

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 01/29/15;  
Decision Issued: 03/23/15; Agency: Department of Corrections; AHO: Carl Wilson  
Schmidt, Esq.; Case No. 10518.



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10518**

Hearing Date: January 29, 2015  
Decision Issued: March 23, 2015

### **PROCEDURAL HISTORY**

On September 16, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On September 16, 2014, 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 16, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2015, a hearing was held at the Agency's office.

### **APPEARANCES**

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

Showers at the Facility consist of single stalls with doors that lock to secure inmates inside the stall until two corrections officers let them out to return to their cells. The locks used at the Facility are Folger Adam locks designed to secure prisoners at corrections facilities. They are made of heavy gauge steel with a one inch thick and two inch long deadbolt. The locks cannot be "picked" from inside the stall. An inmate would have to reach over the door securing the stall and use a tool to pick the lock. This would be exceptionally difficult, if not impossible. The Unit Manager testified he was unaware of any instance at the Facility where an inmate successfully defeated a shower door lock.

Grievant received training regarding how to properly secure inmates in showers. He and another corrections officer were supposed to escort an inmate to the shower, place the inmate in the shower, close the stall door, and lock the door. After the inmate showered, the inmate was to be escorted by two corrections officers back to his cell.

On August 25, 2014, Grievant and Officer O escorted the Inmate from his cell to the shower stall. Once the Inmate was inside the stall, Grievant was supposed to lock the door to prevent the Inmate from getting out of the shower. Grievant closed the door

but failed to properly lock and check the shower door. Grievant left the building and took a break. After the Inmate showered, he realized the door was unlocked and opened it. He left the shower stall unescorted and began walking about the Housing Unit. He consumed a snack and a drink from an officer's desk.

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

"[I]nadequate or unsatisfactory job performance" is a Group I offense.<sup>4</sup> 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.

On August 25, 2014, Grievant was responsible for securing the Inmate inside the shower. Grievant escorted the Inmate into the shower, closed the door, but failed to properly lock the door. The Inmate exited the stall without being escorted. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

Grievant argued that Grievant properly closed and locked the shower door but the Inmate was able to defeat the lock to escape. A camera was located inside the housing unit with a view of several cells and the shower area. The focus and quality of the video is such that one watching the video cannot determine what actions the Inmate took and whether he defeated the lock. Although the Inmate initially claimed to staff that he defeated the lock and it might have been possible for him to have retained a tool when he was escorted and placed in the shower, it remains speculative to conclude that the Inmate defeated the lock. Grievant presented witnesses who were aware of inmates placing objects in door locks to prevent them closing but none to show that on August 25, 2014, the Inmate placed anything in the shower door to prevent its closure.

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

The Agency argued that Grievant should receive a Group II Written Notice for failure to follow policy. Although a witness testified that Grievant's actions were contrary to policy, the Agency did not present the policy to the Hearing Officer. The Hearing Officer will not assume a policy has been violated without having the opportunity to view and cite the policy.

*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>5</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 II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

## 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.

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<sup>5</sup> *Va. Code § 2.2-3005.*

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>6</sup>

[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

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