



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11480

Hearing Date: June 24, 2020
Decision Issued: September 14, 2020

PROCEDURAL HISTORY

On November 18, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence and leaving a security post without permission.

On December 17, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 6, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 24, 2020, a hearing was held by audio conference.

APPEARANCES

Grievant
Grievant's Representative
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 employed Grievant as a Corrections Officer at one of its facilities. She had been employed by the Agency for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

The Housing Unit had Pod A and Pod B. To get to Pod A from outside the Housing Unit, an employee would walk through a main entry door into the lobby. From the lobby, the employee would walk through a secured door into an area called the vestibule. From the vestibule, the employee would walk through another secured door into Pod A. The area inside Pod A was called the pod floor. The floor was an open area surrounded by inmate cells. When inmates were not in their cells, they could congregate on the floor.

An employee standing in the lobby could look through a large glass window/wall and see into the floor of Pod A. Not all of the pod floor was visible from the lobby.

When a corrections officer was present on the pod floor, the corrections officer served as a deterrent to bad behavior by inmates. Inmates often waited until a corrections officer left their area before engaging in illegal behavior. Facility managers and supervisors repeatedly informed corrections officers that if the officers were working as a Floor Officer they were to remain on the pod floor during in-pod rec.

The process of a nurse giving inmates their prescribed medication is referred to as “pill pass” or “pill call.” Typically pill pass occurred when inmates were secured in their cells. The Nurse and a corrections officer would walk from one cell the next to dispense medication. Less frequently, pill pass occurred with the Nurse secured in the vestibule (sometimes referred to as a “sally port”) and inmates on the pod floor. Inmates would approach a window and receive their medication.

“Mass movement” is when ten or more inmates are moving from one location to another. During mass movement, an officer assigned to the floor must be on the floor under Facility practice. When a nurse came onto the pod during mass movement, the Floor Officer was supposed to secure the nurse in an interview office or a sergeant’s office until mass movement ended and the inmates were in their cells.

Inmates engaged in “outside rec” when they were outdoors in the Housing Unit yard. When inmates were inside the Housing Unit and on the pod floor and not in their cells, security staff referred to this as “inside rec” or “in-pod rec.” Inside rec was not supposed to take place on Pod A and Pod B at the same time. When inmates were entering the Housing Unit after outside rec, a corrections officer working outside would notify by radio corrections officers inside the Housing Unit that outside rec was over and the inmates were going inside the Housing Unit.

If the Facility was fully staffed, it would have four floor officers and two control booth officers assigned to all of the four pods in the Housing Unit. On August 21, 2019, the Housing Unit was short-staffed.

On August 21, 2019, Grievant was assigned as Floor Officer for the Housing Unit Pod A and Pod B. It was not unusual for a Floor Officer to be assigned to both Pod A and Pod B.

Post Order 82 specifies the duties of the Unit Pod A Floor Officer. Post Order 82 provides:

Maintain control of area through observation coupled with vocal instructions and counseling as expected to correct inappropriate behavior of all offenders. ***

The Floor Officer will assume the Control/Gun Post duties, as outlined in the Control/Gun Officer Post Orders, during the period of In-Pod Recreation. ***

Do not leave your post until you have been relieved or the post is closed by the shift commander or higher authority.

Post Order 81 is the Lower Gun Officer Post and it provides:

The Gun Officer is present to deter and prevent violence by inmates. The Gun Control Officer will use the weapon to prevent assaults, disturbances, inmate fights, and destruction of State property.

At 9:30 a.m., Grievant was in the Sergeant's Office working on the computer. While inmates from Pod A finished outside recreation and were entering the pod, Grievant remained in the Sergeant's Office. In-pod rec began at approximately 10 a.m. The Nurse came to the Housing Unit at approximately 10:10 a.m. At approximately 10:13 a.m., Grievant left the Sergeant's Office and went to escort the Nurse who was doing pill pass. Pill pass usually takes about 45 minutes to one hour to complete.

Lieutenant A was the housing unit commander on August 21, 2019 and was in the watch office.

Once pill pass was over on Pod A, Grievant exited Pod A en route to Pod B to conduct pill pass. Once pill pass was over in Pod B, Grievant escorted the Nurse to lobby of the Housing Unit. The Nurse exited the Housing Unit. Grievant remained in the lobby. The Nurse went to the Medical Unit.

