

Issues: Group II Written Notice (failure to follow policy/instruction), and Termination (due to accumulation); Hearing Date: 10/05/15; Decision Issued: 10/21/15; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 10682; Outcome: No changes – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10682

**Hearing Date: October 05, 2015
Decision Issued: October 21, 2015**

PROCEDURAL HISTORY

On July 29, 2015 Grievant was issued a Group II Written Notice for *Failure to Follow Instructions and/or Policy* (Written Notice Offense Code 13). Based upon the accumulation of disciplinary action, Grievant was removed from employment effective July 29, 2015. The Group II Written Notice provided:

On 6/23/15 [Grievant] was assigned to A-Building Control Room. On two separate occasions, [Grievant] failed to follow written procedures by opening cell doors that were not called for by the SHU Floor Officers and staff were not present at the doors that were opened (attached referral by [Lt.]). Failure to ensure that the proper cell doors are opened places staff and offenders at risk. Based upon this incident, [Grievant] is being issued a Group II Written Notice for failure to follow written procedure.

On August 21, 2015 Grievant timely filed a grievance challenging the Agency's action. The matter was qualified for hearing and, effective September 8, 2015, the Office of Employment Dispute Resolution appointed the undersigned as hearing officer in this matter. Hearing was held at Agency Facility on October 5, 2015.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the Agency 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 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 action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.¹

HEARING

The following appeared at hearing held at Facility on October 5, 2015:

Grievant
Agency Party Designee
Agency Attorney
Witnesses

Exhibits were admitted, *en masse*, by agreement of the parties. Agency's Exhibits consist of one binder of exhibits tabbed 1 through 8. Grievant's exhibits consist of copies of documents offered by Grievant and copies of Daily Duty Rosters Grievant admitted by agreement at hearing.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each of the witnesses, the Hearing Officer makes the following findings of fact:

Grievant has been employed as a Correctional Officer by the Department of Corrections since June 10, 2013.² Grievant has an active Group III Written Notice issued September 15, 2014 for sleeping during work hours.³

On June 23, 2015 Grievant was assigned at Facility as the Building A. Control Room Officer.⁴ Grievant's duties involve, among other matters, electronically opening and closing Segregation Unit cell doors via a control panel in the Building A. Control Room.⁵

Facility Segregation Unit houses offenders removed from the general population due to receiving disciplinary infractions, having suicidal issues, and other serious issues. Offenders are held there for special purpose bed/cell assignments under maximum security regulations and procedures with strict security maintained in the Segregation Unit.⁶

Security regulations and procedures in the Segregation Unit require, among other matters, that offenders be kept separated, offenders be kept fully restrained when outside their cells, only one Segregation Unit cell door be opened at a time, two Correctional Officers be present when a cell door is opened, and Correctional Officers wait until the cell door is close before fully removing the offender's restraints.⁷

Grievant, as the Building A. Control Room Officer, was assigned to a control room which held the control panel for opening and closing Segregation Unit cell doors. The control room

¹ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

² A. Tab 1.

³ A. Tab 3.

⁴ G. Exhibit, Daily Duty Roster.

⁵ A. Tab 6 and testimony.

⁶ A. Tab 6, A. Tab 7, and testimony.

⁷ A. Tab 6, A. Tab 7, and testimony.

afforded him windows for a direct view of the Segregation cells and monitors he could also use to observe Segregation Unit cells.⁸

On June 23, 2015 at approximately 10:39 a.m. Grievant was radioed by a Floor Officer in the Segregation Unit to close Segregation Unit cell #210. However, instead of closing the cell door to cell # 210 as requested, Grievant opened the cell door to a different cell in the Segregation Unit. Grievant opened the door to cell # 201. Grievant was responsible for more than one segregation cell door being opened at a time.

On June 23, 2015 at approximately 11:04 a.m. Grievant was radioed by a Floor Officer in the Segregation Unit to close Segregation Unit cell #223. However, instead of closing the cell door to cell # 223 as requested, Grievant opened the cell door to a different cell in the Segregation Unit. Grievant opened the door to cell # 222. Grievant was responsible for more than one segregation cell door being opened at a time.

