

Issue: Group III Written Notice with Termination (violating safety rule); Hearing Date: 05/30/13; Decision Issued: 06/19/13; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 10083; Outcome: No Relief – Agency Upheld; Administrative Review: EDR Ruling Request received 07/02/13; EDR Ruling No. 2014-3649 issued 07/30/13; Outcome: AHO's decision affirmed.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10083

Hearing Date: May 30, 2013

Decision Issued: June 19, 2013

SUMMARY OF DECISION

The Agency had found Grievant engaged in a safety rule violation. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant engaged in the conduct alleged, that it was misconduct, and that the Agency's discipline was consistent with law and policy. Thus, the Hearing Officer upheld the discipline.

HISTORY

On March 20, 2013, the Agency issued Grievant a Group III Written Notice with termination for a safety rule violation. On or about March 22, 2013, Grievant timely filed his grievance to challenge the Agency's action. On April 30, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on May 10, 2013,¹ and a scheduling order was issued on May 18, 2013, which scheduled the hearing for May 30, 2013.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. Grievant objected to the inmates' statements offered as Agency Exhibit 3, arguing that they were inconsistent. The Hearing Officer overruled the objection and admitted Agency Exhibits 1 through 6 and the Hearing Officer's exhibit.² The Grievant was given the opportunity to submit exhibits but declined to do so.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented himself.

¹ The PHC was originally scheduled for May 8, 2013; however, it could not be held as the Hearing Officer was unable to reach the Agency's Advocate. Thereafter, the PHC was rescheduled for May 10, 2013, the next date that the parties were available.

² The Hearing Officer's exhibit contains correspondence to the parties from the Hearing Officer and vice versa, as well as any orders issued by the Hearing Officer.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (3 witnesses)
Grievant/Witness for Grievant

ISSUE

Was the written notice warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is a prison. It employed Grievant as a correctional officer prior to his termination on March 20, 2013. (A Exh. 1, p. 1).
2. On March 15, 2013, Grievant was on duty. About 1:15 p.m., he entered the control booth of the prison’s inmate housing unit. The Agency identifies the housing unit as POD 310. About 200 inmates reside there. While in the control booth, a heated verbal exchange erupted between Grievant and another correctional officer (“Other Correctional Officer”) who was already in the control booth upon Grievant’s arrival. A fight ensued. During the struggle, Grievant and Other Correctional Officer managed to lock themselves out of the control booth. This left the inmate housing unit unguarded, resulting in no one to control entry and exit into the housing unit. Further (A Exhs. 2, 3; Testimony of Warden).
3. The control booth remained without staff for several minutes. (Testimony of Warden).
4. At the time of this event, 196 inmates were in this area and there was mass movement of them. Several inmates observed the incident through the glass windows of the control booth. As the incident unfolded many inmates rushed to see what was happening. They were eventually deflected by Agency staff. (Testimonies of Warden and Cog Counselor; A Exh. 2).

5. Management collected statements from four (4) inmates about their observations. (A Exh. 2).

6. Inmate 1's statement indicates that Grievant entered the control booth and confronted Other Correctional Officer. At this time the two correctional officers (Grievant and Other Correctional Officer) were yelling at each other. Other Correctional Officer moved to another side of the control booth while instructing Grievant to "leave him alone." At which time Grievant followed him and then pointed his finger in Other Correctional Officer's face. The two correctional officers then starting pushing each other. Yelling continued. On several occasions Other Correctional Officer told Grievant to leave him alone. Grievant continued to point his finger in the face of the other Correctional Officer. The two correctional officers moved to the breeze way and both ended up in the vestibule outside the control booth. (A Exh. 3, p. 1).

7. Inmate 2's statement denoted that while in the control booth, Grievant hit the Other Correctional Officer in his face. The two correctional officers argued and Grievant approached Other Correctional Officer and pushed him. When Other Correctional Officer tried to leave the control booth, Grievant attempted to exit before him, and the two of them ended up in the vestibule. (A Exh. 2, p. 2).

