

Issue: Group III Written Notice with transfer, demotion and pay reduction; Hearing Date: 02/04/14; Decision Issued: 02/24/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10247; Outcome: No Relief - Agency Upheld;

Administrative Review: EDR Ruling Request received 03/10/14; EDR Ruling No. 2014-3838 issued 04/17/14; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 03/10/14; DHRM Ruling issued 04/22/14; Outcome: AHO's decision affirmed; **Judicial Review**: Appealed to Greenville County Circuit Court; Outcome: AHO's decision affirmed (07/05/14).



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10247

Hearing Date: February 4, 2014
Decision Issued: February 24, 2014

PROCEDURAL HISTORY

On July 26, 2013, Grievant was issued a Group III Written Notice of disciplinary action with disciplinary transfer, disciplinary demotion to a lower pay band with a ten percent disciplinary pay reduction for physical abuse/maltreatment of an offender.

On August 14, 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 December 30, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 4, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's 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 Unit Manager at one of its Facilities until he was demoted to the position of Counselor and transferred to another facility. His compensation was reduced by ten percent. Unit Managers at the Facility were non-security staff but they were sometimes referred to as "mini-wardens" because of their positions of authority over housing units at the Facility. Grievant had been employed by the Agency for over 21 years. He held numerous security positions with the Agency and became a Unit Manager in June 2012.

The Inmate was a mental health patient at the Facility. Evidence was not presented regarding the nature of the Inmate's mental health condition, but the Warden testified that not all inmates at the Facility with mental health concerns were violent. Grievant received four hours of training per year regarding how to supervise mentally ill inmates.

On May 13, 2013 at approximately 8:50 a.m., the Inmate asked Officer G to open his door but she refused. The Inmate began arguing with Officer G and used inappropriate language. The Inmate told Officer G, "f—k you and your kids!" The Inmate threw several items at the Control Booth where Officer G was working inside. Approximately 30 minutes later, the Inmate was escorted to the Sergeant's Office to meet with Grievant. QMHP M, Senior Psychology Associate, and Sergeant M were also in the room with Grievant and the Inmate. Grievant began discussing the Inmate's

behavior towards Officer G. The Inmate became angry because he considered his conflict with Officer G to have been addressed already and not needing further discussion. The Inmate said he was angry and clinched his fists. He would not listen to reason from Grievant and the mental health staff. Based on the Inmate's disposition and comments, Grievant asked the Inmate to present himself to be handcuffed. The Inmate refused. Grievant instructed Sergeant M to call for assistance. The Inmate was given another opportunity to present himself to be restrained and he again refused while continuing to argue. Grievant positioned himself behind the Inmate and placed handcuffs on the Inmate's left and right wrists. Grievant wanted to lower the Inmate to the ground and instructed the Inmate to bend his knees. The Inmate said, "bend my knees?" and Grievant said "yes." The Inmate did not bend his knees. Grievant then forced the Inmate's knees to a sitting position and forcefully laid the Inmate on the floor and pushed the right side of the Inmate's face on the floor. Grievant held the Inmate on the floor while he waited for assistance to arrive.

Security staff responded to Grievant's location from other parts of the Facility. Grievant instructed that it was not necessary to place leg restrains on the Inmate. The Inmate was escorted from the Housing Unit to the Medical Unit. The Inmate complained of injuries. The Nurse examined the Inmate and concluded he was alert but showed no injuries. The Inmate was escorted to another housing unit.

On May 13, 2013 at approximately 12:35 p.m., the Inmate filed an emergency grievance claiming that Grievant 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.

On May 14, 2013, the Inmate drafted an Informal Complaint stating:

On May 13, 2013 while I handcuffed with my hands behind my back, I was physically assaulted by Unit Manager [Grievant] and I wish to press charges.¹

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."² 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

¹ Agency Exhibit 2.

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

Operating Procedure 420.1 governs Use of Force.⁵ This policy defines “excessive force” as “[t]hat amount of force that is beyond what is reasonably required to prevent harm or to control a particular situation or that is not justified by the circumstances. Section IV(4) provides that:

The use of force is restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to maintain or regulate control, and then only as a last resort and in accordance with appropriate statutory authority.

Grievant used force⁶ on the Inmate when he hit the Inmate’s knee to force the Inmate into a sitting position. He used force by moving the Inmate to the ground. He used force by pushing the Inmate’s face to the floor and holding the Inmate’s head to the floor while he waited for assistance to arrive.

Grievant’s use of force was excessive. The Inmate had his hands cuffed behind his back. He did not move in a manner to harm anyone. He did not spit on anyone. He did not attempt to kick or head butt anyone. Although he was angry and had expressed that anger, he did not move in any manner to transform his anger into harm to others. Grievant was in control of the Inmate because he had placed handcuffs on the Inmate so that the Inmate’s hands were behind the Inmate’s back. The Inmate did not threaten anyone verbally. Grievant interpreted the Inmate’s non-verbal cues as threatening. These non-verbal cues were clinching his fists, gritting his teeth, raising his voice, and not standing still. The Inmate’s non-verbal cues were not sufficient to justify Grievant’s decision to use force.

“Physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders” is a Group III offense. The Agency is responsible for supervising offenders but it is also responsible for their care and protection. Grievant used physical force on the Inmate. His action was an abuse because his force was not necessary. The physical abuse was recognized maltreatment because the Agency’s policy distinguished between force and excessive force and prohibited the use of excessive force. The Agency has presented sufficient

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

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

⁵ The Hearing Officer asked the Agency to provide the Use of Force policy in effect in May 2013, but the Agency failed to do so. The Hearing Officer will use the policy effective July 1, 2013 contained in Grievant Exhibit 4. The Agency represented that the two policies were not materially different.

⁶ Grievant was authorized to place handcuffs on the Inmate in order to maintain control of the Inmate. The Inmate was not responding to Grievant’s instructions.

evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may impose a disciplinary transfer, demotion, and pay reduction. Accordingly, Grievant's disciplinary demotion, transfer, and pay reduction must be upheld.

Grievant argued that the Inmate's injuries were not significant and were overstated by the Inmate. It is not necessary for the Agency to show that the Inmate suffered serious injuries to establish physical abuse.

Grievant argued that the level of disciplinary action was too harsh. Grievant is highly educated and has extensive experience working in various positions including leadership positions with the Agency. Although it is clear the Agency could have addressed Grievant's behavior equally as well by taking significantly lesser disciplinary action, the Agency has met its burden of proof in this case. Once an agency meets its burden of proof in a case, the Hearing Officer does not have the authority to alter the disciplinary action in the absence of mitigating circumstances. In other words, although the Hearing Officer may agree that the disciplinary action is too harsh, the Hearing Officer may not as a matter of course substitute his judgment for that of Agency managers without a showing of mitigating circumstances.

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. 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 III Written Notice of disciplinary action with disciplinary transfer, demotion and pay reduction is **upheld**.

⁷ 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 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

⁸ 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

Carl Wilson Schmidt, Esq.
Hearing Officer