At approximately 10:37 a.m., Inmate 1 was seated on the floor next to a cell. Inmate 2 had a weapon. Inmate 2 approached Inmate 1 and got on top of him and began stabbing him repeatedly. Control Booth Officer M observed Inmate 2's attack. She tried to make an emergency call on the radio but was unable to do so. She gave Inmate 2 two warnings to stop but he continued. She fired the OC spray into the floor. Inmate 2 got off of Inmate 1.

Grievant was in the lobby outside of Pod A. She was speaking to two inmates and looked out the front entry door. The two offenders looked through the glass window/wall and into Pod A. They observed the attack and called to Grievant. Grievant looked through the wall/window and observed two inmates fighting near the control booth area. She was unable to identify the two inmates who were fighting. Grievant used her radio to call a "1033" emergency so that other corrections staff would come to the Housing Unit.

Control Booth Officer M allowed Inmate 1 to exit Pod A. Grievant observed Inmate 1 bleeding from his neck.

Other staff entered the Housing Unit lower lobby and entered Pod A. Grievant and the Lieutenant escorted Inmate 1 to the medical unit. Inmate 1 was treated by medical staff and left the Facility by ambulance. Inmate 1 later died.

The Lieutenant was in charge of the Housing Unit that day. She was in the Watch Commander's Office and not in the Housing Unit at the time of the attack.

The Housing Unit Manager was not at the Housing Unit at the time of the attack. He watched a video of the incident and referred Grievant for disciplinary action. He

concluded, “[i]t is the Floor Officer[‘s] responsibility to be present while offenders are in the pod for in-pod recreation. You failed to properly supervise offenders assigned to your area.”¹

The Housing Unit Manager testified that if the Nurse comes to the Unit while inmates are on the floor, the floor officer can leave the floor to escort the Nurse since the Nurse is a priority. The floor officer should call for assistance from a supervisor, according to the Housing Unit Manager. When Grievant saw that inmates in Pod A and Pod B were out of their cells, she should have called for assistance.

The Agency presented several videos of the incident. A video of the hallway outside of Pod A had a time stamp that was approximately one hour and three minutes later than the time stamps for the videos showing events inside Pod A.

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

Group III offenses include, “[g]ross negligence on the job that results (or could have resulted) in the escape, death, or serious injury of a ward of the State or the death or serious injury of a State employee.”⁵ The Agency’s policy does not define gross negligence. Grievant’s behavior does not meet the standard of negligence as defined by Virginia case law.

Group III offenses include “[l]eaving a security post without permission during working hours.”⁶ At the time of the attack, inmates were out of their cells in Pod A. They were having “in-pod rec.” During in-pod rec, the Floor Officer’s post is supposed to be on the floor of the pod having in-pod rec. Grievant was not on the floor of Pod A at the time of the attack and, thus, was not at her post. She did not have permission to be

¹ Agency Exhibit p. 7.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ DOC Operating Procedure 135.1(V)(E)(2)(o).

⁶ DOC Operating Procedure 135.1(V)(E)(2)(n).

away from her post after the Nurse exited the Housing Unit. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she was escorting the Nurse and that escorting the Nurse was a priority. The evidence showed that at the time of the inmate attack, the Nurse was in the Medical Unit and not with Grievant. The Nurse testified he heard the emergency call while he was in the Medical Unit after finishing pill pass. A video of the Unit lobby shows that Grievant is in the lobby without the Nurse. Grievant was speaking with two inmates in the lobby when the attack occurred in Pod A. It does not appear that Grievant escorted the Nurse to the Housing Unit exit and then immediately began walking to the Pod A floor as she should have. Grievant was not at her post at the time of the attack.

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"⁷ 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 argued that the Facility was short-staffed. If the Housing Unit was fully staffed, it would have had 8 security staff working. Instead, it had only 4 security staff working, including Grievant.

Although it is clear that the Facility was understaffed, it is not clear that Grievant was prohibited from performing her duties because of the understaffing. After the Nurse left the Housing Unit, Grievant could have walked to Pod A and performed her duties as expected. 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**.

⁷ Va. Code § 2.2-3005.

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 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 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 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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.