8. Inmate 3's statement revealed that he observed Grievant enter the control booth and when Grievant and Other Correctional Officer began to argue. Grievant then pushed Other Correctional Officer. There was no physical response to Grievant's pushing. Grievant then gestured Other Correctional Officer to enter the vestibule. (A Exh. 2, p. 3).

9. Inmate 4's statement indicates that he observed Grievant and Other Correctional Officer arguing in the control booth when Grievant pushed Other Correctional Officer's head. Other Correctional Officer continued operating the control panel as Grievant then walked to the entrance door of the control booth and motioned the Other Control Officer to enter the vestibule. Inmate 4's vision was then impaired because numerous inmates ran to the control booth window to observe the incident. (A Exh. 4, p. 4).

10. Cog Counselor was informed of the incident when an inmate came to him and stated Grievant and Other Correctional Officer were fighting. Upon arriving in the area of the control booth, Cog Counselor observed the two correctional officers arguing, but he did not see a physical altercation. (Testimony of Cog Counselor).

11. Treatment Officer observed Grievant and Other Correctional Officer arguing but did not see them fighting. (Treatment Officer).

12. At the time of the fight, a civilian was visiting the inmates' housing unit for a meeting with Cog Counselor. The civilian's presence increased the need for adequate security. (Testimony of Cog Counselor; Testimony of Warden).

13. The Warden thoroughly investigated the incident. This action included the Warden undertaking the following:

(i) interviewing Grievant and Other Correctional Officer separately and soon after the incident about what occurred;

(ii) viewing the surveillance footage of the incident and determining that Grievant was agitated before entering the control booth that Other Correctional Officer was occupying upon Grievant's entry;

(iii) considering Warden's review of the Master Pass List ("Pass List") that indicated the movement of inmates during the relevant time;

(iv) reviewing statements from several employees and inmates who were in the prison area during the time of the incident;

(v) recognizing that the source of the problem was Grievant's failure prior to the incident to review the Pass List and write down the names of the inmates who had passes to various areas of the prison. (This procedure was consistent with policy and Grievant's responsibility on the day of the incident). (Testimony of Warden).

14. Through his investigation, the Warden determined Grievant and Other Correctional Officer were equally responsible for the occurrence. (Testimony of Warden).

15. The Hearing Officer finds the evidence shows Grievant played a substantial role in starting the fight and that the incident resulted in a major security breach. (A Exhs. 2, 3; Testimony of Warden).

16. Management issued Grievant and Other Correctional Officer Group III Written Notices and terminated them. (Testimony of Warden; A Exh. 1).

17. Specifically, the Agency terminated Grievant for the violation of a safety rule. (A Exh. 1).

18. Agency policy 135.1V(D) provides that violating safety rules where there is a threat of physical harm is a Group III Offense. Also, the policy provides that Group III Offenses include acts and behavior of such a serious nature that a first occurrence normally warrants removal. (A Exh. 6, p. 9).

The Agency policy also indicates that safety rules of major importance are those intended to prevent serious danger to the workplace or to other employees. (A Exh. 6, p. 14).

19. Agency policy also required the control booth to be attended by a correctional officer at all times to foster a secure environment in the housing unit.

The evidence is not sufficient to determine whether Grievant or Other

Correctional Officer was in charge of the control booth at the time of the altercation. However, Grievant was aware of the requirement that the control booth must be attended at all times to secure the prison. (Testimony of Warden).

20. Grievant had received training regarding the Agency's safety procedures prior to the incident. (A Exh. 5).

21. Grievant had accumulated no Written Group Notices for conduct infractions at the time of the incident. Also, in the past, the Agency had recognized Grievant as the employee of the month. (Testimony of Grievant).

22. The Agency rated Grievant as a "contributor" on his most recent performance evaluation.

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.³

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior,

³ Grievance Procedural Manual §5.8

conduct, and related employment problems in the workplace.⁴

These standards provide that Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence.⁵ When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.⁶

As stated previously, Agency management issued Grievant a Group III Written Notice with termination for a safety violation. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant violated a safety rule by engaging in an altercation with another correctional officer on March 15, 2013.

