

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 09/30/14; Decision Issued: 10/01/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10448; 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: 10448

Hearing Date: September 30, 2014
Decision Issued: October 1, 2014

PROCEDURAL HISTORY

On June 23, 2014, Grievant was issued a Group II Written Notice of disciplinary action with suspension from June 23, 2014 to June 26, 2014 for failure to follow policy.

On July 18, 2014, 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 August 26, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 30, 2014, 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 Senior at one of its locations. He has been employed by the Agency for approximately seven years. No evidence of prior active disciplinary action was introduced during the hearing.

Inmates at the Facility live in housing units. When family or friends come to visit inmates, the inmates meet with visitors in the visitation room of the Support Building. When inmates leave the housing unit for visitation, they are given a pass by a corrections officer in the housing unit and then escorted from the housing unit to the Support Building. In the back of the Support Building is the shakedown room where inmates are strip-searched and given new clothing to wear into the visitation room. The size of the shakedown room is approximately 23 feet by 6. Once visitation ends, inmates return to the shakedown area and return the clothing they were given to enter the visitation room. They put on their old clothing and leave the Support Building.

On several occasions, Grievant and the Inmate worked in the same area. Grievant believed the Inmate had made statements to other inmates about Grievant. Grievant disliked what he believed the Inmate had said about him.

On June 8, 2014, the Facility was on lockdown. During a lockdown, inmate movement was limited but inmates were permitted to meet with visitors. Grievant was working in the shakedown room of the Support Building. Two other officers were also working in the building. At approximately 9:10 a.m., Grievant called Officer O in the

housing unit and told her to send the Inmate to the Support Building. Grievant said it was not for a visitation. Officer O drafted a trip pass and wrote on the pass that it was not for a visitation. She gave the pass to the Inmate and the Inmate left the housing unit and walked to the Support Building. The Inmate entered the shakedown area where Grievant was located. The doors to the room were closed. Grievant confronted the Inmate about comments the Inmate had made. Grievant demanded that the Inmate “stop saying false statements to offenders because if it [the Inmate’s allegations] was true, then why haven’t you reported it!” The Inmate replied, “well the guys in the laundry [room] said you say I’m a spy and you trying to get me hit up.”¹ Grievant replied, “[Inmate’s last name] keep my name out of your mouth saying false statements before there be issues.” Officer C was present and told the Inmate to stand there and shut up. Officer A was also present.

After the Inmate left the Support Building he walked to the Watch Office and questioned the Lieutenant how he could get out of his cell during a lock down and be threatened by Grievant. The Inmate expressed his concerns to the Lieutenant and told the Lieutenant that he was fearful of harm from Grievant. The Lieutenant later told Agency managers that it was fortunate that Grievant had confronted the Inmate rather than another offender because the Inmate was more passive than other inmates at the Facility.

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

DOC Operating Procedure 130.1 governs Rules of Conduct Government Employees Relationships with Offenders. Section B(7) provides,

Courtesy and Respect – At all times, employees should be respectful, polite, and courteous in their communications and interaction with offenders, as well as with citizens and other employees. Such practices are primarily factors in a healing environment for effectively engaging

¹ “Hit up” means attacked.

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).

others, resolving issues, maintaining order, control, good discipline, and redirecting behavior to a more positive result.

On June 8, 2014, Grievant confronted the Inmate about the Inmate's statements. Grievant was neither courteous nor respectful to the Inmate. Grievant placed the Inmate in a small room with closed doors. Grievant demanded the Inmate stop making false statements about him to other inmates and to keep Grievant's name out of his mouth. The Inmate felt threatened by Grievant and immediately reported Grievant's behavior. The Inmate's concern was reasonable. No valid security reason existed for Grievant to have summonsed the Inmate to the Support Building. Grievant did not call the Inmate to the Support Building for a visitation. Inmate movement was the exception, not the rule when the Facility was on lockdown. 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 employee may be suspended for up to ten workdays. Accordingly, Grievant's suspension from June 23, 2014 to June 26, 2014 must be upheld.

Grievant admitted that with hindsight he could have handled the matter better but denied that the Agency showed he violated any policy. Although it is true that Grievant did not act contrary to his post orders and did not violate a written policy governing inmate movement, the Agency has presented sufficient evidence to show that Grievant was not respectful to 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"⁵ 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 contends the disciplinary action should be mitigated because the Agency inconsistently disciplined employees. For example, Grievant pointed out that the Inmate was not escorted when he left the housing unit to go to the Support Building. He argued that several other employees observed the Inmate not being escorted but they were not disciplined. This argument fails. To establish a defense for the inconsistent application of disciplinary action, an employee must show that he or she is similarly situated to another employee who was not disciplined. Grievant was not disciplined for failing to

⁵ Va. Code § 2.2-3005.

escort an inmate. If a violation of policy occurred when the Inmate was escorted, it has no bearing on whether Grievant should be disciplined for being discourteous and disrespectful to the Inmate. Grievant did not present evidence of the Agency failing to discipline another employee who had confronted an inmate in the manner used by Grievant.

Grievant argued that the Facility failed to separate him from the Inmate following the incident. Whether the Agency properly separated Grievant from the Inmate following the incident has no bearing on whether Grievant intimidated the Inmate. The Agency's reaction to the conflict is not sufficient to excuse Grievant's action towards the Inmate. 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 II Written Notice of disciplinary action with suspension 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.⁶

[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, Esq.

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.