

Issues: Group III Written Notice (deleting a record from system without authorization) with Transfer, Demotion and Pay Reduction; Hearing Date: 11/22/13; Decision Issued: 01/22/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.10202; Outcome: Partial Relief.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10202**

Hearing Date: November 22, 2013

Decision Issued: January 22, 2014

#### **PROCEDURAL HISTORY**

On July 19, 2013, Grievant was issued a Group III Written Notice of disciplinary action with disciplinary transfer, demotion to a lower pay band with a ten percent disciplinary pay reduction for removal of a State record in which there clearly should have been consultation with higher authority.

On July 30, 2013, 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 he requested a hearing. On October 24, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 22, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant Counsel  
Agency Party Designee  
Agency Advocate  
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 Captain at one of its facilities until he was demoted to a Corrections Sergeant and transferred to another facility. Grievant received a ten percent pay reduction to a lower pay band. Grievant began working for the Agency approximately 18 years earlier. He became a Captain in April 2011. On some occasions, he worked as Watch Commander. This meant he was among the highest ranking employees at the Facility.

When an event such as the use of force occurs at a facility, employees who observed the event are expected to file internal incident reports. The Agency has a computer database called CORIS. Employees may draft their internal incident reports on a computer and have the reports filed within the CORIS system. Grievant was a reviewer for incident reports submitted through CORIS. The CORIS system permitted Grievant to delete incident reports submitted by other employees. Grievant did not receive any training regarding when he should or should not delete internal incident reports.

Grievant was working as the Watch Commander of the Facility on May 13, 2013.

On May 13, 2013, the Inmate's hands were cuffed behind his back and he was speaking with the Unit Manager. QMHP M, Senior Psychology Associate, and Sergeant

M were also in the room with the Unit Manager and the Inmate. At approximately 9:45 a.m., the Unit Manager instructed Sergeant M to call an emergency need for assistance. The Unit Manager “took the Inmate to the ground”. Grievant and Lieutenant M heard the call for assistance and went to the Housing Unit to provide assistance. Grievant did not see the Unit Manager’s interaction with the Inmate. Grievant arrived as other staff were taking the Inmate from the Housing Unit to the segregation unit. Grievant spoke with the Unit Manager but not with Sergeant M. Grievant asked if a use of force report needed to be written. The Unit Manager told Grievant that force was not used on the Inmate.

Grievant perceived the Unit Manager as a peer and not as a subordinate. Unit Managers at the Facility were sometimes referred to as “mini-wardens” because of their positions of authority over housing units at the Facility. Grievant believed his responsibility was to provide staffing for the unit.

On May 13, 2013 at approximately 12:35 p.m., the Inmate filed an emergency grievance claiming that the Unit Manager had assaulted him by slamming him to the floor and that the right side of his face was in extreme pain. He wrote that he felt the same way he felt the last time he had a concussion.<sup>1</sup>

At 11:22 a.m. on May 13, 2013, the Unit Manager wrote an email to several people including Grievant stating that the Inmate was called to the sergeant’s office to discuss with the Unit Manager the Inmate’s actions involving vulgar language used against Officer G. Based on the Inmate’s disposition and comments, the Inmate was asked to present himself to be handcuffed. The Inmate refused to do so several times. The Unit Manager instructed Sergeant M to call for assistance. The Unit Manager wrote that he:

positioned himself behind [the Inmate] and placed restraints on his left and right wrist. Force was not used in the aforementioned incident, however, [the Inmate] was guided down to the floor because of his prior resistance. At approximately 9:46, Support #1 staff arrived in response to the call for assistance and [Officer M and Officer L] escorted [the Inmate] to medical and then to Housing Unit #10.<sup>2</sup>

The email was made into an Internal Incident Report.

Sergeant M was involved in announcing an emergency and seeking assistance from other staff. She saw the Inmate when he was standing up but turned away as the Inmate was placed on the floor. She observed the Unit Manager with his hand on the Inmate’s head while the Inmate was on the floor. She asked the Unit Manager if she

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<sup>1</sup> It is unclear when or if Grievant received notification of the Inmate’s grievance.

<sup>2</sup> Agency Exhibit 4.

needed to complete an internal incident report. He indicated she did not have to do so since he would be making a report.

