

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 12/04/13;
Decision Issued: 12/12/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10214; Outcome: No Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10214

Hearing Date: December 4, 2013
Decision Issued: December 12, 2013

PROCEDURAL HISTORY

On January 7, 2013, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On January 25, 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 18, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 4, 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. Grievant has been employed by the Agency for approximately 26 years. 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.¹

Facility managers followed their customary practice to inform staff of the memo by having supervisors read the memo to Corrections Officers during roll call at the beginning of their shifts. Grievant was one of the employees being advised of the change in the Facility's practice as described in the October 3, 2012 memorandum.

¹ Agency Exhibit 5.

The main door is often left open when the Facility has “controlled movement” meaning that two corrections officers are involved in moving groups of inmates from one portion of the Facility to another area. When there is no controlled movement, the door is to be left closed and secured.

On October 14, 2012, Grievant let another corrections officer into the wing and left the main door to the Housing Unit open. Approximately 20 seconds later, the Assistant Warden walked into the wing and realized that the door was left open inappropriately.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁵ 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.

Grievant was instructed that the main doors to the Housing Unit should remain locked. On October 14, 2012, Grievant left the main doors to the Housing Unit open and unlocked thereby acting contrary to the instruction. Grievant’s behavior was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the Assistant Warden counseled him regarding leaving the door open but the Warden later chose to take disciplinary action. Grievant did not present any policy that would prohibit the Agency from both counseling and taking disciplinary action against him. The Agency was free to both counsel and take disciplinary action against Grievant.

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Grievant pointed out that the Agency failed to timely process his grievance through the Step Process. The evidence showed that the Third Step Respondent issued his decision to uphold the disciplinary action on March 7, 2013. The paperwork “got lost” in the Regional Office but when it was returned to Grievant’s Facility, the Agency referred the matter for hearing. Although it is clear the Agency should have processed the grievance on a more timely basis, the Agency’s failure to do so does not provide a basis to reduce or eliminate the disciplinary action. The length of the delay was not to such a degree that witness recollection might have been affected or otherwise prevented the Hearing Officer from determining the facts of this case. Grievant also argued that the First Step Respondent should have been a Lieutenant instead of a Sergeant. The Agency denied Grievant’s assertion. Grievant was unable to produce a policy indicating that the Lieutenant had to be the First Step Respondent. Grievant’s assertion is unsupported by the evidence.

Grievant argued that there were no adverse consequences to the Agency because no inmates were near the door on October 14, 2012 and that he was standing a few feet away from the door while it was open. This argument fails because it is not necessary for the Agency to show it suffered adverse consequences in order to show inadequate or unsatisfactory job 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”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 disciplinary action was free of improper motive.

Grievant argued that the disciplinary action was too harsh because of his length of service with good performance and because the Assistant Warden counseled him regarding his actions. The Agency mitigated the disciplinary action from a Group II Written Notice to a Group I because the Agency acknowledged the prior practice of leaving the door open and because the Assistant Warden had counseled Grievant. Grievant’s length of service would not otherwise be a basis to mitigate the disciplinary action under the Rules. There is no basis under the Rules to further mitigate the disciplinary action.

⁶ *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 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.