

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 03/30/17; Decision Issued: 03/31/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10954; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling Request received 04/05/17; Ruling No. 2017-4531 issued 04/19/17; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10954

Hearing Date: March 30, 2017
Decision Issued: March 31, 2017

PROCEDURAL HISTORY

On November 3, 2016, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On November 17, 2016, 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 she requested a hearing. On February 6, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 30, 2017, 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 Captain at one of its facilities. Grievant has been employed by the Agency for approximately 20 years. No evidence or prior active disciplinary action was introduced during the hearing.

Grievant worked as the Watch Commander at the Facility. Grievant's regular shift was from 5:30 p.m. until 6 a.m. on the following day.

The service gate consisted of two gates that opened in the middle to permit vehicles to pass. When the service gate was closed, it was supposed to be secured using a chain and lock to prevent inmates from opening and passing through the gate.

Inmates did not usually pass through the service gate. If an inmate was able to pass through the service gate without being authorized to do so, the inmate could hide and attempt to pass through the sally port gate to exit the facility.

On September 23, 2016, the Major sent Grievant and other supervisors an email stating:

There have been some recent issues with doors found unsecured. At ALL shift changes the Yard officer will do an inner check of all facility doors, locks, gates and manhole covers. These areas are part of the Yard

officer's area of control. This will be logged in their logbook with any areas that had a deficiency noted and the Watch Commander notified.¹

Two officers working on the dayshift on October 20, 2016 passed through the service gate at approximately 3:30 p.m. and left the service gate unsecured.²

At approximately 5:30 p.m. on October 20, 2016, Grievant reported to work and assumed her duties as Watch Commander in charge of the Facility. The night shift Yard Officer reported to work as well.

The Yard Officer was required to check the service gate at the beginning of the night shift. The Yard Officer was not aware of his obligation to check the service gate. The Yard Officer was not working when the Major's directive was issued. When he returned to work, he was not informed of his obligation to check the service gate.

On October 20, 2016, the Yard Officer did not check the service gate. Had he checked the service gate, he would have realized the gate was unsecured and corrected the problem.

Grievant knew that the Yard Officer was supposed to check the service gate during his shift. Grievant knew that the Yard Officer was supposed to inform her or the Lieutenant that he had completed his task of checking the service gate and other gates.

On October 21, 2016 when day shift employees assumed their posts, an officer checked the service gate and observed that it was not secured. The service gate remained unsecured from approximately 3:30 p.m. on October 20, 2016 to approximately 6 a.m. on October 21, 2016.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

¹ Agency Exhibit 6.

² They received Group I Written Notices for failing to secure the service gate.

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁶ 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 ensuring that her subordinates performed their duties and receiving reports when they completed their tasks. The Yard Officer did not check the service gate at the beginning of his shift on October 20, 2016. This meant the service gate remained unsecured for over twelve hours. Grievant should have inquired of the Yard Officer or the Lieutenant regarding whether the Yard Officer had checked the service gate. Grievant’s failure to do so justifies the Agency’s decision to issue a Group I Written Notice.

Grievant argued that the Agency could have addressed her behavior by issuing a notice of needs improvement instead of a written notice. Although the Agency did not have to issue a Written Notice in this case, the Agency was authorized by State policy to do so.

Grievant argued that having the service gate remain unsecured was not a breach of security. The Agency has established that Grievant’s work performance was unsatisfactory. If the Hearing Officer assumes for the sake of argument that the unsecured service gate was not a breach of security, the outcome of this case does not change. Grievant’s behavior was unsatisfactory performance regardless of whether it resulted in a breach of security.

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”⁷ 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.

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

⁷ Va. Code § 2.2-3005.

Grievant contends the disciplinary action should be mitigated because of her good work performance and over 20 years without having received any disciplinary action. There is little doubt that Grievant has been a good and valuable employee to the Commonwealth of Virginia. An employee's good work performance, however, is rarely if ever, a basis to mitigate disciplinary action. 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 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.