

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 01/30/14; Decision Issued: 02/06/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10257; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10257

Hearing Date: January 30, 2014

Decision Issued: February 6, 2014

PROCEDURAL HISTORY

On September 25, 2013, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow policy.

On October 23, 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 January 15, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 30, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 Sergeant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On August 16, 2013, Grievant and several other corrections officers and employees were in the Medical unit with the Inmate. The Inmate was facing and standing approximately three feet away from Grievant. The Inmate's hands were handcuffed in the front. Grievant removed the Inmate's handcuffs. Another corrections officer handcuffed the Inmate's hands behind his back. After the Inmate's hands were cuffed behind his back, he moved towards Grievant and spit in Grievant's face when he was approximately 8 inches from Grievant. A corrections officer was standing directly behind Grievant with his right hand holding onto a bar of a tall gate. Grievant had limited room to move backwards when the Inmate spit on him. Grievant clinched his right fist and punched the Inmate using his right arm using a "roundhouse punch". Prior to the punch, the Inmate's face was within Grievant's personal space and moving slightly forward. The Inmate did not move away or back down until Grievant's fist hit him in the face. The force of the punch knocked the Inmate backwards and to the Inmate's right and several feet away from Grievant. The punch prevented the Inmate from continuing to spit on Grievant.

On August 17, 2013, the Inmate complained to the Warden that he had been hit by Grievant. The Warden initiated an investigation.

The Agency reviewed the video of the incident and considered Grievant's explanation. The Agency concluded that Grievant did not engage in offender abuse but that he did not follow Agency policy. The proper response according to the Agency would have been for Grievant to step back and let the other corrections officers secure the offender.

Grievant received training regarding the use of force but was not provided with training regarding how to respond to an inmate who spits on a corrections officer.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

DOC Operating Procedure 420.1 governs Use of Force. Under this policy, "[e]xcessive force" is that 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(A)(1) provides, [e]mployees have a responsibility, consistent with their self-protection, to protect offenders, other employees, and members of the community who are threatened by the actions of any incarcerated offender." Section IV(A)(4) states:

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 regain control, and then only as a last resort and in accordance with appropriate statutory authority.

Grievant used force on the Inmate when he punched the Inmate in the face. Grievant's use of force was justified for the purpose of self-defense. The Inmate spit on Grievant as he moved towards Grievant's face. The Inmate remained in a position sufficiently close to Grievant to continue spitting on him if Grievant did not take immediate action. Another corrections officer was standing immediately behind Grievant blocking his backward movement. If Grievant had waited until the other corrections officers responded as preferred by the Agency, the Inmate would have remained in a position directly in front of Grievant and able to continue spitting on

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

Grievant. Grievant's response was immediate and effective in stopping the Inmate's advance. The punch immediately turned the Inmate in a direction away from Grievant.

The Agency did not provide specific training regarding how to respond to inmates who spit on them. Grievant's method of stopping the Inmate's behavior was effective and consistent with Grievant's right of self-defense.

DOC Operating Procedure 038.1 governs Reporting Serious or Unusual Incidents. An incident is:

An actual or threatened event or occurrence outside the ordinary routine that involves the life, health and safety of employees, volunteers, guests, or offenders (incarcerated or under Community supervision), damage to state property, or disrupts or threatens security, good order, and discipline of a facility or organizational unit.⁴

Section IV(A) of the Operating Procedure 038.1 provides "[t]imely and accurate reporting of incidents that occur in the Department of Corrections is essential for proper management and administration." Section IV(B)(1) requires, "[a]ny DOC employee ... [who] observes or has knowledge of an incident affecting the safe, orderly operation of a DOC organizational unit shall report that incident."

When the Inmate spit on Grievant and Grievant punched the Inmate, an incident occurred. Grievant failed to complete an incident report thereby acting contrary to Agency policy. The Agency has established that Grievant committed a Group II offense for failure to follow policy subject to mitigating circumstances discussed below.

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"⁵ 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.

⁴ Agency Exhibit 4.

⁵ Va. Code § 2.2-3005.

Mitigating circumstances exist to treat Grievant's behavior as a Group I offense instead of a Group II offense. Sergeant S was outside of the Medical unit when the incident occurred. When he learned what had happened, he instructed Grievant to complete a disciplinary charge against the Inmate. Grievant did so. Once the Lieutenant learned of the incident and realized that the Inmate was a gang member, the Lieutenant ordered Grievant to leave the Facility immediately for fear of retaliation against Grievant. Grievant left the Facility prior to the conclusion of his shift. He had some opportunity but not an adequate opportunity to complete an incident report using the Agency's computerized reporting system. In addition, several other employees witnessed the incident yet none of them filed incident reports. It is not clear whether any of those other employees received disciplinary action for failing to file incident reports. The Hearing Officer finds that the disciplinary action should be mitigated to a Group I offense.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a three day suspension is **reduced** to a Group I offense. 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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.