

Issue: Group III Written Notice with Termination (actions which undermine the agency's effectiveness); Hearing Date: 06/26/14; Decision Issued: 07/16/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10286; Outcome: Partial Relief;
Administrative Review: EDR Ruling Request received 07/29/14; EDR Ruling No. 2015-3958 issued 08/29/14; Outcome: Remanded to AHO: Remand Decision issued 09/15/14; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 07/29/14; DHRM Ruling issued 10/14/14; 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: 10286

Hearing Date: June 26, 2014
Decision Issued: July 16, 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 17, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The matter was originally scheduled for April 4, 2014 but was continued at the Hearing Officer's request. On June 26, 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 Corrections Officer at one of its Facilities. The purpose of his position was "[p]rovide security over adult offenders at the institution and while in transport; supervises their daily activities and observes and records their behavior and movement to ensure their safe and secure confinement."¹ He had been employed by the Agency for approximately four years.

Grievant reported to the Sergeant who reported to the Lieutenant who reported to the Captain. The Captain 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, the Captain was the highest ranking security employee and in charge of the Facility.

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 S.

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, the Captain was working at the Facility as the Watch Commander. The Warden was at his home and was not working. The Captain had questions about certain issues so the Captain 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.² The Lieutenant, Sergeant I, and Grievant were escorting the Offender. They entered the Medical Waiting Area.

The Captain 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 the Captain.

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.

The Captain wanted to discern the Offender's problems or concerns and asked the Offender "What's going on?" The Captain put his hand on the Offender's shoulder. The Offender put his head down and did not answer the Captain. Officer W did not like the fact that the Offender was not responding to the Captain's questions. Officer W approached the Offender and yelled, "When the Captain asks you a question you better

² 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.

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.

The Captain told Officer W to stop and moved in a position to block some of Officer W's blows. Officer W hit the Captain 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. The Captain 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.

The Captain 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.

The Captain and the Lieutenant went to the Watch Commander's office and began to look over the Agency's policies regarding how to report the incident. The Captain 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. The Captain 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.

The Captain 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."³

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

³ Agency Exhibit 13.

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 an 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.

Grievant 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. Grievant 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 the Captain at his residence and told the Captain 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 the Captain could give him. The Captain 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, the Captain called the Facility and spoke with the Warden. The Captain said there was something he needed to talk about with the Warden. The Captain told the Warden of the physical assault on the Offender by Officer W. The Warden asked why he was just learning about this now. The Captain 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.⁴

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, the Captain wrote a handwritten IIR describing Officer W slapping the Offender. The Captain added, "I take responsibility for failure to report in a timely manner in accordance with policy."⁵

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, Grievant 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.

If the Captain 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

⁴ Agency Exhibit 4(O).

⁵ Agency Exhibit 4(D).

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.”⁶ 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.”⁷ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁸

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.

DOC Operating Procedure 038.1(IV)(B) addresses Internal Incident Reports. This section provides:

1. Any DOC employee ... that observes ... an incident affecting the safe, orderly operation of a DOC organizational unit shall report that incident.
 - a. Persons with DOC computer accounts shall submit Internal Incident Reports using VACORIS.
 - b. Volunteers and others without DOC computer accounts shall make a verbal report to responsible DOC staff. If necessary, the verbal report should be documented with a written report containing the required information.

2. Written reports shall be submitted to the Facility Unit Head or designee not later than the **end of the shift** when any of the following occur:
 - a. Discharge of a firearm or other weapon.
 - b. Chemical agents are used to control offenders.
 - c. Force is used to control offenders.
 - d. Offender(s) remain in restraints at the end of the shift. (Emphasis added)

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁹ On December 15, 2013, Officer W used force to compel the Offender into answering the Captain’s questions. Officer W’s actions constituted an incident requiring reporting by anyone observing Officer W’s behavior. Grievant knew from his training that he was expected to report an incident by filing an internal incident report before his shift ended. DOC Operating Procedure 038.1 expressed Grievant’s obligation to file internal incident reports by the end of his shift. Grievant could have filed an IIR in VACORIS or on a handwritten form if he did not feel comfortable or was unsure of whether to file the IIR in VACORIS. On December 15, 2013, Grievant failed to file an internal incident report by the end of his shift thereby acting contrary to DOC policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, it is appropriate for Grievant to be suspended for ten work days.

The Agency argued that Grievant should receive a Group III Written Notice for undermining the effectiveness of the Agency. Had the matter been reported immediately to the Warden, the Agency would have removed Officer W immediately and initiated an investigation immediately.