The evidence shows that Agency policy 135.1V(D) prohibits violating safety rules where there is a threat of physical harm. What is more, the facts show that Agency safety rules of major importance are those intended to prevent serious danger to the workplace or to other employees. The facts reveal that one such safety policy required the control room to be staffed and operated at all times to maintain and promote a secure environment within the prison and inmate housing unit.

Grievant breached the referenced safety policies noted above on March 15, 2013.⁷ The evidence shows that on that date, he entered the control booth in inmate housing unit POD 310 in an agitated state and argued with the correctional officer who was already in the booth. Grievant then battered the Other Correctional Officer. Fighting ensued with Grievant gesturing the Other Correctional Officer to step outside the control booth into the vestibule. Eventually, both correctional officers found themselves in the vestibule with the control booth unattended. During this episode hundreds of inmates were in movement in the housing unit. Some watched the fight between Grievant and Other Correctional Officer. In fact, the evidence shows that one inmate alarmed the Cog Counselor of the incident. Other inmates gathered around the control booth area to watch the confrontation between the two correctional officers. Moreover, for several minutes there was no surveillance of the housing unit from the control booth due to the lockout

⁴ Virginia Department of Corrections Operating Procedure 135.1 I.

⁵ Virginia Department of Corrections Operating Procedure 135.V (D)(1).

⁶ Virginia Department of Corrections Operating Procedure 135.V (D)(3)(b)

⁷ The Hearing Officer does not make a finding on whether Other Correctional Officer's conduct violated the safety rules because he is not the subject of this Grievance.

caused by Grievant and Other Correctional Officer.

This situation was perilous for several reasons. Due to the vacant control booth, the ability for Agency staff to alert other staff to any dangerous activity of any inmates or employees was severely hampered. For example, if a correctional officer walking the prison floor alone needed assistance to subdue a combative inmate, staff absent from the control booth prevented this. Moreover, a civilian had entered the housing unit during the time of the incident. That civilian's behavior (as a foreigner in the prison) could not be monitored to the degree permitted if the control booth was operated by a correctional officer. Further, Grievant's misconduct could have been modeled by inmates.

Thus, considering the above, the Hearing Officer finds Grievant engaged in the conduct alleged and it violated a safety rule of major importance.

Having made this finding, the Hearing Officer is cognizant of Grievant's claim that he did not instigate the altercation, that he was not responsible for operating the control room at the time, and, further, that the statements of 4 inmates are not credible as they are inconsistent. Having considered all of Grievant's arguments, the Hearing Officer finds as noted above that the Agency has met its burden and shown Grievant engaged in the conduct alleged and it was misconduct.

B. Was the discipline consistent with policy and law?

The evidence reveals that Agency policy provides that Group III Offenses include acts and behavior of such a serious nature that a first occurrence normally warrants removal. Further, its policy notes that violating safety rules where there is a threat of physical harm is a Group III Offense.

Grievant's battery of Other Correctional Officer and his major contribution to causing the control booth to be unattended for several minutes in a prison setting with mass movement of hundreds of inmates constitute a threat of physical harm. Further, Grievant's conduct violated a safety rule intended to prevent serious danger to the workplace or other employees. Due to the seriousness of the violation, the Hearing Officer finds the discipline is consistent with policy and law.

II. Mitigation

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."⁸ EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found

⁸ Va. Code § 2.2-3005 and (c)(6)

to be consistent with law and policy.”⁹ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁰

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated and considered all evidence. This includes her recognition of Grievant’s written response to the discipline and Grievant’s non-history of accumulating group notices, and his recognition in the past of being the employee of the month. The Hearing Officer further notes that Grievant’s behavior was aggravated by the fact that the verbal and physical confrontation took place in the presence of hundreds of inmates.

Having undergone a thorough consideration of all the evidence, the Hearing Officer cannot find the Agency acted without reason.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency’s discipline.

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

⁹ *Rules for Conducting Grievance Hearings* VI(A)

¹⁰ *Rules for Conducting Grievance Hearings* VI(B)

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
Departmental of Human Resource Management
101 N. 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 N. 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.¹¹

Entered this 19th day of June , 2013.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate
Agency Representative
Grievant
Director of EDR

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.