

Issues: Group III Written Notice with Suspension, Demotion and Pay Reduction (behavior that undermined Agency's effectiveness and security breach); Hearing Date: 08/07/15; Decision Issued: 08/24/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10641; 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: 10641

Hearing Date: August 7, 2015
Decision Issued: August 24, 2015

PROCEDURAL HISTORY

On May 13, 2015, Grievant was issued a Group III Written Notice of disciplinary action for throwing a security badge in a trash can accessible by inmates. He was transferred to another facility, demoted to Lieutenant, and received a five percent disciplinary pay reduction effective May 21, 2015. He also received a five workday suspension.

On June 5, 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 he requested a hearing. On July 8, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 7, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 employed Grievant as a Captain at one of its facilities until his demotion to Lieutenant on May 21, 2015. He sometimes worked as a watch commander in charge of an entire facility. He has a favorable work performance history and is highly-regarded by staff at his former facility. He has been employed by the Agency for approximately 13 years.

Security officers wear a badge on their uniforms. The badge states, "Virginia Department of Corrections" along with a logo patterned after the obverse of the Great Seal of Virginia.

When employees obtain new uniforms, the DOC badge is already sewn on the uniform. The Agency has employees dedicated to the issuance of new uniforms and retrieval of old uniforms.

The Facility has a visitation room where inmates can meet with family members. The visitation room is inside the secured perimeter of the Facility. Inmates entering the visitation room must be searched before and after leaving the room. Some inmates

work inside the visitation room to clean the room. They would have access to the contents of trash cans in the room. Filled trash bags from the trash cans are taken by employees outside of the secured perimeter to be removed from the Facility.

Officer J's mother found a DOC badge in a church parking lot. She gave it to Officer J. The badge was "tattered up" and appeared to have been pulled from a uniform. Officer J brought the badge to the Facility through the secured perimeter with the objective of giving it to Grievant.

On April 12, 2015, Grievant was in the visitation room to conduct briefing for the night shift. Officer J gave the badge to the Sergeant as Officer J was "signing in." The Sergeant told Grievant that the badge was found in a church parking lot and Officer J brought it into the Facility. Grievant held the badge while he conducted the briefing. He told the employees when they find something like this they should always turn it in. After he finished the briefing, he spoke with several staff individually and then left the visitation room. As he was leaving, he threw the badge into the trash can in the visitation room.

Officer W was in the visitation room. He looked into the trash can. He saw four or five pieces of trash underneath a DOC badge. He retrieved the badge and wrapped in a napkin. He gave the badge to the Lieutenant.

When Grievant was later asked about the incident, he admitted throwing the badge into the trash can. He acknowledged it was a mistake.

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

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

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

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.”

The Agency has met its burden of proof to show that Grievant’s behavior rose to the level of a Group III offense. The disciplinary action must be “consistent with the provisions of this procedure based on the severity of the offense.” Under the Agency’s Standards of Conduct Group III offenses include, “[i]ntroducing or attempting to introduce contraband into a facility or to an offender” and “[r]efusal to obey instructions that could result in a weakening of security.” If an inmate possessed a DOC badge, the inmate would be in possession of contraband. The inmate’s possession of a DOC badge would also result in a slight weakening of security. Because both of these concerns rise to the level of a Group III offense, Grievant’s act of discarding a DOC badge and making it accessible to an inmate constitutes a Group III offense. In other words, Grievant’s behavior is consistent with two other items listed as Group III offenses thereby justifying the Agency’s decision to issue a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may transfer, demote, suspend, and impose a disciplinary pay reduction as the Agency did in this case.

This case is close. The level of discipline appears excessive. The Hearing Officer, however, is not a “super-personnel officer” who can substitute his preferred level of discipline for that of the Agency once the Agency has met its burden of proof. The Agency alleged that if an inmate retrieved the badge, he could have used the badge for escape. The likelihood that an inmate with a DOC badge would also obtain a uniform, DOC identification card and be able to fool corrections officers at approximately six gates seems highly unlikely. Nevertheless, an inmate in possession of a DOC badge would constitute a weakening of security.

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”⁴ 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.

⁴ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension, transfer, demotion, and disciplinary pay reduction 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.