

Issue: Group III Written Notice with Termination (actions which undermine the agency's effectiveness); Hearing Date: 06/24/14; Decision Issued: 07/14/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10282; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 07/29/14; EDR Ruling No. 2015-3953 issued 08/29/14; Outcome: AHO's decision affirmed;** **Administrative Review: DHRM Ruling Request received 07/29/14; DHRM Ruling issued 09/10/14; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10282

Hearing Date: June 24, 2014

Decision Issued: July 14, 2014

PROCEDURAL HISTORY

On January 14, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for actions that undermine the effectiveness of the Agency.

On January 27, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 27, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The matter was originally scheduled for April 2, 2014 but was continued at the Hearing Officer's request. On June 24, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 employed Grievant as a Captain at one of its Facilities. The purpose of his position was to "provide security and supervision of adult offenders."¹ He worked sometimes as the Watch Commander at the Facility when other senior managers such as the Warden were not at the Facility. As Watch Commander, Grievant was the highest ranking security employee and in charge of the Facility. Grievant had been employed by the Agency for approximately 17 years.

Grievant's Post Order provided, "[c]ontact your supervisor on any matter not covered in the Post Orders and for clarification of items that may be unclear. Do not guess or assume anything."²

VACORIS is the Agency's electronic database containing information such as reports of events occurring at each prison. It is possible for staff of one prison to read the reports written by staff of another prison. If facility employees enter scandalous or unseemly information into VACORIS and that information is viewed by employees of another facility, employees at the first facility may feel they are at risk of ridicule.

¹ Grievant Exhibit U.

² Agency Exhibit 6.

DOC Operating Procedure 038.1 governs Reporting Serious or Unusual Incidents. An Incident is defined as:

An actual or threatened event or occurrence outside the ordinary routine that involves the life, health, and safety of employees, volunteers, guests, or offenders (incarcerated or under Community supervision), damage to state property, or disrupts or threatens security, good order and discipline of a facility or organizational unit.

Incident Reports (IR) are different from Internal Incident Reports (IIR) under the Agency's practices. An IIR would be written by those observing an incident. A supervisor would take IIRs written by employees and create an Incident Report. The Incident Report along with the IIRs would be included in VACORIS and presented to Agency managers.

Internal Incident Reports are typically entered into VACORIS but the Facility's practice is to allow handwritten IIRs on some occasions.

On Saturday December 14, 2013, Grievant was working at the Facility as the Watch Commander. The Warden was at his home and was not working. Grievant had questions about certain issues so Grievant called the Warden several times at his home.

On Sunday December 15, 2013 at approximately 7:30 a.m. or 8 a.m., the Offender was being escorted from his Housing Unit through the Breezeway and into the Medical Waiting Area. The Offender claimed to have had a seizure and needed medical assistance. The Offender was seated in a wheelchair and wearing restraints.³ The Lieutenant, Sergeant I, and the Officer were escorting the Offender. They entered the Medical Waiting Area.

Grievant was making rounds in the Medical Unit and was accompanied by Sergeant T as they exited the Medical Unit and entered the Medical Waiting Area and met the Offender as well as the employees escorting him. Officer W was inside the Medical Unit initially but he also entered the Medical Unit Waiting Area with Grievant.

Several nursing employees of the Medical Unit walked through the Medical Unit Waiting Area and into the Breezeway. As the employees passed through the Medical Unit Waiting Area, the Offender spoke to them in an offensive manner. He was not otherwise disruptive.

Grievant wanted to discern the Offender's problems or concerns and asked the Offender "What's going on?" Grievant put his hand on the Offender's shoulder. The Offender put his head down and did not answer Grievant. Officer W did not like the fact

³ The Offender did not have difficulty walking but the Agency's practice was to escort inmates to the Medical Unit while seated in a wheel-chair.

that the Offender was not responding to Grievant's questions. Officer W approached the Offender and yelled, "When the Captain asks you a question you better answer!" Officer W began to slap the Offender in the face with the palm of his open hand and the back of his hand. Officer W was slapping the Offender from right to left and from left to right. Officer W slapped the Offender many times, possibly six to eight times.

Grievant told Officer W to stop and moved in a position to block some of Officer W's blows. Officer W hit Grievant as he continued to try to slap the Offender. The Lieutenant initially had his back to Officer W but turned and observed Officer W. He told Officer W to stop. Sergeant T told Officer W to stop.

Officer W stopped hitting the Offender. Grievant instructed Officer W to leave the Medical Unit Waiting Area and go to the Medical Unit Control Room. Officer W remained at the Facility in the Medical Unit Control Room and worked the rest of his shift until 6 p.m.

Officer W's behavior was a simple assault and battery of the Offender. Officer W's behavior was a criminal act and such a conclusion should have been obvious to all of the staff who observed Officer W.

