

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 07/15/13; Decision Issued: 07/17/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10130; 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: 10130

Hearing Date: July 15, 2013
Decision Issued: July 17, 2013

PROCEDURAL HISTORY

On February 5, 2013¹, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On March 5, 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 June 20, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 15, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

¹ The Written Notice was revised July 8, 2013.

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.

On October 3, 2012, the Major issued a memorandum to security staff regarding Housing Unit doors. The memo stated:

It has been brought to my attention that during shift change the main doors to the Housing Units have been left unlocked. It is very important that the main doors to the Housing Units remain locked at all times, with the only exceptions being the entering and exiting of staff on the Housing Units.

This will be closely monitored to ensure all staff are following this practice.²

² Agency Exhibit 4.

Facility managers followed their customary practice to inform staff of the memo by having supervisors read the memo to Corrections Officers during muster at the beginning of their shifts. Grievant and another Corrections Officer began their shifts at 10 a.m. on October 3, 2012. A supervisor did not meet with them to inform them of the Major's memorandum. The other Corrections Officer learned from other corrections officers of the change in policy several weeks later. Grievant did not have actual knowledge of the change in policy.

At the end of each day, Facility managers would send each employee including Grievant an email with an attachment referred to as the Daily Report. The Daily Report or "pass off" for October 3, 2012 stated under the section entitled "Other Facility Events", "Review memo released by [the Major] concerning Housing unit entry doors" and "Reviewed memo from [the Major] in briefing on Night shift concerning housing unit entry doors." Employees were informed to review the Daily Report in the event they missed a particular day's muster.

The October 3, 2012 memo was placed in a book in the Watch Commander's office. The book was available to all security staff. Grievant did not read the October 3, 2012 memo.

At the direction of Facility managers, a Facility employee viewed the video of the Housing Unit door for December 21, 2012 and December 22, 2012. On those dates, Grievant left the main doors unlocked contrary to the October 3, 2012 memo.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁶ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Beginning October 3, 2012, the Facility required security employees to ensure that the main doors to the Housing Units were secured at shift changes. On December 21, 2012 and December 22, 2012, Grievant left the main doors unlocked, and thus unsecured. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory work performance.

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.

Grievant contends the disciplinary action should be mitigated because he did not have notice of the Agency’s rule requiring him to lock the main Housing Unit doors. It is clear that Grievant did not have actual notice of the change in policy. He did not receive a briefing from Facility supervisors about the change in policy. Grievant, however, received adequate notice of the existence of the policy to support the Agency’s issuance of disciplinary action. The purpose of the Daily Report was to inform employees of important matters in the event the employees missed muster. Grievant receive a copy of the Daily Report. After reading the document, he should have been aware that Facility supervisors had reviewed a memorandum from the Major concerning housing unit entry doors. He could have read the memo by going to the Watch Commander’s office and locating the document. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.⁸

DECISION

⁷ Va. Code § 2.2-3005.

⁸ Grievant asserted that the Agency had improved its notification procedures following this incident. The Agency’s attempt to improve its notification procedures is not an admission by the Agency that its notification procedure in effect in October 2012 was insufficient to place Grievant on notice of the Agency’s change in policy.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I 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 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.⁹

⁹ 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