The Agency has not established that Grievant’s behavior undermined the effectiveness of the Agency. If Grievant had complied with DOC policy and filed an IIR¹⁰, it is not clear that Agency managers would have acted differently or initiated an investigation sooner. Grievant was obligated to file an IIR before the end of his shift at 6 p.m. on December 15, 2013. If he had filed an IIR before the end of his shift that day, the IIR would not have been read by the Warden or anyone else in senior management that day.¹¹ The Captain, Lieutenant and two Sergeants were aware already of the incident. An IIR would not have provided them with any additional notice of the incident. The Captain decided not to report the matter to the Warden until the following day. The Captain left the Facility approximately three hours before the end of Grievant’s shift. Filing an IIR before 6 p.m. on December 15, 2013 would not have changed the Captain’s behavior. No credible evidence was presented to show that Grievant had a duty to recognize that the Captain’s delay was wrong and to contact the Warden directly. Indeed, if Grievant had called the Warden before the Captain called the Warden, Grievant would have undermined the Captain’s authority and possibly

⁹ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

¹⁰ It is not clear from the DOC Policy that more than one IR (as opposed to an IIR) was required to be filed. As the Warden testified, the Captain was the person who would have been obligated to file an IR after receiving the IIRs. The Captain had decided to report the incident to the Warden on the following day.

¹¹ No evidence was presented to show that the AOD likely would have become aware of the IIR and taken action to notify the Warden or begin an investigation.

appeared insubordinate. Grievant's failure to notify the Warden was not inappropriate behavior.¹²

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"¹³ 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 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. The Captain 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. To the extent the examples provided by Grievant constitute mitigating circumstances, they would not be sufficient to lower the disciplinary level below a Group II Written Notice with suspension.

Grievant argued that he reported the incident because the Captain was present during the incident. He argued that he was not told to write an IIR and thought the supervisors would write IIRs. These arguments fail. Grievant was obligated to file a written IIR regardless of whether the Captain, Lieutenant, Sergeant I, and Sergeant T observed the incident. Since Grievant was not told to refrain from filing an IIR, he remained obligated to file an IIR.

Grievant testified that the Captain instructed him not to file a report until the Captain spoke with the Warden. If the Captain made such an instruction and it was a primary factor in Grievant's failure to file an IIR, then surely Grievant would have offered this explanation as soon as his behavior was questioned. Grievant was asked by the

¹² DOC Operating Procedure 038.1 identifies circumstances when a regional administrator must be called by telephone. That obligation appears to be an institutional obligation based on the Attachment to the policy and does not appear rest directly with a lieutenant working at a facility.

¹³ Va. Code § 2.2-3005.

Investigator why he failed to timely file an IIR. He was asked for clarification about his response to the Investigator. In neither case did he say clearly that the Captain instructed him not to file an IIR. The strength of Grievant's defense is weakened by his failure to initially defense his inaction by declaring he was merely following the Captain's instructions.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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 **reduced** to a Group II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency may account for Grievant's ten work day suspension when determining the appropriate back pay.

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.¹⁴

[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

¹⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 10286-R

Reconsideration Decision Issued: September 15, 2014

RECONSIDERATION DECISION

On August 29, 2014, the Office of Employment Dispute Resolution issued Ruling 2015-3956 remanding this matter to the Hearing Officer:

Accordingly, the hearing decision must be remanded to the hearing officer for further consideration of that evidence. Specifically, the hearing officer must include in his remand decision a discussion of the evidence presented by the agency in the Written Notice, and any corresponding testimony, as it relates to how the grievant's actions on December 15 may have undermined the effectiveness of the agency more broadly. In addition, the hearing officer must consider this evidence in light of the provisions of DHRM Policy 1.60, *Standards of Conduct*, which provides that conduct that "undermines the effectiveness" of the agency's activities "in the **judgment** of agency heads or their designees"[footnote omitted] may be appropriately addressed as unacceptable behavior under the provisions of the policy.[footnote omitted]

Contrary to the Ruling, the Hearing Officer considered all of the Agency's arguments, including the wording of the Written Notices issued to the five employees involved in observing Officer W's criminal behavior. The problem with the Agency's arguments is that a party cannot rise above its own evidence and in this case the Agency has not established a basis for removal of any employee other than the Captain.

