaffing and Correction Officers were expected to perform multiple roles in multiple areas. One of the tasks being performed by the grievant on that date was collecting the dirty laundry of the inmates.

At approximately 6:34 a.m. on June 28 the inmates in Pod A-6 were released from their cells and exited the pod for breakfast. The grievant was present collecting laundry. No other officer had been assigned to that Pod as a Restrictive Housing Unit Officer for that shift. The duty roster reflects one officer assigned as a Population Officer but his name was stricken from the roster. He apparently did not work on that date as no hours are shown as having been worked.

Agency Operating Procedure 401.1 requires a complete security check be made of each cell whenever offenders exit their cells for chow. A complete security check, in this situation, would have involved a Corrections Officer walking past each cell and verifying that it was vacant.

The video of Pod A-6 shows the offenders exiting and, at one point, two Correction Officers being present. The Assistant Warden identified the grievant as being the officer collecting laundry in the Pod. No complete security check, as contemplated by the Operating Procedure, was performed by the grievant after the offenders exited for breakfast on June 28.

The grievant was present in the pod for approximately eleven minutes after the offenders left. Eleven minutes was sufficient time for him to have completed a security check. He and the other officer present are shown on the video sitting at a table in the pod conversing during these eleven minutes.

The absence of a security check would have gone unnoticed had the agency not commenced an investigation regarding a note passed by an offender. Only upon reviewing the video did the agency realize no security check had been performed. After the grievant was given pre-disciplinary due process, it issued to him a Group I Written Notice on August 31, 2016 for what is described as both unsatisfactory job performance and failure to follow policy.

## **V. ANALYSIS**

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

In the hearing the grievant did not admit that he failed to perform the security check; neither did he deny it. He testified he could not say whether he was the individual shown on the video. The Assistant Warden unequivocally identified the grievant as the officer shown on the video collecting laundry. A portion of Exhibit 2 submitted by the agency is a summary of the First Resolution Step meeting between the grievant and a lieutenant. The summary states that the grievant “is not in disagreement that he failed to conduct the check.” I find that the grievant was one of the officers on the video and that he failed to perform the security check required by the Operating Procedure.

The requirement of a complete security check outlined in Operating Procedure 401.1 was not met by the grievant. He was in the best position to see that the check was performed, being in the pod when the inmates exited. No other officer is shown in the pod at that exact time. This failure of the grievant qualifies as misconduct.

Agency Operating Procedure 135.1 sets forth the Standards of Conduct utilized by the Commonwealth of Virginia for disciplinary actions. A Group I offense is one that is not severe in nature but requires correction “in the interest of maintaining a productive and well managed workforce.” Inadequate or unsatisfactory job performance is specifically listed as a type of offense that qualifies under that test. The Written Notice shows the violation is alleged numerically as being a failure to follow policy; it verbally

recites “unsatisfactory work performance.” A failure to perform assigned work or otherwise comply with applicable written policy is a Group II offense according to Operating Procedure 135.1. Because the agency has treated this as Group I offense, I express no opinion whether a Group II Written Notice would have been appropriate. The issuance of the Group I discipline is consistent with established law and policy.

The Assistant Warden testified multiple other officers had been issued Group I Written Notices for failure to perform a complete security check. The grievant has presented no evidence that he has been singled out for punishment or that this discipline was retaliatory.

He does argue, however, that the discipline should be mitigated based on his work load being the result of the agency being understaffed. Under the *Rules* I can mitigate punishment only if a grievant proves it exceeds the bounds of reasonableness. The Assistant Warden admitted to the understaffing issues. The argument of the grievant fails to acknowledge his guilt in not prioritizing his duties in an acceptable manner. Collecting dirty laundry is a necessary task, but not one with facility security implications. A reasonable corrections officer would have ceased his laundry duties to perform the security check. Additionally, the grievant has presented no excuse for why the check could not have been performed during the time he was sitting at the table with the other officer in the absence of the offenders.

## **VI. DECISION**

For the reasons stated above, I affirm the issuance to the grievant of the Group I Written Notice on August 31, 2016.

## **VII. 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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 this final.

RENDERED this January 25, 2017.

/s/Thomas P. Walk  
Thomas P. Walk, Hearing Officer