

Issue: Group II Written Notice with Suspension (unsatisfactory job performance);
Hearing Date: 09/26/13; Decision Issued: 10/07/13; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10147; 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: 10147

Hearing Date: September 26, 2013

Decision Issued: October 7, 2013

PROCEDURAL HISTORY

On April 3, 2013, Grievant was issued a Group II Written Notice of disciplinary action with a 40 hour work suspension for wrongful identification of an offender and the incompleteness of subsequent reports.

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 August 6, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 26, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Attorney
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 Lieutenant at one of its Facilities. He began working for the Agency in 1994. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility houses inmates with mental health concerns. The Facility has a special housing unit where inmates are placed in single cells. On the outside of each cell is a TS77 form which contains the name of the inmate in each cell and a sheet for officers to record the times they make security checks by looking into the cell to check the status of the inmate inside. Cell 4 and Cell 5 are located next to each other in the special housing unit.

CORIS contains additional information on each inmate at the Facility and contains a picture of each inmate. In March 2012, CORIS was readily available to security personnel at the Facility. Pictures of inmates were not placed near their cells. Employees relied on the TS77 form to assist with the identification of special housing unit cells.

On March 12, 2013, Inmate M, an African American, arrived at the Facility and was placed in Cell 5. Inmate M was 23 years old and weighed 157 lbs. He had a tattoo on his right hand of his mother's name. He had his brother's name tattooed on his right arm. Inmate M was scheduled to take Bzotropine (Cogentin) 2 mg tablet-crushed and Risperidone 4 mg tablet-crushed. Inmate M had an order from a doctor providing that in the event he refused to take his medication orally, he was to be forcefully medicated using an injection of Haloperidol.

On March 19, 2013, Inmate C, an African American, arrived at the Facility and was placed in Cell 4. Inmate C was 29 years old and weighted 189 lbs. He had no tattoos on his arms or neck. Inmate C was scheduled to take Benztropine (Cogentin) 1 mg tablet-crushed and Haloperidol 5 mg tablet-crushed. Inmate C had an order from a doctor providing that in the event he refused to take his medication orally, he was to be forcefully medicated with both medications using an injection.

On March 23, 2013 at approximately 7:30 p.m., Officer S and Officer C removed Inmate M from Cell 5 and escorted him to the shower. A few minutes later, Officer S and Officer C removed Inmate C from Cell 4 and escorted him to the shower next to the shower where Inmate M was showering.

At approximately 7:44 p.m., Officer S and Officer C removed Inmate M from the shower and mistakenly escorted him to Cell 4. Officer R and Officer G removed Inmate C from the shower and escorted him to Cell 5. They placed him in Cell 5 because the cell was unoccupied.

Between 7:45 p.m. and 8:30 p.m., the Nurse entered the special housing unit and began "pill call." She had prescription medication set aside for each inmate. The Nurse was escorted by Officer S and Officer C as she went to each cell. She approached Cell 5 and looked at the name posted on the side of the door. She believed the person inside Cell 5 was Inmate M, but actually Inmate C was inside Cell 5. She offered medication to the person inside Cell 5 but the inmate refused.

The group proceeded to Cell 4. The Nurse checked the name outside the door and believed the person inside Cell 4 was Inmate C but actually Inmate M was inside Cell 4. The person inside Cell 4 agreed to take the medication offered by the Nurse. She gave the medication prescribed for Inmate C to Inmate M who was inside Inmate C's cell.

After pill call, the Nurse reported to Grievant that Inmate M had refused to take his medication. Grievant remembered speaking with Inmate M the previous night (March 22, 2012) because Inmate M has refused to take his medication. Grievant called a female Corrections Officer B to speak with Inmate M and convince him to take his medication. Inmate M eventually complied with the request of Officer B to take his medication. Grievant decided to make another attempt to have a female employee persuade Inmate M to take his medication. At Grievant's request, Corrections Officer A spoke with the inmate in Cell 5. She observed the inmate inside Cell 5 as he remained seated on his bunk. He would not come to the cell door. She could not hear anything the inmate said because of the sound from a large industrial fan in the wing.

Corrections Officer A informed Grievant that she was unsuccessful at convincing the inmate in Cell 5 to take his medications. Grievant decided to assemble and lead a cell entry team to forcefully medicate the inmate in Cell 5. The cell entry team consisted of several corrections officers with Sergeant D responsible for making a video recording of the cell extraction.

Grievant approached Cell 5 with Sergeant D video recording Grievant's interaction with the inmate in Cell 5. The other officers stood to the side as Grievant spoke with the inmate in Cell 5. Grievant addressed the inmate in Cell 5 as Inmate M and instructed the inmate to present himself so he could be handcuffed. The inmate inside Cell 5 was on his bunk and remained calm. Grievant continued referring to the inmate inside Cell 5 as Inmate M and asking Inmate M to approach the tray slot of the door so he could be restrained. The inmate inside Cell responded to Grievant but his voice was not always audible on the video tape. On at least two instances, the inmate inside Cell 5 said his name was the first name of Inmate C and the last name of Inmate C. Grievant heard the inmate claim to be Inmate C but Grievant believed that Inmate M was delusional because of his mental health status and the fact that he had referred to himself as "God" on the prior day. Grievant directed a burst of Oleoresin Capsicum (O.C.) spray at the inmate but missed. Grievant directed a second burst of O.C. spray at the inmate and hit the inmate with the spray. Grievant continued to attempt to ask the inmate to approach the door so he could be restrained and receive his medication.

When Inmate C identified himself as Inmate C and not as Inmate M, only Grievant and Sergeant D could hear the inmate. The other officers remained several feet away from Grievant.

At approximately 9:25 p.m., Grievant ordered the cell entry team to enter the cell to restrain the inmate. Officer S carried an electronic shield that was activated and an electronic shock was administered to the inmate. The inmate in Cell 5 was forced on his stomach, handcuffed, and the Nurse administered an intra-muscular injection of 5 mg of Haloperidol. The inmate was removed from Cell 5 and taken to the shower so that he could have the opportunity to wash off the O.C. spray on his body. Cell 5 was decontaminated while the inmate was in the shower.

After the inmate finished his shower, Officer S and another officer removed the inmate from the shower and escorted him towards Cell 5. As he entered the cell, the inmate said "You all need to change the name on the door, my name is not [Inmate M], it's [Inmate C]." After securing Inmate C in Cell 5, Officer S walked a few steps to the CORIS system which contained a photograph of each inmate. Office S confirmed that the inmate in Cell 5 who was claiming to be Inmate C was in fact Inmate C. Officer S notified Grievant of the error. Grievant went to the CORIS system and verified the misidentification. Grievant notified the Nurse of the medication error. He notified the Warden and Institutional Program Manager of the incident. They came to the special housing unit to verify Grievant's findings.

Inmate C was to receive two medications by injection if he refused to take medications orally. Because of the misidentification of the inmates, Inmate C did not receive an injection of Benztropine. In addition, Inmate M received the medication originally intended for Inmate C.

Grievant drafted an Incident Report regarding the misidentification of the two inmates. He listed the staff involved. He described the Type of Incident as "Cell Extraction. Use of force, including electronic devices, chemical agents, and canines." He listed the letters and numbers used to identify the video of the incident. Grievant

described the process followed to extract the inmate. Grievant described how upon returning from the shower after decontamination, Inmate C said that the name of Cell 5 needed to be changed since he was not Inmate M and he was Inmate C. A reader of the report would understand that two inmates had been mixed up and one inmate had been forcefully medicated.

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

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁴ 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 March 23, 2012, Grievant approached Cell 5 and addressed the inmate inside as Inmate M and attempted the inmate to take his medication. The inmate inside Cell 5 identified himself as Inmate C on at least two occasions. Grievant could have stopped the cell entry for a few minutes to walk to a computer with the CORIS system and obtain a picture of the inmate assigned to Cell 5. Grievant did not believe the inmate’s claim that he was Inmate C. Grievant proceeded with the cell entry which resulted in the forced medication of Inmate C with medication of one of his medications. Grievant’s work performance was unsatisfactory or inadequate to the Agency thereby justifying the issuance of a Group I Written Notice.

In rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

The Agency has presented sufficient evidence to support the elevation of a Group I offense to a Group II offense in this case. The Agency suffered a material

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).

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

adverse impact by Grievant's behavior. Inmate C was justified in refusing to take medication intended and prescribed for Inmate M. Inmate C knew he was being asked to take medication for Inmate M and told Grievant he was not Inmate M. By forcing Inmate C to take medication intended for another, Grievant placed the Agency at risk of legal action from Inmate C.⁵

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁶

DOC Operating Procedure 038.1 addresses Reporting Serious or Unusual Incidents. Section IV(A)(1) provides:

Timely and accurate reporting of incidents that occur in the Department of Corrections is essential for proper management and administration. Since incident reports are frequently used in litigation proceedings, the importance of writing clear, concise, factual, and complete reports cannot be over emphasized. Incident reports allow the DOC executive staff to make decisions concerning directive and operational changes, and to keep other officials informed as necessary.

An Incident Report is a summary of an incident and rarely contains every detail of the incident. In this case, Grievant provided sufficient detail to properly describe the incident as a mix up of two inmates with a forced medication of one inmate. He failed to mention that Grievant addressed the inmate in Cell 5 as Inmate M and the inmate inside identified himself as Inmate C. The report was not incomplete without this detail but it would have been better had this detail been included. At most the Agency has established inadequate or unsatisfactory job performance with respect to Grievant's drafting of the incident report.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice with respect to misidentifying inmates. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's suspension for 40 hours must be upheld.

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

⁵ It is possible that cell extraction and forced medication may have been unnecessary. If Inmate C had been addressed as Inmate C and asked to take his medication, it is possible that he may have taken the medication. Whether this would have occurred, however, is not known because Inmate C was not addressed as Inmate C.

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁷ Va. Code § 2.2-3005.

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 argued that mitigating circumstances exists. He points out that he was entitled to rely on his subordinates who told him Inmate M was in Cell 5. He argued he was entitled to rely on the identification card on the wall next to the cell which did not contain a picture of the inmate even though the Agency could have put a picture on the wall and began doing so after the incident. To the extent these considerations are mitigating circumstances they are countered by an aggravating factor, namely that Inmate C specifically identified himself by name in at least two instances. Grievant was in a position to stop the cell entry to verify the inmate's claim.

In light of the standard set forth in the Rules, 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 II Written Notice of disciplinary action with a 40 hour suspension 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.