The Agency's standards of conduct are 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 the Standards of Conduct. The Agency's judgment, however, is not without limitation. The disciplinary action must be consistent with the provisions of the Standards of Conduct and based on the severity of the offense. In this case, the Case No. 10286

disciplinary action consistent with the Standards of Conduct is a Group II for failure to follow policy. The severity of the offense shows it is a Group II offense at most.

The Agency alleged Grievant's failure to report was behavior contributing to a culture of silence that intimidated staff from reporting wrongdoing and ultimately supported criminal and violent behavior. This argument is untenable. The four employees filled out incident reports and, thus, reported the incident. The Agency's assertion that the employees did not report the incident is untrue. The reports they filed contained truthful statements. The behavior at issue is not the failure to report; it is the failure to report timely. The question is why they did not timely report the incident.

The answer is because they were attempting to follow the Captain's direction to delay reporting the incident until such time as directed by the Captain. The Captain wanted to speak with the Warden personally. Corrections employees are expected to comply with the instructions of superior officers and may be disciplined for failing to do so. The Captain did not instruct any employee to refrain from reporting Officer W's behavior. The Captain instructed his subordinate employees to delay reporting Officer W's behavior so that he could report first.

The Agency argued that the four employees failed to timely report the incident because they were contributing to a "culture of silence." No credible evidence was presented to support this allegation. In this case, the Warden testified that he believed the four employees were telling the truth when they explained why they delayed filing incident reports. The four employees asserted that they were respecting their chain of command and did not wish to undermine the Captain's authority as Watch Commander of the Facility. None of the employees had the objective of hiding Officer W's behavior and this conclusion is confirmed by the Warden's testimony.

The Agency did not present any credible evidence showing the employees expressed fear for the consequences that Officer W might suffer.¹⁵ The Agency presented no credible evidence to show that Officer W had a significantly meaningful relationship with any of the employees that they would be willing to jeopardize their careers to protect him. The Agency presented no credible evidence of a culture of silence at the Facility and that the four employees were part of that culture. The Agency presented no credible evidence that other employees were intimidated from reporting future incidents. The Agency presented no credible evidence that the four employees undermined the Agency's Mission to create a safe work environment and Values other than engaging in a Group II offense for failure to timely file incident reports. The Agency presented no credible evidence to show that the Agency's integrity was undermined by the four employees.

¹⁵ Several of the employees wrote that they did not want to be "snitches". This language would suggest that the employees did not wish to report Officer W. The Warden questioned the employees about this language. The employees established, however, that they were concerned about "snitching out" the Captain for failing to timely report the matter. They recognized that the Captain's delay was inappropriate. The Warden testified he believed the employees' explanations. The Warden expressed confidence in his assessment of the employees' truthfulness. There is no credible evidence to show that the employees were attempting to protect Officer W from disciplinary action or criminal prosecution. The Warden testified he did not believe anyone was afraid of "snitching out" Officer W.

The Agency alleged the four employees ignored serious, unethical, illegal and violent behavior. This allegation was not established by the evidence. The four employees did not ignore Officer W's behavior, they failed to timely report that behavior because they felt obligated to comply with the Captain's instructions and did not wish to undermine his authority by disregarding his instruction.

The Agency's assertion that by "failing to report the abuse of the offender, the Grievant was complicit in the crime" is nonsense. The employees who observed Officer W's behavior were not responsible for his behavior and did not engage in a cover up of that behavior regardless of what the Agency may assert.

Simply because something bad happens at a corrections facility is not a justification to begin disciplining employees without consideration as to why they acted or failed to act. In other words, whether there was some impact on an agency is irrelevant unless that impact was caused by the employee receiving disciplinary action.

The behavior of the Captain was materially different from the behavior of the four subordinate employees. The Captain had the duty to notify immediately the Warden of the incident. His failure to do so undermined the Agency's effectiveness and justified issuance of a Group III Written Notice with removal. The Captain's subordinates, however, had no duty to call the Warden. To the extent they had a duty to notify verbally a superior employee, that employee would have been the Captain who was the Watch Commander at the time of the incident. Each of the four employees knew that the Captain was fully aware of the incident and such verbal notification would have been unnecessary. The examples given by the Agency to show its effectiveness was undermined were caused by the Captain failing to notify the Warden immediately after the incident. The examples were not caused by the four employees' failure to file incident reports. The Captain's subordinates should not be punished as if they held the position of Watch Commander.

There is no basis to change the Original Hearing Decision because the Agency has not identified any credible evidence to show that the outcome of that decision should be changed.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer