

Issue: Group III Written Notice with Suspension (attempting to bring contraband into facility); Hearing Date: 09/22/16; Decision Issued: 10/12/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10858; Outcome: Partial Relief;
Administrative Review: EDR Ruling Request received 10/27/16; EDR Ruling No. 2017-4439 issued 11/29/16; Outcome: Remanded to AHO for clarification; Remand Decision issued 01/03/17; Outcome: Original decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10858

Hearing Date: September 22, 2016
Decision Issued: October 12, 2016

PROCEDURAL HISTORY

On June 20, 2016, Grievant was issued a Group III Written Notice of disciplinary action with a 30 calendar day suspension for introducing or attempting to introduce contraband into the facility.

On June 27, 2016, 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 August 23, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 22, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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. 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 Trainer/Instructor II at one of its facilities. He began working for the Agency in March 2013. Grievant taught electrician skills to inmates. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had dental surgery in March 2015 and June 2015. He received prescription medication consisting of Amoxicillin and Penicillin. He took Advil to relieve pain in lieu of prescription medication. Grievant purchased Advil in a large container of 250 or 500 pills. His practice was to remove the Advil from the large container and place it in an empty prescription bottle so he could carry it with him.

In March and June 2015, Grievant took his prescribed medication into the Facility and an Advil in his wife's empty prescription bottle. He passed through the Agency's security gate at the Facility's sally port. A Corrections Officer searched Grievant and reviewed the contents of his belongings. The Corrections Officer permitted him to enter the Agency's secured area so he could go to his work area.

Grievant worked at a desk in the Building which is inside the Facility's secured (fenced) perimeter. Grievant's desk had an approximately six inch thick red line drawn on the floor around his desk. The red line indicated that it was a restricted area that inmates could not cross. If an offender crossed the red line, the offender could be charged with an inmate offense. If Grievant was not in the room looking towards his desk, an inmate could open his desk drawer and obtain items inside the drawer.

On May 3, 2016, the Agency's strikeforce team conducted a search of the Facility. They searched Grievant's classroom including his desk. The desk drawer was not locked. They opened the desk drawer and observed three prescription bottles.

The first prescription bottle had a label showing Grievant's name, a date filled of June 16, 2015 and the medicine of Penicillin. It showed a discard date of October 13, 2015. The label read, "Take 1 Tablet by Mouth Four Times A Day Until Finished. Start This One Day Prior to Surgery. Inside the bottle were four Penicillin pills.

The second bottle was empty but showed a label with the name of Grievant's wife but the name was marked over with a black marker. The label showed the bottle was for an anti-depressant medicine. The bottle showed the pills were to be discarded after August 6, 2015. When Grievant brought the bottle into the Facility, he had an Advil inside the bottle.¹

The third bottle was empty and had a label showing Grievant's name, a date filled of March 22, 2015 and the medicine of Amoxicillin. The bottle showed a discard date of March 22, 2016.

Grievant knew the strikeforce search was scheduled to take place. He did not remove the pill bottles because he had forgotten he placed them in his desk. He had been through other strikeforce searches without the strikeforce teams locating or objecting to the pill bottles.

The Facility has a vending machine for employees allowing them to purchase pain relievers in individual packets.

Offenders at the Facility are allowed to have their own prescribed medicine with them as long as it is "on their person."

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

¹ The Agency argued that Grievant acted contrary to law by placing Advil in a bottle for a prescription medication. Grievant was not disciplined for doing so and the Agency did not establish the nature of the alleged criminal offense.

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

“Introducing or attempting to introduce contraband into a facility or to an offender” is a Group III offense.⁵

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁶

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁷ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Under the Agency’s Employee, Vendor, and Offender Searches policy, contraband is “[a]n item forbidden for entry, possession, or removal from a Department of Corrections facility.”⁸ Employees, however, are allowed to bring into the Facility:

- 1-day dose of prescription medication. Prescription med container must be clearly marked with the employee’s name and prescription sheet or bottle
- 1-day dose of OTC meds. Should be in small individual packet.⁹

In 2015, Grievant brought Penicillin into the Facility to take as part of his treatment following dental surgery. He failed to remove those pills and left them in his unlocked desk drawer. An inmate could have accessed the medication and then misused or sold the medication inside the Facility. An inmate also could have read the prescription bottle to access some of Grievant’s personal medical information such as the type of medication he was taking and the identity of his doctor. Grievant’s failure to

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ Virginia Department of Corrections Operating Procedure 135.1(D)(2)(hh).

