

Issue: Group III Written Notice with demotion and pay reduction (failure to follow policy); Hearing Date: 07/25/14; Decision Issued: 09/03/14; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10396; Outcome: Partial Relief.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10396
HEARING DATE: July 25, 2014
DECISION ISSUED: September 3, 2014

PROCEDURAL HISTORY

A complaint was made against Grievant based on an event of February 27, 2014 regarding Grievant's misplacement of security keys and restraints. Grievant was issued a Group III Written Notice with demotion and a five percent pay reduction on April 1, 2014 for violation of Operating Procedure 430.3, "Key Control and Locking Devices".¹

A Hearing Officer was appointed on June 16, 2014 and a pre-hearing conference was scheduled on June 25, 2014. During the prehearing conference a Hearing was scheduled for July 25, 2014.

APPEARANCES

Agency advocate
Agency representative as witness
Grievant as witness
Four Grievant's witnesses

ISSUES

- 1) Did Grievant violate Operating Procedure 430.3 by directing his subordinates to store keys in an unauthorized place?
- 2) Should Grievant's Group III discipline be reduced or waived considering similar examples of disparate treatment?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

¹ Agency Exhibit 3

APPLICABLE LAW and POLICY

The Agency relies on its Operating Procedure 430.3 "Key Control and Locking Devices".

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."²

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

On February 2, 2014 Grievant was handed security keys and restraints by his subordinate officers. Grievant instructed one officer to place the items in a drawer in his office. Grievant admitted in his statement that this was not the proper placement for the keys.³ Grievant was assigned to the highest security pod in the facility with offenders who needed segregated from the general population. The office was off limits to offenders. While unlikely, an offender could gain entrance to the office and have time to rummage through a desk drawer. Grievant was aware he was violating a policy. Grievant had 16 ½ years of good service with no prior disciplines. Grievant cooperated with the investigation.

Grievant was issued a Group III disciplinary action with a demotion and a five percent pay decrease.⁴

At hearing, the Agency stressed the high priority needed for the security of facility keys. Agency highlighted the obvious safety hazards misplacement of keys could cause. The Agency emphasized the safety issue was the reason for the Group III action which was mitigated to demotion rather than termination due to Grievant's otherwise good performance of 16 years.

Grievant, while admitting his wrong doing, emphasized his good record. Grievant also discussed the unlikeliness of their being a security breach based on his misplacement of the keys and brought to attention two other security breaches which garnered less severe punishments.

The Grievant's good record was already considered by the Agency in determining Grievant's discipline. It will not be reconsidered by the hearing officer.

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ Agency Exhibit 1

⁴ Agency Exhibit 2

Both length of service and otherwise satisfactory work performance are grounds for mitigation by Agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the Agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the Agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are never relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an Agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charges. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.⁵

The Grievant's security breach was significant.

The Agency has a role as guardian of public and institutional integrity regarding the security of the facility. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers.

The Grievant's discipline was considered in light of that of other employees who had breached security.

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.⁶

Grievant presented two other security breach issues claiming disciplinary action has not been consistently applied in Grievant's case.

In one instance of security breach, a trainee was stationed in the controlled tower alone as the officer in charge believed the trainee had completed training.

⁵ EDR Ruling No. 2007-1518 (October 27, 2009)

⁶ EDR Rules for Conducting Grievance Hearings VI,B.2

The other instance of security breach involved laundry removal. It was explained by the Agency that laundry is taken outside the building. An offender is permitted to assist in this task provided the offender is accompanied by two officers. A lance is thrust into the laundry bins to be certain no offender is attempting to escape by hiding in the bin. Regarding the incident in question, the Agency stated only one officer was present while the offender was outside the facility with access to a potentially lethal weapon.

In the first instance the officer was given counseling. In the second instance the officer was given a Group II discipline. The warden explained the lesser punishments were due to the officer's in question not knowing they had committed an offense. In Grievant's case, grievant knew he was taking an incorrect action.

Grievant was disciplined based on the security risk he caused not on the knowledge or lack of knowledge he had regarding the offense. This hearing officer finds it difficult to believe two other security breaches were lightly punished because the officer was unaware of the policy. Most particularly, permitting an offender to be insufficiently watched in an outside area with access to a potentially lethal weapon is certainly a far greater security risk than the remote possibility a dangerous offender could have access to an office and the time necessary to find misplaced keys.

OPINION

Grievant, by his own admission, did create a security risk in an area of the facility which housed a segregated population of offenders at high risk. Agency disciplining Grievant was appropriate. However, this hearing officer does find sufficient disparate treatment in discipline regarding the Agency's discipline of other security issues to warrant a reduction to similar discipline for Grievant.

DECISION

For the above reasons, Agency's Group III discipline is **reduced** to a Group II discipline. Grievant's salary should be reinstated at the previous level. The Agency is free to place Grievant where Grievant is best suited to perform an adequate job provided his salary is not reduced. No back pay is being awarded as Grievant was adequately paid for the less demanding task he performed during the course of the appeal.

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:

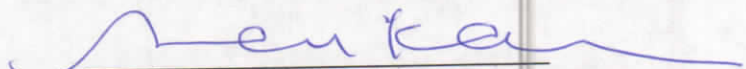
Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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

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


Sondra K. Alan, Hearing Officer

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.