

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 11/21/13; Decision Issued: 01/07/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10205; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10205

Hearing Date: November 21, 2013

Decision Issued: January 7, 2014

PROCEDURAL HISTORY

On July 15, 2013, Grievant was issued a Group II Written Notice of disciplinary action with a 10 workday suspension for failure to follow policy.

On August 12, 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 November 4, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 21, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Corrections Officer Senior at one of its Facilities. He has been employed by the Agency for approximately 1.5 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding the Use of Force. His training regarding Chemical Agents included:

1. Conditions of use:
 - a. Chemical agents shall be used in accordance with DOC training. Chemical agents shall only be used as a control mechanism and shall never be used as a punishment.
 - b. All certified corrections officers authorized to use chemical agents will receive approved training in their use and in the treatment of individuals exposed to chemical agents.
 - c. Except when there is imminent danger of physical violence towards other persons by an offender or group of offenders, or in the event of an attempted escape, the use of chemical agents by an employee shall be authorized only by the Shift Commander or above.

- d. Chemical agents may be useful to control the following situations:
 1. In self-defense or in defense of other persons.
 2. When an immediate threat to the security of any part of the facility exist.¹

Inmates at the Facility reside in cells located in Pods. A cell door has a tall narrow window beginning near the middle of the door and extending upward to approximately six inches from the top of the door. In the middle of the door and below the bottom of the window is a key lock in the shape of a circle. Below the lock is a window whose width is approximately two times its vertical length. The window can be opened by inserting a key in the key lock and unlocking the window. The window is used to pass food trays and other items into and out of the cell without having to open the cell door. Inmates sometimes attempt to prevent the tray slot window from closing properly by jamming a sheet or other item to cover the locking mechanism. In order to ensure that the window is not pushed open if the key lock is not working or has been prevented from locking by an inmate, a “drop bar” is attached on the cell door and to the side of the window. It can be pushed downward to cover the tray slot. When the drop bar is properly positioned, it covers part of the tray slot and prevents the Inmate from pushing the tray slot outward and open even if the tray slot is unlocked and could otherwise be pushed open.

On June 27, 2013 at approximately 7:25 p.m., Grievant was assisting another corrections officer take laundry to the Pod and arrange it on a rack. The Inmate called Grievant to come to his cell door. Grievant moved within a few feet of the Inmate’s door. The Inmate shouted to Grievant that he was going to throw feces on Grievant and that Grievant would “wear it.” Grievant could see through the cell window that the Inmate was crouching halfway down to the floor and holding in one hand a cup with a dark substance that Grievant believed was feces. The Inmate was using his other hand to pull down an object or item he had inserted into the tray slot locking mechanism. The Inmate was attempting to push open the tray slot. Grievant perceived the Inmate’s words and actions to mean that the Inmate was attempting to push open the tray slot and throw feces on Grievant. The drop bar was up and, thus, it could not serve to keep the tray slot closed. Grievant did not have a key to secure the drop bar. Because Grievant was close to the tray slot and he believed he did not have a way to exit without being hit by feces, he decided to pull the Oleoresin Capsicum (OC) spray canister from the carrying case on his belt and spray a one second burst under the door of the Inmate’s cell. Grievant sprayed the OC towards the floor and not towards the Inmate’s body.² His action was successful in moving the Inmate away from the door and

¹ Agency Exhibit 3.

² When the medical staff later examined the Inmate, the Inmate did not complain of eye or nose irritation or redness in his skin. These symptoms likely would have resulted if Grievant had sprayed the Inmate directly.

Grievant exited the Pod at approximately 7:35 p.m. He returned to another pod and conducted a security check which required approximately 4 minutes to complete.

Grievant reported the incident to Sergeant R after completing his security check. Lieutenant R entered the Pod at 7:44 p.m. after being called there by Sergeant R.

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

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁶

Operating Procedure 420.1 governs Use of Force. This policy defines Excessive Force as that “amount of force that is beyond what is reasonably required to prevent harm or to control a particular situation where that is not justified by the circumstances.” Section D(6)(a) provides, “Chemical agents shall be used in accordance with DOC training. Chemical agents shall only be used as a control mechanism and shall never be used as a punishment.” Section D(6)(c) provides, “Except when there is imminent danger of physical violence towards other persons by an offender or group of offenders, or in the event of an attempted escape, the use of chemical agents by an employee shall be authorized only by the Shift Commander or above.” Section D(6)(d) states, “Chemical agents may be useful to control the following situations: *** In self-defense or in the defense of other persons.”

