

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 08/07/19; Decision Issued: 08/19/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11355; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 09/05/19; EDR Ruling No. 2020-4981 issued 10/01/19; 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: 11355**

Hearing Date: August 7, 2019  
Decision Issued: August 19, 2019

#### **PROCEDURAL HISTORY**

On November 29, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On January 29, 2019, Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 13, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 7, 2019, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Lieutenant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Under the Agency's count practice, corrections officers counted the number of inmates and then called the Lieutenant to report the number counted. The Lieutenant then entered that information into VACORIS. VACORIS has a census number of inmates. If the total number entered by the Lieutenant did not match the number of inmates VACORIS lists, the Lieutenant was supposed to call the officers and ask them to conduct a second count. If the total count of the second count matched the number of inmates listed in VACORIS, then a third physical count was conducted to corroborate the second count.

On August 6, 2018, Grievant was in charge of taking count at the facility. Corrections officers throughout the facility counted each inmate and then called Grievant to inform her of the count number. Grievant entered the numbers she received from the corrections officers. The numbers Grievant entered into VACORIS differed from the count record that VACORIS showed for the Facility. Grievant did not instruct the corrections officers to conduct a second physical count of inmates and provide her with that information.

Grievant's behavior was discovered and referred for disciplinary action. Grievant was given notice of the referral and a meeting was scheduled for September 14, 2018 with the Assistant Warden. The Assistant Warden has prepared a Written Notice to issue to Grievant. After Grievant explained that the Assistant Warden had not yet presented her mitigating circumstances for consideration, the Assistant Warden shredded the Written Notice.

After considering the mitigating circumstances, the Assistant Warden drafted a Group I Written Notice dated November 29, 2018. The Group I Written Notice was mailed on December 3, 2018 but was sent to an incorrect address.

Grievant met with a human resource employee and when that employee opened Grievant's personnel file, Grievant observed the written notice in her file. She filed a Grievance. The Agency did not deny Grievant's grievance for untimeliness.

### **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."<sup>1</sup> 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."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

Operating Procedure 410.2 governs Count Procedures. Section (IV)(B)(9) provides:

- a. When an in accurate count is made, the count will be recorded in VACORIS as Un-reconciled.
- b. A second count will be completed immediately. If the second count is accurate, the third count must be made to corroborate the accurate count. Each count shall be recorded VACORIS with its start and end times.

"[I]nadequate or unsatisfactory job performance" is a Group I offense.<sup>4</sup> In order to prove inadequate or unsatisfactory job performance, the Agency must establish that

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Counting inmates at the Facility was one of the most important duties for staff to complete properly. A count would reveal if an inmate had died or escaped. Failing to follow count procedures could result in the Agency being unaware of an escaped inmate.

On August 6, 2018, Grievant was in charge of the count procedure at the Facility. She received count information from corrections officers and entered that information into VACORIS. The number of inmates counted did not match the number listed in the VACORIS. Grievant should have ordered a second physical count of inmates by the corrections officers. She failed to order a second physical count thereby making her work performance unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the disciplinary action was too harsh and that she should have received a notice of improvement needed. DOC Operating Procedure 135.2(IV)(C)(6)(b) provides, "While minor performance and behavior problems can be typically resolved through a counseling process as the first level of corrective action, counseling is not a prerequisite to taking formal disciplinary action." The Agency is not obligated to engage in progressive corrective action prior to issuing disciplinary action.

Grievant argued she was not properly trained regarding the count procedures. The Warden spoke with a Captain and Lieutenant who were responsible for training Grievant. Both indicated they properly trained Grievant regarding count procedures. In addition, the procedure Grievant failed to follow is set forth in Operating Procedure 410.2, Count Procedures and that policy was available to Grievant on the Agency's intranet. The Agency has presented sufficient evidence to show that Grievant had adequate training and notice of the proper way to complete a count.

Grievant argued that the Agency did not follow procedural due process because the initial draft of the written notice was issued before Grievant was given the opportunity to present mitigating circumstances. The Agency recognized this mistake and then allowed Grievant to submit mitigating circumstances prior to issuing the written notice before the Hearing Officer. To the extent the Agency may have failed to provide Grievant with procedural due process, the grievance hearing process cures that defect. Grievant had the opportunity to present any witness or defense to the Hearing Officer that the Agency may have failed to consider.

Grievant argued that she failed to order recounts on prior occasions when recounts were necessary and no action was taking against her. It appears that the reason no action was taken against Grievant was because Agency managers were not aware of her prior errors.

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 ....”<sup>5</sup> 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. In light of this standard, 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 I Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance

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<sup>5</sup> Va. Code § 2.2-3005.

with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.