



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11533

Hearing Date: July 28, 2020
Decision Issued: August 18, 2020

PROCEDURAL HISTORY

On March 24, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence on the job that results or could have resulted in death, escape, or serious injury.

On April 20, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 12, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 28, 2020, a hearing was held by audio conference.

APPEARANCES

Grievant
Grievant's Representative
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. 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 Captain at one of its facilities. Grievant had prior active disciplinary action. He received a Group II Written Notice on June 20, 2019 for failure to follow policy.

When Grievant worked as shift commander, his Job Summary was:

It is the responsibility of this post to directly supervise the security Operations Supervisor and to ensure all essential posts are adequately manned and function properly on shift. Will perform job functions for the shift such as timekeeping, duty rosters and perform other security tasks as assigned by the Chief of Security.¹

Grievant's duties included keeping an accurate duty roster of all security officers. Grievant was responsible for submitting a master roster for a 30 day cycle to be completed in October of each year.

Grievant worked in the Restrictive Housing Unit (RHU). His regular shift began at 5:45 p.m. and ended the following morning. Inmates placed in the RHU were to be

¹ Agency Exhibit p. 80.

checked every 30 minutes by corrections officers to verify the inmates were not in distress. These inmates were at “higher risk” than inmates in the general inmate population. After each check, a corrections officer was supposed to document completion of the check by writing on an Individual Offender Log adjacent to each inmate’s cell.

The Agency conducted a Security Readiness Assessment of the Facility from March 3, 2020 to March 5, 2020. A team of wardens toured the Facility during the day to review the Facility’s operations.

Grievant was reassigned to the day shift from March 3, 2020 to March 5, 2020 to escort the security assessment team. When Grievant was not working as shift commander, his lieutenants were responsible for serving as shift commanders. On March 2, 2020, Lieutenant S was shift commander. On March 3, 2020 and March 4, 2020, Lieutenant H was shift commander.

The Warden testified that there was a floor officer present on March 3, 2020, March 4, 2020, and March 5, 2020.

Lieutenant H testified that Grievant did not “pull” any staff from shifts on March 3, 2020 and March 4, 2020 because Grievant was not present during those shifts.

If assigned corrections officers did not report to work on March 2, 2020, March 3, 2020, and March 4, 2020, the shift commander was responsible for “drafting” other employees to work in the RHU. Grievant did not have this responsibility while he was assigned to escort the Security Readiness Assessment team. If a corrections officer assigned to work in the RHU was “pulled” by the shift commander to work in another part of the Facility, the employee was obligated to comply with that order. Grievant did not “pull” any corrections officers from the RHU from March 2, 2020 through March 5, 2020 because he was not acting as shift commander.

Major R testified that the night shift at the Facility had 23 to 25 assigned staff but only approximately 18 to 23 positions were filled because of staffing shortages. In other words, the Facility was usually short-staffed. He added that there were supposed to be at least four employees working in the RHU.

On March 2, 2020, one sergeant and four corrections officers were assigned to the RHU. The sergeant and three officers were in the RHU at 5:45 p.m.

On March 3, 2020, one sergeant and four corrections officers were assigned to the RHU. The sergeant and four corrections officers were in the RHU at 5:45 p.m.

On March 4, 2020, one sergeant and four corrections officers were assigned to the RHU. The sergeant and four corrections officers were in the RHU at 5:45 p.m.

The Security Readiness Assessment team identified numerous security check sheets that were incomplete for Grievant's Housing Unit. Staff stopped making 30 minute checks during the night shift. For example, on March 2, 2020 at 6 p.m., Lieutenant S was the shift commander. At approximately 12:35 a.m., Officer W exited the RHU. The log book entry read, "didn't make no rounds." At 1 a.m., the log book entry read, "No floor officer." At 1:30 a.m., the log book showed Officer Y entering the RHU. At 3:45 a.m., the log book entry read, "no rounds has been made, no ofc." At 4 a.m., the log book entry read, "No Floor ofc." At 4:15 a.m., the log book entry read, "No floor ofc. for rounds." At 5:30 a.m., the log book entry read, "No floor ofc. do rounds." On March 3, 2020 at 6 p.m., Lieutenant S was the shift commander. At 6:10 p.m., the log book entry reads, "No rounds was made. No floor ofc."

CONCLUSIONS OF POLICY

The Agency alleged:

As shift commander, it is your responsibility to ensure that your shift has: 1) adequate staffing to ensure a safe and efficient operations, and 2) staff is adhering and complying with all operating procedures, rules, and regulations and not taking short cuts. Your failure to make rounds and identify security issues, security breaches, staff failure to follow policy and/or your decision to continuously pull staff from critical posts constitutes gross negligence.²

The Agency did not establish that Grievant failed to ensure adequate staffing. Grievant was responsible for scheduling employees to work in the RHU. He was expected to assign at least four corrections officers to the RHU. Grievant assigned one sergeant and four corrections officers to the RHU at the beginning of the night shift on March 2, 2020, March 3, 2020, and March 4, 2020. He satisfied his obligation with respect to ensuring the night shift had adequate staff.

Grievant was assigned responsibility to escort the security assessment team as the team reviewed the Facility's operations. He performed these duties during the day. He did not serve as shift commander at the beginning of the night shifts on March 2, 2020, March 3, 2020, and March 4, 2020. Because he was not the shift commander at the beginning of those shifts, he was not responsible for "drafting" employees from the prior shift to cover unscheduled absences by oncoming night shift employees. Because he was not shift commander, he was not responsible for moving officers assigned to the RHU to other parts of the Facility to perform other duties. If a shift commander on the night shift decided to move a corrections officer from the RHU to another part of the Facility, Grievant was not consulted and was not aware when the decision was made. He could not stop the shift commander's decision.

² Agency Exhibit p. 3.

The Agency established that corrections officers did not always make 30 minute cell checks in the RHU from March 2, 2020 through the morning of March 5, 2020. Grievant, however, was not involved in the decisions to move corrections officers out of RHU. He was not responsible for the failure of corrections officers consistently to make 30 minute cell checks.

The Agency did not establish that Grievant engaged in gross negligence on the job. The Group III Written Notice must be reversed.

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 **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position, 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. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.