

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 06/08/15; Decision Issued: 06/11/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10596; Outcome: No Relief – Agency Upheld.

Administrative Review: EDR Ruling Request received 06/24/15; EDR Ruling No. 2015-4180 issued 07/17/15; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 06/25/15; DHRM Ruling issued 07/21/15; 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: 10596

Hearing Date: June 8, 2015
Decision Issued: June 11, 2015

PROCEDURAL HISTORY

On January 28, 2015, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for refusal to obey instructions that could result in a weakening of security.

On February 24, 2015, 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 she requested a hearing. On May 4, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 8, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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. 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 at one of its Facilities. She began working for the Agency in 1995. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility had a Farm located several miles from the Main Facility. Grievant worked at the Farm. Her duties included receiving tools, engraving tools, and securing tools in a locked cage at the Farm. Her Post Order required that she "[e]nsure that there are no [breaches] in security, safety, and sanitation."¹

In February 2014, Grievant received tools including ten 10-inch knives, two hex blades, five pairs of scissors, two drill bits, five small files, three T-handle socket wrenches, two flathead screwdrivers, two Phillips head screwdrivers, and a midsize drill bit. She did not have time to engrave the tools and place them in the Farm's inventory prior to an audit by the Security Readiness Assessment Team. She knew that if the Security Readiness Assessment Team found the tools and noted that they had not been engraved, she would get in trouble. Grievant took the tools and hid them in a compartment underneath a cabinet in a staff bathroom. The bathroom was accessible from the staff lounge. Grievant kept the door to the staff lounge locked to prevent inmates from entering the staff lounge. Grievant forgot that she had placed the tools in the staff bathroom so she did not remove them after the audit.

¹ Agency Exhibit 5.

On September 28, 2014, the Agency conducted a search of all areas of the Farm in an attempt to locate inmate contraband. Search team members located the tools where Grievant had left them. When confronted, Grievant admitted her actions.

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

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

In the Agency’s judgment Grievant should receive a Group III Written Notice of disciplinary action because she (1) hid tools in a bathroom cabinet so they would not be detected by an audit team and (2) violated the Agency’s tool policy. The Agency’s judgment is supported by the record. Grievant hid tools in order to avoid detection of her unsatisfactory work performance. This behavior reflects deception which is consistent with the Group III offense of falsification. Upon the issuance of a Group III Written Notice, an employee may be suspended for up to 30 workdays. Grievant’s behavior was also contrary to DOC Operating Procedure 430.2(IV)(B) which provided:

3. All Class A⁵ tools will be stored on a shadow board in a tool room that is located outside the facility security perimeter. ***

4. Class A tools will be issued only to designated employees for specific functions and will be returned to the place of storage upon completion of the project.

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).

⁵ Class A tools would include knives with ten inch blades.

5. All tools shall be accounted for each day and stored in the assigned storage location.

Grievant failed to store the tools properly and account for them daily.⁶ Failure to follow policy is a Group II offense. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, the Agency has presented sufficient to support the issuance of a Group III Written Notice with a five workday suspension.

Grievant argued that she did not create a breach in security because she kept the bathroom door locked and the tools were not accessible to inmates. Grievant's argument is supported by the evidence and, thus, she did not create a breach in security. Grievant, however, failed to comply with policy which is a Group II offense. Grievant's failure to create a security breach means there is no basis to elevate the Group II offense for violating policy to a Group III offense. The Agency, however, also disciplined Grievant for her deceptive behavior which is sufficient to support the issuance of a Group III Written Notice.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁸ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse

⁶ Grievant also received several new tools and failed to engrave them. DOC Operating Procedure 430.3(D) requires that "[a]ll appropriate facility tools will be marked with an identification symbol that will identify the facility and the department to which the tools are assigned."

⁷ Va. Code § 2.2-3005.

⁸ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁹

Grievant argued that the Agency retaliated against her. She engaged in protected activity when she inquired regarding the status of the Agency's investigation of her behavior. Grievant argued that the Warden had already made up his mind to discipline her prior to issuing the disciplinary action. Grievant suffered an adverse employment action because she received disciplinary action. Grievant has not established a connection between the disciplinary action and her protected activity. The Agency took disciplinary action based on Grievant's behavior and not as a pretext for retaliation. Even if the Warden had decided to issue disciplinary action prior to receiving Grievant's response, it would not form a basis to alter the disciplinary action. Grievant had the opportunity to present during the hearing any defenses to the disciplinary action that may have been disregarded by the Warden.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a five work day 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

⁹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.