CONCLUSIONS OF POLICY

OP 135.1

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: 2/1/14) divide unacceptable behavior 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. 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. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.⁹

Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy is listed in OP 135.1 as an example of a Group II Offense. Normal Discipline for a first Group II offense is issuance of the Group II Written Notice and up to 10 workdays maximum suspension.¹⁰

Post Order 18:

Security Post Order - Post Number 18 sets forth the duties and responsibilities of the Building A. Control Room Officer. This Post Order provides, among other matters, the Control Room Officer is responsible for and is charged with:

- remaining aware of all floor activity
- maintaining control of all cell doors
- coordinating floor movements
- ensuring that only one segregation cell door will be opened at a time
- ensuring there must be two officers present prior to any cell door being opened
- if an offender is restrained, ensuring the offender is not allowed to be in direct contact with offenders not restrained¹¹

OP 425.4

⁸ Testimony.

⁹ A. Tab 8.

¹⁰ A. Tab 8.

¹¹ A. Tab 6.

Operating Procedure 425.4 - Management of Bed and Cell Assignments (“OP 425.4”) provides that offenders should be placed in special housing when their presence in the general population poses an unacceptable risk to the offender, other offenders, institutional staff, or the safe, secure operation of the institution.

OP 425.4 defines “Special Housing” and “Segregation” as follows:

Special Housing - A general term for special purpose bed assignments including segregation, disciplinary segregation, general detention, and pre-hearing detention.

Segregation – Special purpose bed assignments operated under maximum security regulations and procedures, and utilized under proper administrative process, for the personal protection or custodial management of offenders.

This OP requires, whenever a special housing unit offender is outside a secure area, such as a cell, shower, or recreation module, restraints and escort shall be provided in accordance with OP 420.2. Before exiting a Special Housing Unit cell a strip search is required to be conducted on the offender and a frisk search is required after restraints are applied. A frisk search is further required prior to returning an offender to a Special Housing Unit cell.¹²

Active Written Notice:

Grievant has one active Group III Written Notice issued on 9/25/14 for sleeping during work hours.¹³ Group III Written Notices remain “active” for a four year period from the date issued and may be used, while active, in conjunction with other disciplinary actions by the agency as the basis for suspending, transferring, demoting, or terminating an employee. Any subsequent Written Notice issued during the “active” life period of a Group III Written Notice, regardless of level, may result in removal.¹⁴

Segregation Unit:

Offenders in the Segregation Unit were removed from the general population and placed there due to disciplinary infractions, for suicidal issues, and for other serious issues. Strict security is required by written policy for the Segregation Unit which requires, among other matters:

- Offenders in the Segregation Unit are kept separated within the Segregation Unit.
- Segregation offenders are required to be fully restrained outside their cells.
- Only one cell door is to be opened at a time.
- Two Correction Officers be present when any cell door is opened.
- Correctional Officers are to wait until the cell door is closed before fully removing the offender’s restraints.
- Restrained offenders are not to be in contact with non restrained offenders.¹⁵

Grievant’s duty assignment placed him in a control room overlooking the floor in which segregated offenders are held. He had a direct view and had monitors to view the Segregation Unit cells. To open a particular cell door Grievant must press two separate buttons on his control panel, an override button and the cell number button. Prior to opening a Segregation Unit cell door Grievant is required to visually confirm two correctional officers are present outside the cell. Policy

¹² A. Tab 7.

¹³ A. Tab 3.

¹⁴ §VI, B, 3 of the Rules for Conducting Grievance Hearings; A. Tab 8.

¹⁵ A. Tab 6 and A. Tab 8.

also requires that a Floor Officer twice repeat cell numbers for opening or closing to the Control Officer.¹⁶

6/23/15:

On 6/23/15 at about 10:39 a.m. a Floor Officer in the Segregation Unit requested, via radio, that Grievant close the door to cell #210. The cell number was repeated twice. However, Grievant opened the cell door to cell #201. There was no staff present at cell #201 when the cell door was opened and this cell housed an offender on suicidal precautions.

Lt. was on the Segregation Unit floor 6/23/15. Lt. heard officers call out for cell #210 to be closed at the back side of pod. The cell number was repeated twice. Lt. heard a different cell door open behind him and saw the door to cell #201 opening. Lt. called twice on the radio for Grievant to close the door on cell #201 and walked out to the middle of pod floor and waived his hands at the control booth to get Grievant's attention for him to close the cell. The cell door was opened long enough for the offender to move from his bed and approach the door. For a period of time both cell # 210 and cell #201 were open.

Later that same date, at approximately 11:04 a.m., Segregation Unit Floor Officers were returning an offender from the shower to his cell and requested, via radio, Grievant close cell #223 in order to fully remove the offender's restraints but Grievant opened the door to cell #222. One of the two Floor Officers got on the radio and requested the open door on cell #222 be closed. For a period of time both cell #223 and cell #222 were open.

Lt. expressed concern in writing to management that Grievant's actions on 6/23/15 violated policy, gave rise to concerns for safety standards, and places others in danger. Lt. had counseled Grievant in the past concerning opening/closing doors and addressed being more prompt in closing doors/opening when requested and, for safety reasons, giving this priority over other matters going on. He also had instructed staff, including Grievant, that they were to get a visual on the cell before opening it to insure two officers were present. Lt. had concerns Grievant failed to get a visual before opening the cell doors.

Concern was expressed Grievant was not paying attention when he both a.) opened cell doors when requested to close cell doors and b.) undertook actions as to different cell numbers than were requested by Floor Officers. Management was concerned that Grievant did not observe the cell door insuring two officers were outside the cell before opening it. Management was further concerned Grievant's actions presented a repeated violation of safety standards and could have placed others in danger.

Grievant:

Grievant does not contest he opened cell # 201 after being requested to close cell #210 and he does not contest he later opened cell #222 when requested to close cell #223. Grievant contends he made honest mistakes and his mistakes were not intentional. He also contends the disciplinary action taken was unwarranted, too severe, other employees have opened cell doors in error and were not disciplined, and he was subjected to unfair, unequal, or misapplication of policy.

Grievant contends other persons have imitated his voice at work and he has jokingly been told to open and close incorrect doors. He also raises there were several times when Floor Officers requested him to access a particular cell door with only one officer present when they knew there are supposed to be two officers present.

¹⁶ Testimony.

Policy:

The evidence indicates that Agency has promulgated *Security Post Order 18 – Building A. Control Room Officer* (“PO 18”). PO 18, among other matters, sets forth in writing requirements and responsibilities for the Segregation Unit and set forth certain requirements and responsibilities for Grievant. Grievant was aware or should have been aware of Post Order 18 which provides for maximum security requirements and procedures in the Segregation Unit. Grievant had access to PO 18, he was required to read the Post Order, required to check with his supervisor if there are any questions, and required to sign that he had read and understood the Post Order.¹⁷

Intent:

Grievant indicated his actions were not intentional.¹⁸ Agency is not required in this case to prove Grievant failed to follow written policy intentionally or that he opened wrong cell doors intentionally. The subjective intent of Grievant is not an element which is required to be proved by the Agency in this case for the offense of failure to follow written policy.

Grievant was aware of the higher risks involved in the Segregation Unit and the higher security requirements imposed by written policy due to the nature of the offenders housed there. On two separate instances during his shift Grievant not only opened a cell when requested to close a cell door but also opened a cell different than the cell number called in twice by the Floor Officer to be closed. In each of the two incidents Grievant’s actions raised a potential for injury and resulted in more than one segregation cell being opened at a time.

Other matters:

Grievant raised concern about staff purposefully attempting to confuse him. He also indicated, “During these situations and many times in the past, [C/O] has jokingly told me to open and close incorrect doors.”¹⁹ However, there is insufficient evidence admitted to find Grievant was asked, jokingly or intentionally, to open a wrong cell door either at the time of the 6/23/15 incidents or at any other time. There was no testimony or evidence, other than Grievant’s contention, that Grievant or any other Correctional Officer was intentionally asked to open the wrong cell door or asked, as a joke, to open the wrong cell door.

Lt. was on the Segregation Unit and did not hear any joking on the radio on 6/23/15 or hear anyone saying anything on the radio to confuse Grievant. He had not heard anything regarding joking about opening doors.

Grievant raised that his voice was imitated at work and evidence was presented that his voice has been imitated at work by another employee. One witness testified he had heard someone imitate Grievant one time about five or six months prior to his testimony who asked him to call operations. However, when he called operation they didn’t know anything. This witness was not aware of any joking regarding security or opening cell doors and there was no evidence indicating any imitation of Grievant’s voice on 6/23/15.

