

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 12/05/13;  
Decision Issued: 12/13/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10209; 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: 10209**

Hearing Date: December 5, 2013  
Decision Issued: December 13, 2013

#### **PROCEDURAL HISTORY**

On July 2, 2013, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy.

On July 28, 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 November 2, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 5, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate

#### **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. The purpose of his position is:

To provide security over adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement.<sup>1</sup>

He has been employed by the Agency for approximately ten years without prior disciplinary action. No evidence of prior active disciplinary action was introduced during the hearing.

When offenders are transported from the facility to a hospital for medical treatment, the Agency considers those offenders to pose a risk to the public. Under the Facility's practice and Agency policy, an offender who is to be transported to a hospital must be placed in hand and leg restraints. The offender must be placed in handcuffs and leg irons.<sup>2</sup> The offender must wear a waist chain to hold the handcuffs closer to his body. Prior to leaving the Facility, the Lieutenant must check the offender's restraints to

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<sup>1</sup> Agency Exhibit 3.

<sup>2</sup> The Agency's practice was to place offenders and two sets of leg irons because of a malfunction with some of the Facility's leg irons.

ensure they are properly secured and in accordance with policy. One transportation officer rides with the offender inside an ambulance while a second transportation officer rides in a second vehicle following the ambulance. Once the offender is at the hospital, the restraints must remain in place unless removal of the restraints is medically necessary and approval from Agency managers is obtained.

On April 26, 2013, Grievant was assigned to transport inmates requiring transport to a hospital. The Inmate was in "bad shape" at the Housing Unit. He needed to be transported from the Facility to a local Hospital. The Lieutenant and Grievant went to the Housing Unit and located the Inmate. Because of the Inmate's medical condition as observed by the Lieutenant, the Lieutenant instructed Grievant to allow the Inmate to exit the sally port without hand restraints but to ensure that handcuffs or flex cuffs were secured on the offender when he arrived at the Hospital. Grievant placed the Inmate in leg irons but did not place handcuffs or flex cuffs on the Inmate. Grievant placed the Inmate in an ambulance and entered the vehicle. They traveled from the Housing Unit to the sally port in order to exit the Facility. At the sally port, the Lieutenant did not check the Inmate's restraints. They left the Facility and travelled to the Hospital. At the hospital, Grievant did not place the Inmate in restraints. When employees of the oncoming shift assumed responsibility for the Inmate they reported to Agency managers that the Inmate was not properly restrained.

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

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

Operating Procedure 411.1 governs Offender Transportation. Section VII provides:

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

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

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

A. Except as authorized in this operating procedure, offenders being transported should be restrained in handcuffs, waist chain, cuffed cover, and leg-irons at all times. \*\*\*

J. Restraint requirements may be modified by the facility's medical staff if standard restraints would be harmful to the medical condition. Such modifications must be approved by the sending facility's Unit Head or Administrative Duty Officer.

Section XV governs Special Purpose Trips. Section XV (A) (8) addresses Ambulance Emergency Transport. Section XV (A) (8) (b) states:

The offender must be appropriately restrained. The facility's medical staff may modify restraint requirements if the medical condition is such that full restraints would interfere with medical treatment or would be harmful. Such modification must be approved by the sending facility's Facility Unit Head or Administrative Duty Officer.

Operating Procedure 411.1(XV)(A) provides:

6. Medical treatment may require partial removal of restraints.

a. Prior to removal of any restraints, the transporting Officers will brief the senior medical staff present regarding the offender's threat risk and security requirements, and reach an agreement concerning restraints to be removed. If agreement cannot be reached, the Facility Unit Head or Administrative Duty Officer of the sending facility will be advised of the situation and guidance requested.

b. Only those restraints that would interfere with the medical procedure may be removed, and will immediately be reapplied at the conclusion of the procedure. With Security Level 3, 4, 5, or Security Level S offenders, some form of restraint, either hand or leg, must be utilized at all times, unless such would be life-threatening.

DOC Operating Procedure 425.2 governs Hospital Security. Section IV(A)(3) of this policy provides:

Unless specified otherwise in this operating procedure, an offender in a local hospital shall be considered in transportation status subject to the minimum security and supervision requirements of Operating Procedure 411.1, Offender Transportation.