QMHP M observed the incident between the Inmate and the Unit Manager. At approximately 2:30 p.m. on May 13<sup>th</sup> 2013, QMHP M submitted an internal incident report through CORIS stating:

At approximately 10:30 a.m. on May 13, 2013, [Senior Psychology Associate] and I [QMHP M] were asked to speak to [the Inmate] regarding an incident between [the Inmate] and [Officer G]. After [Officer G] explain her side of the situation, she left the room and [the Inmate] joined [Unit Manager], [Sergeant M], [Senior Psychology Associate] and me in the office. I asked [the Inmate] to explain the situation that happened earlier with [Officer G]. [The Inmate] advise that it had already been addressed and resolved in a meeting with [Sergeant M] and [Officer G] earlier and that there was nothing left to say. He was asked again about the details of the incident but [the Inmate] did not respond. [Unit Manager] advised [the Inmate] that it wasn't resolve to his liking and wanted further clarification. [The Inmate] responded, "Who was you?" [Unit Manager] that advised [the Inmate] that he is the Unit Manager of Housing Unit 1 and asked [the Inmate] if he had a problem. [The Inmate] stated, "no, but y'all making me angry because this was already taken care of." [Unit Manager] then stated, "We can't make you angry, you make yourself angry". [Unit Manager] then stood up and asked [Sergeant M] for her handcuffs and ordered her to call for a 1033. [Unit Manager] then approached [the Inmate] and directed him to turn around to be handcuffed. [The Inmate] did not respond and remained standing in place, facing [Unit Manager] with his hands behind his back. [Unit Manager] again instructed [the Inmate] to turn around to be cuffed a second time. [The Inmate] remained quiet, standing with his hands behind his back; at which time, [Unit Manager] turned [the Inmate] around and pushed him against the wall to be handcuffed. After being handcuffed, [Unit Manager] instructed [the Inmate] to bend at the knees and put his knees on the floor. [The Inmate] stated, "What? My knees?" Without an answer, [Unit Manager] forced [the Inmate's] knees to bend to a sitting position and without hesitation, forcefully laid him on the floor, pushing the right side of [the Inmate's] face to the floor. While holding [the Inmate] down on the ground, [Unit Manager] advise him that he will stay in that position until assistance arrived. When assistance arrived, [Unit Manager] directed the officers that the ankle cuffs were not necessary and to take [the Inmate] straight to Housing Unit 10.<sup>3</sup>

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<sup>3</sup> Agency Exhibit 4F.

Grievant received and read the internal incident report submitted by QMHP M. Grievant had authorization under the CORIS system administration to delete incident reports. He deleted her report prior to 5:15 p.m. on May 13, 2013.

At approximately 5:15 p.m. on May 13, 2013, Grievant called Sergeant M and asked her to report to the watch office. Sergeant M reported to the watch office and asked Grievant what he needed. Grievant said that he needed her to write an incident report in CORIS about the incident with the Inmate earlier in the day. She asked him why she needed to write an incident report because she knew QMHP M had written one already. Grievant said he deleted QMHP M's incident report. Grievant said he would forward the Unit Manager's email about the incident and instructed her to "copy and paste" the email into her incident report. Sergeant M complied and submitted an internal incident report that was consistent with the Unit Manager's report even though she had observed facts different from those claimed by the Unit Manager.

The Senior Psychology Associate learned that QMHP M's internal incident report had been deleted. On May 14, 2013 at 10:45 a.m., the Senior Psychology Associate submitted an Internal Incident Report in which she stated, in part:

[Unit Manager] ordered [the Inmate] to turn around and place his hands behind his back to be handcuffed. [The Inmate] remained still and was ordered again to turn around to be handcuffed. [The Inmate] did not comply and [Unit Manager] turned the Offender around and placed him up against the wall to ... put handcuffs on him. After placing the handcuffs on him, [Unit Manager] ordered the Offender to bend his knees. Again, Offender did not comply and remained still and stated "what?" "my knees?" At this point, [Unit Manager] placed his knee in a sitting position and without hesitation, forcefully laid him on the floor, pushing the right side of his face to the floor. [Unit Manager] advised [the Inmate] that he will remain on the floor until assistance arrived. When assistance arrived, [Unit Manager] informed the officers that the ankle cuffs were not necessary and that the Offender should be immediately sent to HU-10.<sup>4</sup>

During the investigation, the Unit Manager told the investigator, "[Grievant] told me he deleted the report of either [QMHP M] or [Senior Psychology Associate] because it was not a force incident."<sup>5</sup> When asked about his relationship with Grievant, the Unit Manager stated that "We have a good working relationship. I have known [Grievant] since he began work at this facility. He has worked for me as a sergeant and lieutenant."<sup>6</sup>

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<sup>4</sup> Agency Exhibit 4E.

<sup>5</sup> Agency Exhibit 4C.

<sup>6</sup> Agency Exhibit 4C.

