

Issue: Group II Written Notice (unsatisfactory performance resulting in breach of security); Hearing Date: 02/11/14; Decision Issued: 02/19/14; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10246; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 03/03/14; EDR Ruling No. 2014-3831 issued 03/28/14; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 03/03/14; DHRM Ruling issued: 04/03/14; Outcome: AHO's decision affirmed.

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

IN RE: (CASE NO.: 10246)

DECISION OF HEARING OFFICER

HEARING DATE: FEBRUARY 11, 2014

DECISION DATE: FEBRUARY 19, 2014

I. PROCEDURAL BACKGROUND

The Department of Corrections hereafter (“the agency”) issued the grievant a Group Written Notice II on August 23, 2013. He initiated this grievance on September 22. I was appointed as hearing officer on December 18. I conducted a prehearing conference by telephone on January 13, setting the matter for hearing on February 4. Due to the unexpected unavailability of two witnesses for the agency on that date I continued the hearing to February 11. I conducted the hearing on that date.

II. APPEARANCES

A lay advocate represented the agency. A representative of the agency was present throughout the hearing and testified. The agency presented the testimony of three additional witnesses. A notebook consisting of eight exhibits was presented by the agency and accepted into evidence without objection. A lay advocate represented the grievant. Two witnesses testified on behalf of the grievant. One document was proffered as an exhibit by the grievant and accepted into evidence without objection.

III. ISSUE PRESENTED

Whether the agency acted appropriately in issuing a Group II Written Notice to the grievant on August 23, 2013 for unsatisfactory job performance with a breach of security?

IV. FINDINGS OF FACT

On July 18, 2013 a group of inmates in a State Correctional Facility found a canister of OC Spray lying on the floor in one of the cell pods. One inmate took possession of it. Shortly after taking possession of the spray the inmate approached the building lieutenant and indicated that he wished to speak with him privately. The inmate turned over the canister to the lieutenant and indicated that he had seen the grievant drop it. No incident involving the spray occurred while the inmate was in possession of it.

While making his assigned rounds on July 18 the grievant noticed that his OC Spray canister had slipped from his holster. He began a search for it. The building lieutenant approached him and advised that the canister had been found by an inmate. The grievant told the lieutenant that he had been having problems keeping his holster containing the spray snapped.

OC Spray is a substance similar to commercially available pepper spray. The agency issues that to the corrections officers to be used as a means of maintaining control and security when necessary. The grievant carried the canister of spray on his belt, the canister being secured by a snap on the holster.

The Warden at the facility issued the Written Notice to the grievant on August 23 in accordance with agency procedures. The grievant filed this challenge to the discipline on September 22. On a date prior to the grievant losing possession of his spray canister, a different corrections officer had lost his state issued radio. That radio has yet to be located. An

investigation by the agency has been unable to determine whether the radio was stolen, destroyed, improperly labeled, or otherwise account for its disposition. The officer whose radio went missing received only a Written Notice of Improvement Needed, not any Group Notice under the standards of conduct.

Subsequent to the incident involving the grievant, an inmate took unauthorized possession and control of a pair of fingernail clippers and attached cable. No corrections officer has been disciplined for that event.

V. DISCUSSION AND ANALYSIS

This matter arises under Chapter 30 of Title 2.2 of the Code of Virginia of 1950. That set of statutes provides certain due process rights to state employees, including a formal hearing in certain circumstances. The agency designated with overseeing these rights is the Department of Human Resource Management. That agency has promulgated a Grievance Procedural Manual (“GPM”) and Rules for Conducting Grievance Hearings (“Rules”). Section VI (B) of the Rules provides that disciplinary actions (such as this case), the hearing officer is to determine “whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.”

The hearing officer is required to determine:

1. The employee engaged in the behavior described in the Written Notice;
2. Whether the behavior constituted misconduct; and
3. Whether disciplinary action taken by the agency was consistent with law and policy.

The hearing officer conducts a de novo review of the evidence. He is not bound by any

factual determination or legal determination by the agency. The agency has the burden of proving the allegations in a grievance arising from a disciplinary action, such as this case. The level of proof required is a preponderance of the evidence.

In his meetings with his Supervisors the grievant admitted losing possession of the canister of OC Spray. He did not testify or otherwise present a denial of those actions. I find that the first test has been met.

The agency argues that the actions by the grievant qualified as a Group III offense, violating safety rules where there is a threat or physical harm. The OC Spray qualifies as a chemical agent subject to Agency Directive 430. The grievant has not seriously challenged the proposition that losing control of the spray constitutes a violation of a safety rule. Because the loss occurred in an area where inmates were present, the loss resulted in a breach of security. The incident, although not the result of any intentional act on the part of the grievant, qualifies as a Group III offense.

The agency, however, chose to mitigate the level of offense to a Group II. The mitigation factors were the full cooperation of the grievant, his honesty, and years of service with the agency. These factors are reasonable grounds for mitigation.

The last criterion I must evaluate is whether not the discipline was consistent with law and policy. In the absence of any discriminatory treatment, I find that they clearly do so. The grievant has argued that he has unfairly singled out for discipline, citing the lack of similar punishment against the officers involved with the missing radio and fingernail clippers. To establish a defense of discriminatory treatment to a disciplinary action, the grievant has the burden of proof. He must show that he has been unreasonably treated in a different manner than a similarly situated employee. I do not find that the grievant has met this burden.

The incident regarding the missing radio is distinguishable by the fact that there is no evidence that the radio ever was in the possession of an inmate. Also, the evidence, although confusing, does not show that the officer ever negligently lost control of the radio.

The agency argues that the fingernail clipper incident could not have been used by it as mitigation for the discipline of the grievant because it occurred subsequent to July 18. Although that statement is correct, it misconstrues the argument that the grievant has been subjected to discriminatory treatment. The agency did not object to the evidence regarding the clippers as not being relevant for purposes of this decision, I will assume that a grievant may introduce evidence of events occurring subsequent to his own disciplinary action in order to prove discrimination. I do not find that the two events are similar enough to sustain the argument of the grievant. The clippers were placed in the possession of an inmate for a legitimate purpose. The system (consisting of a lock, cable, and clipper) were destroyed through a malicious act by the inmate. The evidence is not sufficient to support a finding that a reasonable corrections officer was required to be in a position to prevent the destruction from occurring and allowing the inmate to take uncontrolled possession of the items. Such a finding would be required before I could find the incidents to be substantially similar.

With regard to each of the other events submitted for consideration by the grievant, they were both single incidents. Here, the grievant admitted to having prior knowledge of problems with his holster that could result in the canister falling out at any time. The failure by the grievant to remedy the situation by doing nothing more than continuing to re-snap the holster reflects a greater level of indifference than that shown in either of the comparator events.

VI. DECISION

For the reasons stated above, I uphold the issuance of the Group II Written Notice to the grievant on August 23, 2013.

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 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.

ORDERED this February 19, 2014

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