Grievant contends there were several instances where Floor Officers requested him to access a particular door with only one officer present when they knew there are supposed to be two officers present. However, there is no evidence presented in support of this contention or of the allegations’ relation to the events giving rise to the Group II Written Notice.

¹⁷ Testimony Warden.

¹⁸ G. Ex.

¹⁹ G. Ex. Letter of 7/17/15.

Unfair, unequal, or misapplication:

Grievant raised he was unfairly disciplined and stated, "The mistakes that I were fired over, are mistakes that happen every day in the [facilities], with much less severe consequences."²⁰

Evidence was presented that Lt. was aware of incidents where a cell door was opened in error in Segregation. He was not the supervisor for the individuals involved but was aware disciplinary action was taken in those incidents. He was not aware what disciplinary action was taken as he was not involved with the disciplinary process in those incidents.

One witness testified to having opened a wrong cell door and testified he was not disciplined for his action. However, the evidence indicates the circumstances and facts as to this incident differ significantly from the facts and circumstances in the present case.

Grievant was twice requested to close a cell door in the Segregation Unit but on each occasion opened a different cell door instead of closing the cell door requested. The witness testified he opened a wrong cell that was in a general population pod. His actions did not involve matters within the Segregation Unit. The security requirements for the Segregation Unit set out in policy differ from the security requirements in the general population pod. The witness testified to having once opened a wrong cell door during pill pass in a general population pod. Testimony indicated that in the general population pod offenders were allowed to exit their cells without restraints, there was no requirement that two officers be present when the cell door is opened, and there is no requirement that offenders be kept separate from other offenders. There was no evidence that there was a requirement for only one cell door to be open at a time in the general population pod.

To find unfair, unequal, or misapplication of policy it is necessary to determine whether management violated a mandatory provision of policy, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. In this case there is no evidence that management violated a mandatory provision of policy. Furthermore, facts and circumstances in Grievant's case are different than the facts and circumstances concerning the officer who opened an incorrect cell and did not receive discipline. While evidence indicated other incidents of opening the wrong cell in Segregation Unit were known to have occurred, the evidence indicated that disciplinary action was taken for such actions. No evidence was presented to indicate what that discipline was or if the discipline differed from discipline issued to Grievant. Upon review of the totality of the evidence, there is insufficient evidence to find the challenged action was so unfair as to amount to a disregard of the intent of the applicable policy.

There is there is insufficient evidence to find unfair/unequal/misapplication of policy.

Mitigation:

In the decision to issue a Group II Written Notice Agency took into consideration Grievant's actions on 6/23/15, written policy, the safety and security of offenders and employees in the Segregation Unit, Grievant's having received two substandards, his having an active Group III Written Notice, and his having been employed by Agency since 6/10/13.

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency

²⁰ G. Ex.

in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1.

The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense). If the agency does not prevail as to any of the elements (i) through (iii) above, the disciplinary action should not be upheld. If the agency prevails on all three elements, the hearing officer must then consider whether the grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances. Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

Upon review of the evidence in this case, and for the reasons stated above, it is found that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy. Furthermore, the Hearing Officer has reviewed the record evidence to determine if the discipline exceeds the limits of reasonableness. In this matter, Agency issued one Group II Written Notice addressing the two instances of failure to follow written policy. Grievant had just over a 2 year length of employment with Agency (employed 6/10/13 and terminated from employment 7/29/15) and during that period the evidence indicates Grievant received two substandards (10/28/14 for misconduct and 3/25/15 for failure to report an incident to supervisor) and one Group III Written Notice which is active.²¹ Grievant was aware of Post Order 18 and its written requirements. He was aware of the nature of the Segregation Unit and the special safety and security requirements for matters within the Segregation Unit. Taking into consideration the totality of the evidence, Grievant's discipline is not found to exceed the limits of reasonableness.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

²¹ A. Tab 4 and testimony.

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the Agency's issuance to Grievant of a Group II Written Notice with termination on account of accumulated discipline is **upheld**.

APPEAL RIGHTS

As the *Grievance Procedure Manual* (effective date: July 1, 2012) sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to: Grievant
Agency Attorney
EDR