The Major asked Grievant to write an incident report about his deletion of QMHP M's incident report. On May 16, 2013, Grievant wrote an Internal Incident Report stating, in part:

On May 13, 2013, at an unknown time, I [Grievant] deleted an Internal Incident Report in CORIS submitted by [QMHP M]. There was not any attempt to disclose/hide information. An incident occurred in Housing Unit 1 involving an uncooperative offender. A (10-33) was called by [Sergeant M]. I responded to the unit, however, the incident was under control. I entered [Unit Manager's] office to check with him on what occurred. [Unit Manager] explained the situation and upon his completion, I asked was there any force used. [Unit Manager] said that there was no force used. I attempted to view the incident with Rapid Eye Camera System, however; the incident was not in view of the camera as I accessed. [Unit Manager] sent an email to me and several administrators in reference to the incident stating that no force was used. [QMHP M] submitted an Internal Incident Report based on her perception of the incident. [QMHP M] did not report to anyone her perception of the incident. The report was observed in CORIS. At the end of the day, I noticed that [Unit Manager] nor [Sergeant M], Building Supervisor, submitted a report in CORIS. I called [Sergeant M] to the Watch Office and explained that she needed to submit a report. I explained that [Unit Manager] sent an email notifying the administrators that she could reference. [Sergeant M's] report was added to the duty report at the close of shift. There was no attempt to disclose/hide information.<sup>7</sup>

On May 22, 2013, Grievant informed the investigator, in part:

I was not present when the actual incident occurred, but I was the Watch Commander during the time of the incident. At the end of the day, I checked CORIS and identified [QMHP M's] report. This report did not contain any support documentation from any security personnel, [Sergeant M] or [Unit Manager]. I deleted the report due to these reasons. There was no intent on my part to hide or cover up anything. Sometime between 1700-1730 hours, May 13, 2013, I called and told [Sergeant M] to report to my office. Upon her arrival I told [Sergeant M] to do a report, because no one had done one, other than [QMHP M]. There had not been any notifications of a use of force by anyone. I sent [Sergeant M] a copy of [Unit Manager's] email and informed her to do a report. I indicated I did not know if she wanted to "copy and paste it" but a report needs to be done. I have been shown IIR 0830 and 0839 and noted the discrepancy in the time the report was written. I did not change anything on any of the reports submitted by [Sergeant M] or anyone else.<sup>8</sup>

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<sup>7</sup> Agency Exhibit 4D.

<sup>8</sup> Agency Exhibit 4D.

On May 22, 2013, the Senior Psychology Associate told the investigator that she did not write an internal incident report on May 13, 2013 because the Unit Manager said it was all right to have one internal incident report from the mental health unit. She and QMHP M wrote an internal incident report under QMHP M's account.

### **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."<sup>9</sup> 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."<sup>10</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>11</sup>

Several facts of this case could be read to suggest that Grievant was involved in a cover up to prevent the Agency from concluding force was used on the Inmate. Grievant received an incident report from the Unit Manager which said the Unit Manager did not use force but the report submitted by QMHP M showed that the Unit Manager pushed the Inmate against the wall, forced the Inmate's knees to bend, forcefully laid the Inmate on the floor and pushed the Inmate's face to the floor. Grievant deleted a report that should have been interpreted as describing a use of force. Grievant then persuaded Sergeant M to draft an incident report by copying the Unit Manager's incident report which did not describe a use of force. If Grievant was involved in a cover up, his behavior clearly would have supported the issuance of a Group III Written Notice. Group III offenses include deceitful behavior such as falsifying records.

The Agency, however, did not find that Grievant attempted to cover up a use of force by the Unit Manager. The Agency did not take disciplinary action against Grievant for engaging in any cover up. The Warden testified that the use of force was a sensitive issue and that litigation often followed if employees inappropriately used force. He believed that once Grievant received conflicting reports from the Unit Manager and the QMHP M, Grievant should have investigated the facts further to determine why the reports differed. Grievant should not have simply deleted the QMHP M's report.

Grievant consistently stated that he deleted QMHP M's report because it was not consistent with the Unit Manager's report that force was not used.

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<sup>9</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>10</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>11</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).



Grievant did not violate any policy justifying the issuance of a Group III offense. Grievant did not receive training regarding when he could modify or delete internal incident reports. He was given authorization to exercise his discretion regarding modifying and deleting reports. His behavior was an error in judgment. Once Grievant received conflicting internal incident reports, he should have investigated the facts of the incident in more detail before concluding that QMHP M's report should have been deleted. At most, his behavior rises to the level of a Group II offense. The Agency did not allege and it has not been established that Grievant's behavior was malicious or intended to harm the Agency or inappropriately protect the Unit Manager. The Agency has not established that the impact on it was so severe as to justify elevating the disciplinary action to a Group III Written Notice. When the facts of this case are considered as a whole, Grievant's behavior is best described as a Group II offense. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Grievant's disciplinary transfer, demotion, and pay reduction must be reversed.

*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 ...."<sup>12</sup> 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 further 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 disciplinary transfer, demotion, and pay reduction is **reduced** to a Group II Written Notice with a ten work day suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to transfer, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of transfer and credit for leave and seniority that the employee did not otherwise accrue.

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<sup>12</sup> *Va. Code § 2.2-3005.*

## 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 final.<sup>13</sup>

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<sup>13</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer