

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 04/13/15;  
Decision Issued: 04/20/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10560; Outcome: No Relief - Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10560**

Hearing Date: April 13, 2015

Decision Issued: April 20, 2015

#### **PROCEDURAL HISTORY**

On October 1, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On October 28, 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 March 2, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 13, 2015, 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 Officer Senior at one of its facilities. Grievant's duties included supervising inmates at the Facility. No evidence of prior active disciplinary action was introduced during the hearing.

On September 2, 2014, Grievant was responsible for supervising a crew of inmates painting fences inside the Facility. He obtained 18 cans of paint at the sallyport. The Agency considered the paint a dangerous flammable substance because it could be ignited and used as a weapon by inmates. Grievant gave four or five cans to approximately four inmates to take at one time to different parts of the fence.

Grievant reported to the Sergeant who was also working in the Yard. The Sergeant instructed Grievant to assist with "pulling chow" meaning he was to assist with moving groups of inmates during lunchtime. This task would have taken between one to two hours. Although Grievant remained in the Yard, his focus was on the inmates being moved rather than on the inmates painting the fence. He was no longer effectively supervising the inmates who were painting.

After finishing the duties requested by the Sergeant, Grievant returned his focus to the inmates who were painting. When their duties were completed, the inmates returned their paint cans to Grievant. Only 17 of the 18 paint cans were returned. One inmate said he had returned a can to the Sergeant but the Sergeant did not remember receiving a paint can from the inmate. Grievant reported the paint can missing and began searching the yard, the watch office, and the cells of the offenders who received

paint cans. He was unable to find the missing paint can. The Agency placed the Facility in “lockdown” meaning that inmates were not permitted to move about the Facility while Facility staff searched the entire Facility. The paint can was not located.

## 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>

DOC Operating Procedure 302.2(C)(6) provides that “[o]ffenders may have access to flammable materials only under supervised conditions.”

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>4</sup> On September 2, 2014, Grievant assumed responsibility for supervising several inmates and having them paint fences at the Facility. He provided them with paint, a flammable liquid. He discontinued supervising the inmates while he performed other duties without having someone else assume responsibility for supervising the inmates. When the inmates finished their work, one of them failed to return all of the paint cans given to him. The Agency has established that Grievant failed to properly supervise inmates possessing flammable materials thereby justifying the issuance of a Group II Written Notice.

Grievant asserted that he should not be given discipline because he complied with his supervisor’s instructions to perform other duties. The evidence showed that when Grievant began pulling chow, the Sergeant did not relieve Grievant of his post or otherwise assume his duties with respect to supervising the inmates who were painting. Grievant could have collected the paint cans and stopped the fence painting when he was no longer able to supervise the inmates. Grievant did not explain to the Sergeant that he needed to delay his new duties until he ended his supervision of the inmates who were painting.

*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

---

<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)(C)(2)(a).

“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 the disciplinary action.

Grievant argued that the Agency delayed in investigating the incident, taking disciplinary action, and advancing the grievance. To the extent the Agency delayed in order to investigate the incident, the delay was not so excessive as to undermine the Agency’s ability to present credible evidence to support its decision. To the extent the Agency delayed in advancing the grievance, Grievant’s remedy would have been to notify the Director of the Office of Employment Dispute Resolution to seek redress.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

## 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.

---

<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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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