Grievant and some of the other employees moved the Offender into the Medical Unit. Nurse S asked the Offender about his concerns. The Offender said that he had had a seizure. None of the security staff told the medical staff that the Offender had been slapped by Officer W. The nursing staff examined the Officer but without the knowledge that Officer W had slapped the Offender.

Grievant and Lieutenant went to the Watch Commander's office and began to look over the Agency's policies regarding how to report the incident. Grievant looked at DOC Operating Procedure 038.1 and was confused regarding how he was to report Officer W's behavior. He asked for help from the Lieutenant but neither could discern how to properly report the incident. Grievant decided he would not notify the Warden until the following Monday morning when the Warden returned to the Facility.

On December 15, 2013 at 8:49 a.m., the Lieutenant wrote an IIR in VACORIS stating that the Offender said he had had a seizure and was escorted to the Medical Unit for assessment. The Lieutenant wrote that the Offender was returned to his cell after the assessment. The Lieutenant did not write about Officer W assaulting the Offender.

Grievant chose not to report the incident to Ms. S who was working as the Administrative Duty Officer on December 15, 2013. He did not report the incident to her "due to the nature of the incident."⁴

⁴ Agency Exhibit 13.

Grievant left the Facility for the day at approximately 3 p.m. on December 15, 2013.

At approximately 4 p.m. on December 15, 2013, the Offender falsely reported to the LPN that he had been sexually assaulted by Agency employees. Lieutenant M2 ordered that the Offender be taken to the Medical Unit for evaluation as required by the federal Prison Rape Elimination Act. The Offender refused to leave his cell to go to the Medical Unit. The Lieutenant recorded on video tape the Offender's statement that he refused to leave his cell. Lieutenant M2 called Lieutenant M1 who instructed Lieutenant M2 to obtain incident reports from staff. Lieutenant M1 was the Facility Investigator.

On December 15, 2013 at 6:03 p.m., the Lieutenant wrote a second IIR in VACORIS stating that he had not seen anyone sexually assault the Offender. The Lieutenant did not mention Officer W assaulting the Offender.

On December 15, 2013 at 5:39 p.m., Sergeant I wrote an IIR in VACORIS stating that he had not seen anyone sexually assaulting the Offender. Sergeant I did not mention Officer W assaulting the Offender.

On December 15, 2013 at 5:36 p.m., Sergeant T wrote an IIR in VACORIS stating that the Offender was not sexually assaulted. Sergeant T did not mention Officer W assaulting the Offender.

The Officer filed an IIR in VACORIS at 5:50 p.m. and again at 6:07 p.m. on December 15, 2013 indicating that the Offender was not sexually assaulted. The Officer did not disclose that Officer W had slapped the Offender earlier that morning.

On December 16, 2013, the QMHP observed that the Offender's face had become swollen. He contacted Lieutenant M1 at approximately 10:03 a.m. and said that the Offender claimed to have been assaulted by staff. Lieutenant M1 notified the Warden who directed that the Offender be taken to the Medical Unit for evaluations. While waiting for the Offender to arrive at the Medical Unit, Lieutenant M1 called Grievant at his residence and told Grievant that he had received a report of injuries to the Offender and that the Offender had alleged he was assaulted. Lieutenant M1 asked if there was any more information Grievant could give him. Grievant said the Offender had a seizure the day before and had been brought to the Medical Unit.

On December 16, 2013, the Major took a picture of the Offender at approximately 10 or 10:30 a.m. The picture showed the Offender's face and that his face was heavily swollen and bruised. The Offender caused much of the injuries to himself later in the day on December 15, 2013 and after Officer W had hit him.

Between 11 a.m. and noon on December 16, 2013, Grievant called the Facility and spoke with the Warden. Grievant said there was something he needed to talk about with the Warden. Grievant told the Warden of the physical assault on the

Offender by Officer W. The Warden asked why he was just learning about this now. Grievant said he wanted to talk to the Warden personally.

On December 16, 2013 at 1:39 p.m., the Warden sent the Special Investigation Unit Head a picture of the Offender. The Investigator was working at another Facility and was contacted at 2:09 p.m.

At 3:37 p.m. on December 16, 2013, Lieutenant M1 sent the Warden an email stating:

Based on a report from staff, [Offender] was examined by medical and interviewed today at approximately 10:00 a.m. During this interview, the offender alleged that he had been assaulted by staff yesterday morning, just inside the entrance to medical. Subsequent interviews with staff have indicated that [Offender] was assaulted by [Officer W] and was stopped by the other staff present. Incident reports continue to be received from all staff present during this incident. All information, includ[ing] the available video, will be forwarded to SIU as directed.⁵

All of the employees involved in the incident were asked to come to the Facility and fill out internal incident reports.

On December 16, 2013, Grievant wrote a handwritten IIR describing Officer W slapping the Offender. Grievant added, "I take responsibility for failure to report in a timely manner in accordance with policy."⁶

On December 16, 2013, the Lieutenant wrote a handwritten IIR describing Officer W smacking the Offender.