Section IV(B) provides:

(8) Restraints shall not be removed for medical procedures except in accordance with the agreement and Operating Procedure 411.1, Offender Transportation. Flexi-cuffs may be temporarily substituted for metal restraints if necessary for certain medical procedures.

(9) Medical treatment may require partial removal of restraints.

a. Prior to removal of any restraints, the transporting Officers will brief the senior medical staff present regarding the offender's threat risk and security requirements, and reach an agreement concerning restraints to be removed. If agreement cannot be reached, the Facility Unit Head or Administrative Duty Officer of the sending facility will be advised of the situation and guidance requested.

b. Only those restraints that would interfere with the medical procedure may be removed, and will immediately be reapplied at the conclusion of the procedure. With Security Level 3, 4, 5, or Security Level S offenders, some form of restraint, either hand or leg, must be utilized at all times, unless such would be life-threatening.

Under Operating Procedure 411.1, the Inmate was to be in handcuffs, waist chain, cuffed cover, and leg-irons at all times unless an exception existed. One of those exceptions included medical treatment of an offender. The Inmate could be transported out of the Facility without wearing handcuffs only after approval from the Unit Head or Administrative Duty Officer. The Lieutenant was not the Unit Head or the Administrative Duty Officer and, thus, the policy was violated when the Inmate left the Facility without wearing handcuffs. Grievant was not responsible for this deviation from policy because the decision to deviate from the policy was made by the Lieutenant and Grievant was expected to comply with his supervisor's instructions.<sup>7</sup> Grievant complied with the Lieutenant's instructions when the Inmate left the Facility.

The Lieutenant's decision to deviate from the Agency's policy ended, in essence, when the Inmate reached the Hospital. The Lieutenant instructed Grievant to place the Inmate in handcuffs or flex cuffs when they reached the Hospital. The Lieutenant's instruction was consistent with the Agency's policy and had the effect of restoring the policy's requirement that the Inmate be placed in handcuffs or flex cuffs. In other words, to the extent the Lieutenant's instruction excused Grievant's failure to comply with the Agency's policy when the Inmate left the Facility, that excuse no longer existed once the Inmate reached the Hospital. By failing to comply with the Lieutenant's instruction when the Inmate reached the Hospital, Grievant was fully responsible for failing to comply with the Agency's policy requiring that the Inmate be in handcuffs at the Hospital. The

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<sup>7</sup> The Agency argued that if the Lieutenant gave Grievant an instruction contrary to policy, Grievant should have addressed the matter with the Lieutenant's superior officer. The extent of the policy violation (Lieutenant instead of Unit Head approving restraint modification) is not so significant that Grievant should have immediately recognized the error and challenged the Lieutenant. Grievant was expected to comply with his supervisor's instructions.

Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. The Agency mitigated that disciplinary action to a Group I Written Notice and that disciplinary action must be upheld.

Grievant argued that he had the authority under policy to refrain from placing the Offender in restraints following consultation with medical staff. Grievant's interpretation of the Agency's policy, for the most part, is correct. The Agency's policy requires that offenders be in restraints while at the Hospital unless an exception applies. For example, restraints that interfere with a medical procedure may be removed until the conclusion of a medical procedure. Prior to removing any restraints, the transporting Officer is obligated to (1) brief the senior medical staff present regarding the offender's threat risk and security requirements and (2) reach an agreement concerning restraints to be removed. Only if agreement cannot be reached, must the transporting Officer advise the Facility Unit Head or Administrative Duty Officer of the sending facility and obtain guidance.

Grievant did not testify in this case. None of the medical staff from the Hospital testified. It is unclear what occurred once Grievant and the Inmate reached the Hospital. It is unknown whether Grievant briefed senior medical staff and advise them of the offender's threat risk and security requirements. It is unknown whether Grievant and any such medical staff reached an agreement concerning restraints to be removed. Given the absence of evidence showing what occurred at the Hospital, Grievant's defense cannot be established. The Agency has established that Grievant was instructed to place restraints on the Inmate at the Hospital and that he failed to do so. Grievant has not presented evidence to show that there was a basis under policy to remove those restraints.

*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>8</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.

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<sup>8</sup> Va. Code § 2.2-3005.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 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>9</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>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.