

Issue: Group III Written Notice with Termination (action that undermined security);
Hearing Date: 09/15/15; Decision Issued: 09/16/15; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10666; 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: 10666

Hearing Date: September 15, 2015
Decision Issued: September 16, 2015

PROCEDURAL HISTORY

On July 1, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for an act that undermined security.

On July 2, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 11, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 15, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency 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 Corrections Officer at one of its facilities. Her responsibilities included supervising inmates transported from a facility to a hospital. No evidence of prior active disciplinary action was introduced during the hearing.

On June 26, 2015, Grievant and Officer W were responsible for supervising an Inmate who was at the Hospital for treatment. They were located inside the Inmate's room. The Inmate was lying on his back in his bed. His legs were shackled but his arms were not in handcuffs. He was not secured to the bed. A chair was located towards the Inmate's head and to his right side. A window was located towards the foot of the Inmate's bed and to the Inmate's left.

Grievant was assigned a duty belt with pouches and a holster to secure a handgun. Grievant was also assigned a gun and magazines holding bullets for the gun. She was supposed to wear the duty belt at all times when supervising inmates in the hospital. Grievant wore the duty belt with the handgun in the holster for several hours as she supervised the Inmate on June 26, 2015. The holster rubbed into the side of her body and she became uncomfortable as she sat in the chair next to the head of the Inmate's bed. While Officer W was taking a break away from the room, Grievant removed her duty belt but left the handgun in the holster. She placed the duty belt on the floor near the Inmate. The gun remained loaded. Grievant stood up from the chair and walked around the foot of the Inmate's bed towards the window. A Nurse came into

the room and observed the duty belt on the floor. The Agency learned of Grievant's actions and reviewed the matter.

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

Operating Procedure 401.1(19) requires employees to:

Keep your weapon holstered, loaded, away and out of view of the offender/public, if possible. Handle your firearm in a safe manner at all times.

Violating safety rules where there is a threat of physical harm is a Group III offense.⁴ Grievant removed her duty belt with the handgun in the holster. The gun was loaded with bullets. If the Inmate had rolled out of the bed, he would have fallen on or near the handgun. Grievant put herself, Officer W, and the public in danger if the Inmate obtained the gun. 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.

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"⁵ 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-

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).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(f).

⁵ Va. Code § 2.2-3005.

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 asserted that she made a mistake and learned from her mistake. She pointed out that she had no prior disciplinary action. Although these considerations may speak well of Grievant, they are not sufficient to mitigate the disciplinary action. 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**.

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.