On December 16, 2013, Sergeant I wrote a handwritten IIR describing Officer W smacking the Offender.

On December 16, 2013, Sergeant T wrote a handwritten IIR describing Officer W smacking the Offender.

On December 17, 2013, the Officer wrote a handwritten IIR stating that Officer W smacked the Offender several times on December 15, 2013 at approximately 7:35 a.m.

The Investigator began his interviews of employees knowledgeable of the incident on December 18, 2013.

⁵ Agency Exhibit 4(O).

⁶ Agency Exhibit 4(D).

If Grievant had reported the incident immediately to the Warden, the Warden would have contacted the Special Investigations Unit to have an investigator begin investigation on Sunday. A picture of the Offender could have been taken to document his limited injuries from the assault.

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.”⁷ 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.”⁸ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁹

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

In the Agency’s judgment, Grievant undermined the effectiveness of the Agency. Inmates are in the care and custody of the Department of Corrections. One of its missions is to ensure the safety of offenders. Security staff serve as the tools to prevent abuse of inmates. It is especially serious to the Agency when one of its employees is involved in inmate abuse because that employee has an obligation to prevent inmate abuse. By failing to timely report Officer W’s actions, Grievant undermined the Agency’s ability to decide how best to protect other staff and inmates from Officer W and begin a timely investigation. Officer W’s behavior was so extreme that he may have posed an immediate risk to other employees or inmates. Agency executives should have had the opportunity to address that risk rather than being forced to rely on Grievant’s decision to return Officer W to the Control Room. Grievant’s failure to report the incident immediately to the Warden undermined the Agency’s ability to begin an investigation. The Offender’s physical condition at the time of the assault was less severe than his condition at the time the investigation began on the following day. The delay prevented the Agency from obtaining pictures of the Offender’s actual condition following the assault and having the medical unit staff focus on the injuries resulting

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

⁸ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁹ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

from the assault rather than focusing on injuries that may have arisen from having a seizure.

The Agency's decision to issue Grievant a Group III Written Notice with removal is supported by the evidence. Grievant knew of his obligation to report immediately Officer W's assault to the Warden. He argued that the Agency's policies conflicted regarding how he was to report the incident. When he reviewed the Agency's DOC Operating Procedure 038.1 governing Reporting Serious or Unusual Incidents, he recognized the confusion. Officer W engaged in a simple assault under policy but he also engaged in criminal activity while on duty. Section IV(C)8 states that, "[i]ncidents of employee misconduct (e.g. staff criminal activity while on duty ...) should **not** be entered into VACORIS unless the incident involves employee sexual misconduct with an offender which will be documented on an Internal Incident Report with PREA checked in the description field." (Emphasis added). Section IV(F)(1) states, however, that simple assaults "shall be recorded on an Internal Incident Report in VACORIS." These provisions of the policy conflict.

Although it is clear that the Agency's policy governing reporting would cause Grievant to question how to report the incident, this confusion does not excuse his failure to contact the Warden immediately. Grievant knew the Warden's telephone number and had called the Warden on the previous day. Grievant's desire to wait until the following day to speak with the Warden rather than further annoying the Warden is untenable. The significance of the incident should have made Grievant realize any delay in reporting would be detrimental to the Agency.

Grievant argued that the Standards of Conduct does not permit the Agency to hold employees of higher rank to a higher standard than employees of a lower rank. This argument fails. The offenses listed in Standards of Conduct are not all-inclusive and the Agency has discretion to elevate disciplinary action based on an employee's position of authority.

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"¹⁰ 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.

¹⁰ *Va. Code § 2.2-3005.*

Grievant presented evidence about Mr. G, a newly hired Institutional Program Manager. In July 2013, Mr. G learned that two officers were fighting each other. Mr. G failed to report the incident to the Warden. When questioned initially, Mr. G lied about what he knew. Eventually Mr. G told the truth to the Warden. Mr. G was given a Group III Written Notice and sought a voluntary demotion. Grievant presented evidence of Sergeant H who in September 2012 was given a Group III with demotion but not removed from employment. Sergeant H observed one inmate attempting to strangle another inmate but failed to report the incident

Grievant contends the disciplinary action should be mitigated based on the inconsistent application of disciplinary action. Grievant was removed for failing to timely report staff abuse of an offender. The other employees were disciplined regarding conflict between two employees and conflict between two inmates. Although the Agency could have removed employees involved in these incidents, it chose not to do so. Grievant was removed from employment and, thus, treated different for his delay in reporting. The Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action with removal for an improper purpose. Agency managers clearly labored extensively regarding what action to take. The Hearing Officer does not believe Grievant was improperly distinguished from other employees with respect to the disciplinary action he received. Simple disparities in disciplinary action are not sufficient to mitigate circumstances in themselves. 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 III Written Notice of disciplinary action with removal 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.¹¹

[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

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.