

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 12/06/13;
Decision Issued: 12/16/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10210; 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: 10210

Hearing Date: December 6, 2013
Decision Issued: December 16, 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 10, 2012, 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 12, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 6, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 Lieutenant at one of its facilities. The purpose of his position is:

Directs the work of Corrections Sergeants and Corrections Officers on assigned shift, coordinates work schedules, and duty rosters, and performs inspections to maintain security in the facility.¹

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.² The offender must wear a waist chain to hold the handcuffs closer to his body. Prior to leaving the Facility, a Lieutenant must check the offender's restraints to 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,

¹ Agency Exhibit 4.

² 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.

the restraints must remain in place unless there is an exception to the Agency's policy such as medical necessity.

On April 26, 2013, Officer P was assigned to transport inmates requiring transport to a hospital. The Inmate was having chest pains and had fainted. He needed to be transported from the Facility to the local Hospital. Grievant and Officer P went to the Housing Unit and observed the Inmate. The Inmate had three intravenous lines in his hand. Grievant concluded that putting handcuffs on the Inmate might have pulled or rubbed against the lines and pulled the lines out of the offender's arms. Grievant believed this might have caused danger to the Inmate. Grievant instructed Officer P 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. Officer P placed the Inmate in leg irons but did not place handcuffs or flex cuffs on the Inmate. Officer P placed the Inmate in an ambulance and entered the vehicle. Grievant entered the vehicle as well. They traveled from the Housing Unit to the sally port in order to exit the Facility. At the sally port, Grievant did not ensure that the Inmate had handcuffs on. Officer P and the Inmate left the Facility and travelled to the Hospital. At the hospital, Officer P did not place the Inmate in hand 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."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

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

Operating Procedure 411.1 governs Offender Transportation. Section VII provides:

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)(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.

Grievant acted contrary to DOC Operating Procedure 411.1(VII)(J) and XV(A)(8)(b) because he modified the restraint requirement for the Inmate without obtaining approval from the Unit Head or Administrative Duty Officer. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice and that action must be upheld.

Grievant argued that there was no threat to public safety and that the medical condition of the Inmate justified his actions to minimize the risk of injury to the Inmate. Grievant's arguments fail because the Agency does not need to show a risk to public safety in order to justify issuing a Group I Written Notice. Although it appears that Grievant's decision not to place handcuffs on the Inmate was likely appropriate given the Inmate's medical condition, responsibility for making that decision was reserved to the Unit Head or Administrative Duty Officer and not to Grievant. Grievant should have obtained the permission from the Unit Head or Administrative Duty Officer before instructing Officer P to refrain from handcuffing the Inmate.

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-

⁷ Va. Code § 2.2-3005.

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.

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.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.