

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 09/27/13; Decision Issued: 10/07/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10163; 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: 10163

Hearing Date: September 27, 2013
Decision Issued: October 7, 2013

PROCEDURAL HISTORY

On April 5, 2013, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On May 4, 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 August 19, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 27, 2013, 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 at one of its Facilities. He began working for the Agency in 1999. 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 made 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 contained 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 Benzotropine (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., Grievant and Officer C removed Inmate M from Cell 5 and escorted him to the shower. A few minutes later, Grievant 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., Grievant 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 Grievant 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 the Lieutenant that Inmate M had refused to take his medication. The Lieutenant remembered speaking with Inmate M the previous night (March 22, 2012) because Inmate M has refused to take his medication. The Lieutenant 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. The Lieutenant decided to make another attempt to have a female employee persuade Inmate M to take his medication. At the Lieutenant'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 the Lieutenant that she was unsuccessful at convincing the inmate in Cell 5 to take his medications. The Lieutenant 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.

The Lieutenant approached Cell 5 with Sergeant D video recording the Lieutenant's interaction with the inmate in Cell 5. The other officers stood to the side as the Lieutenant spoke with the inmate in Cell 5. The Lieutenant 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. The Lieutenant 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 the Lieutenant 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. The Lieutenant heard the inmate claim to be Inmate C but the Lieutenant 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. The Lieutenant directed a burst of Oleoresin Capsicum (O.C.) spray at the inmate but missed. The Lieutenant directed a second burst of O.C. spray at the inmate and hit the inmate with the spray. The Lieutenant 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 the Lieutenant and Sergeant D could hear the inmate. The other officers remained several feet away from the Lieutenant.

At approximately 9:25 p.m., the Lieutenant ordered the cell entry team to enter the cell to restrain the inmate. Grievant 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, Grievant 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, Grievant walked a few steps to the CORIS system which contained a photograph of each inmate. Grievant confirmed that the inmate in Cell 5 who was claiming to be Inmate C was in fact Inmate C. Grievant notified the Lieutenant of the error. The Lieutenant went to the CORIS system and verified the misidentification. The Lieutenant 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 the Lieutenant'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.

The Lieutenant drafted an Incident Report regarding the misidentification of the two inmates. He described the (1) time actions occurred (2) names and actions of the employee involved in the cell extraction, (3) identification number of the recording of the incident, and (4) that 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.

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, 2013, Grievant took Inmate M out of Cell 5 and to the shower. He took Inmate M out of the shower and returned him to Cell 4. Grievant knew that each inmate was assigned to a specific cell in the special housing unit. Grievant knew he was supposed to return Inmate M to Cell 5 because Inmate M was assigned to Cell 5. When Grievant failed to return Inmate M to the appropriate cell, Grievant’s behavior was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

Grievant argued that the two inmates were of similar appearance including hair style. He argued that he was not able to identify the inmates because he was required

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).

by policy to escort inmates while standing behind them and to the side. He points out that the two inmates had been transferred to the Facility only a few days before the incident. These arguments fail. Corrections officers have many opportunities during the course of their duties to view inmate faces to become familiar with the inmates. Corrections officers make “cell checks” during which they must look into a cell, observe the inmate, and then describe the inmate’s status on a sheet next to each inmate’s cell. When removing an inmate from a cell, a corrections officer must speak with the inmate. Even though the inmates had been at the Facility for only a few days, Grievant had sufficient opportunity to learn the appearance of each inmate and be able to distinguish between Inmate M and Inmate C.

Grievant argued he was verbally counseled by the Regional Director and it was improper for the Agency to then take disciplinary action against him. Nothing in the Standards of Conduct prohibits the Agency from both verbally counseling and taking disciplinary action against an employee.

Grievant argued that the Agency failed to follow the “13 criteria” before issuing its investigative report. Whether the Agency conducted a proper investigation does not affect the outcome of this case. The Hearing Officer’s decision is based on the testimony and documents presented during the hearing. The Hearing Officer can disregard the Agency’s investigative report and there remains sufficient evidence to support the taking of disciplinary action against Grievant.

Grievant argued that following the incident he was experiencing workplace harassment. For example, he was denied responsibility as a Field Training Officer in January 2013. Grievant did not report this matter to the Agency for investigation. In the event Grievant was experiencing workplace harassment, it would not affect the outcome of the disciplinary action.⁵

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”⁶ 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

⁵ In addition, the Warden testified that the written notice was not issued as a form of retaliation. His testimony was credible.

⁶ *Va. Code § 2.2-3005.*

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.

DECISION

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.