Section D(6)(e) states “The corrections officer on the scene must use his or her discretion and judgment in determining when and how to administer chemical agents.”

“After a chemical agent has been used to control an offender, appropriate medical staff shall be summoned or the offender taken to a medical facility for examination or treatment.”⁷

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

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

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

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁷ Agency Exhibit 3.

The Agency has not established that Grievant acted contrary to DOC Operating Procedure 420.1. His behavior does not support the issuance of a Group II Written Notice although it does justify the issuance of a Group I Written Notice as discussed below.

Grievant was in “imminent danger of physical violence” from the Inmate. The Inmate expressed his intent to throw feces on Grievant. The Inmate was positioned in a manner to enable him to throw feces on Grievant. The Inmate was attempting to force open the tray slot for the purpose of throwing feces on Grievant. Grievant was close enough to the cell door that if the tray slot had opened and feces had been thrown by the Inmate, Grievant would have been hit with feces. At the moment just prior to Grievant taking action, he was in imminent danger of physical violence from the Inmate. Because he was in imminent danger of physical violence, he did not need the permission of the Shift Commander or anyone else to use force. He did not violate DOC policy when he failed to contact the Shift Commander before using force. Grievant retained the discretion to use force for the purpose of self-defense. That discretion required that he act responsibly.

“[[I]nadequate or unsatisfactory job performance” is a Group I offense.⁸ 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.

Although Grievant had the discretion to use force, his discretion had to be used in accordance with the Agency’s expectations for competent work performance. As the Inmate threatened Grievant and began pushing the tray slot open, Grievant had several options he could take. First, Grievant could have attempted to hold the tray slot closed to prevent it from opening as he called for assistance. Neither party argued that this was the best option. Second, Grievant could have moved away from the cell door and out of the range of the Inmate’s throw. The Agency argued this was Grievant’s better option. Grievant argued that this option would have taken several seconds and he could not have moved fast enough to get beyond the range of the Inmate’s throw if the Inmate had been able to open the tray slot. It is possible, however, that the Inmate might not have been able to get the tray slot open quickly enough to spray Grievant before Grievant moved out of range. Third, Grievant could take the action he did and pull the OC spray container from his belt, lean downward in front of the cell door, and spray the OC spray under the door. Although this option worked, Grievant placed himself at increased risk of being sprayed by the Inmate because he moved his face and body closer to the tray slot to spray OC under the cell door. Although option three worked, it was not a better option than option two. If the Inmate had opened the tray slot as Grievant began to react, the Inmate would have sprayed Grievant as he moved away from the cell door just as the Inmate would have sprayed Grievant as he moved

⁸ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

towards the cell door and bent downward. In other words, Grievant's act of moving forward and bending downward did not reduce his risk of injury any more than had he moved away from the cell door as the Agency would have preferred. Grievant's decision to bend down and spray the Inmate with OC spray was a poor decision when compared to the option of moving away from the cell door. If Grievant had moved away from the cell door, the Inmate's cell would not have been sprayed with OC. By spraying the Inmate's cell with OC, Agency employees had to begin a decontamination process which required the Inmate to be evaluated by medical staff and moved to the shower room and given the option of taking a shower. Grievant's decision to spray the Inmate cell with OC spray created additional burden on Agency employees and could have caused discomfort to the Inmate.

Grievant had the discretion to use force. That discretion included the option of not using force and attempting to flee. Grievant's better option would not have been to spray the Inmate but rather would have been to move away from the cell door. Grievant's failure to move away from the cell door was unsatisfactory job performance thereby justifying the issuance of a Group I Written Notice.

The Agency argued that Grievant failed to timely notify his supervisor after spraying the Inmate with OC. The Agency argued Grievant took 20 minutes to notify a supervisor. The evidence showed that Lieutenant R responded to the Pod within nine minutes after being called by Sergeant R. Although Grievant did not immediately notify a supervisor as he had been trained, the delay was not so extreme as to support the issuance of more than a Group I Written Notice.

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"⁹ 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 II Written Notice of disciplinary action with suspension is **reduced** to a Group I Written

⁹ Va. Code § 2.2-3005.

Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.