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

⁸ Virginia Department of Corrections Operating Procedure 445.1(III).

⁹ Virginia Department of Corrections Operating Procedure 445.1, Attachment 2.

remove the medication and bottle was unsatisfactory work performance, a Group I offense.

The Agency argued that Grievant's possession of the four Penicillin tablets showed he Grievant introduced or attempted to introduce contraband into the Facility. At the time Grievant brought the Penicillin into the Facility, it was not contraband. The pills were not forbidden for entry, possession, or removal from the Facility. He was permitted to bring a container clearly marked with his name and prescription along with one day's dose. A day's does was four pills. The Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice.

Grievant brought an Advil into the Facility in a container that originally held many pills for his wife. The Advil was not in a small individual packet as required by policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. The Agency suspended Grievant for 30 calendar days. The Hearing Officer will utilize calendar days instead of workdays to measure the period of suspension. A period of ten calendar days would amount to eight work days in Grievant's case. Accordingly, Grievant shall be suspended for eight work days.

In 2015, Grievant brought Amoxicillin inside a container showing his name and prescription. At the time he brought the bottle into the Facility, it was not contraband. No evidence was presented to show that the bottle contained more than a one day dose. An inmate could have read the prescription bottle to access some of Grievant's personal medical information such as the type of medication he was taking and the identity of his doctor. Grievant's failure to remove the bottle was unsatisfactory work performance, a Group I offense.

Grievant argued that the inmates did not have access to the medication because of the line drawn around his desk indicated his desk was a restricted area. The difficulty with his argument is that if an inmate accessed Grievant's desk and Grievant did not know about it, he would believe his desk had not been accessed. Grievant's work performance was unsatisfactory because of the risk he created that inmates may find the pills and bottles regardless of whether such access actually occurred.

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"¹⁰ 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

¹⁰ *Va. Code § 2.2-3005.*

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 further 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 a 30 calendar day suspension is **reduced** to a Group II Written Notice with an eight work day suspension. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.¹¹

[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

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case No: 10858-R

Reconsideration Decision Issued: January 3, 2017

RECONSIDERATION DECISION

On November 29, 2016, the Office of Employment Dispute Resolution issued Ruling Number 2017-4439 remanding this matter to the Hearing Officer to consider:

1. Whether the Penicillin was contraband because it was not removed from Grievant's desk.
2. Whether the Wife's prescription bottle was contraband.

Under the Agency's Employee, Vendor, and Offender Searches policy, contraband is "[a]n item forbidden for entry, possession, or removal from a Department of Corrections facility."¹²

The Agency alleged that the Penicillin pills became contraband when Grievant failed to remove them from his desk. This argument is without merit. Nothing in the Agency's policy addresses transformation or transmutation of non-contraband items into contraband. The pills were not forbidden for entry. The pills were not forbidden for possession. The pills were not forbidden from removal. The fact that some witnesses testified the pills became contraband when not removed from the Facility shows they did not understand the Agency's policy. Even if the Hearing Officer were to adopt such a nonsensical argument, the Agency's Standards of Conduct would not support issuance of a Group III Written Notice. DOC Operating Procedure 135.1 addresses "[i]ntroducing or attempting to introduce contraband into a facility or to an offender." The transformation of pills from non-contraband to contraband would not involve the act of introducing or attempting to introduce contraband.

¹² Virginia Department of Corrections Operating Procedure 445.1(III).

The Agency alleged that the Wife's prescription bottle itself was contraband. It is not appropriate to consider the bottle without considering its contents at the time it was brought into the Facility. The purpose of the bottle was to carry over-the-counter medication. Grievant was authorized to bring OTC medication into the Facility and to do so using a container. Grievant used the wrong container to bring the medication into the Facility which is a Group II offense, not a Group III offense.

Even if the Hearing Officer were to conclude that the Wife's prescription bottle itself was contraband, mitigating circumstances would justify reduction of the disciplinary action from a Group III offense. Corrections Officers were stationed at the Agency's Front Entry for the primary purpose of ensuring employees did not bring contraband into the secured perimeter. Grievant made no attempt to conceal the items he was bringing into the Facility. The corrections officers working at the Front Entry should have recognized that the Wife's prescription bottle was not permitted into the Secured Perimeter if it was indeed contraband. These corrections officers most likely recognized the Wife's prescription bottle for what it was – a container for OTC medication that was permitted inside the Secured Perimeter.

The Original Decision correctly applied the facts of this case to the Agency's policies and will not be revised.

APPEAL RIGHTS

A hearing officer's original 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 DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer