



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11699

Hearing Date: September 24, 2021
Decision Issued: October 14, 2021

PROCEDURAL HISTORY

On October 26, 2020, Grievant was issued a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for failure to follow safety rules.

On November 16, 2020, 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 June 1, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Sergeant until his demotion to Corrections Officer. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility was located approximately a 30-minute drive from the Hospital. Transportation Officers were only permitted to transport inmates using security vans. Security vans had screens between the front and back seats. They had lockable compartments that could be used to store weapons and ammunition.

The Inmate was in the Hospital. Two corrections officers were with the Inmate. They had a security van that could be used to transport inmates.

Grievant and the Corrections Officer drove in a non-security van from the Facility to the Hospital and arrived at approximately 7:30 a.m. The Corrections Officer reminded Grievant to switch keys with the two corrections officers so Grievant and the Corrections Officer would have a security van to transport the Inmate back to the Facility.

Grievant and the Corrections Officer relieved the two corrections officers of their posts and assumed responsibility for the Inmate. Grievant learned that the Inmate was to be returned to the Facility. Grievant failed to switch keys with one of the outgoing corrections officers. The two corrections officers left the Hospital in the security van leaving Grievant and the Corrections Officer with a non-security van.

Grievant and the Corrections Officer remained at the Hospital with the Inmate. They searched the Inmate. The Corrections Officer placed the Inmate in a wheelchair since the Inmate could not walk. The non-security van was not equipped to handle a wheelchair. The Corrections Officer took the magazine out of his handgun and gave it to Grievant to hold. Grievant placed the magazine in his pocket. The Corrections Officer lifted the Inmate into the van. The Corrections Officer sat in the back seat next to the Inmate.

The non-security van did not have a locked compartment in which to place the magazine. It did not have a screen between the front and back seats to prohibit an inmate from reaching into the front of the van.

Grievant drove the van to the Facility.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group III offenses include, “Violating safety rules where there is a threat of physical harm.”²

Operating Procedure 411.1 governs Offender Transportation. Section II(A) describes Transportation Vehicle Requirements to include:

Secure transportation vehicles used by Institutions may be passenger sedans, vans, and buses with special screening between the offenders and the driver. ***

Weapons locker

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² Operating Procedure 135.1 II(D)(2)(g).

Section II(B)(2)(b) provides, "Offenders should never be seated directly behind the driver in an unsecured vehicle."

Section VIII(C) provides, "Officers directly involved in loading or unloading offenders should not be armed. These officer's weapons should be secured ... in a locked compartment in the vehicle that is inaccessible to offenders."

Section IV(H) provides, "Staff shall not ride in the offender compartment."

Section IX(O)(3) provides, "Officers should not lift offenders (either with their wheelchairs or without their wheelchairs)."

Operating Procedure 411.1 is a safety rule. Grievant violated Operating Procedure 411.1 because he transported an Inmate in a non-security vehicle. He allowed the Corrections Officer to ride in the back seat with the Inmate while Grievant drove the van. Grievant held the Corrections Officer's weapon magazine in his pocket instead of in a locked compartment. Grievant's violated a safety rule and created a threat of physical harm because if the Inmate had been feigning injury, he would have had access to Grievant and his weapon. 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 or in lieu of removal impose a demotion, transfer, and disciplinary pay reduction. Accordingly, Grievant's demotion, transfer, and disciplinary pay reduction must be upheld.

Grievant argued that he spoke with the Captain before leaving the Hospital and told the Captain of the circumstances he faced. He claimed the Captain instructed him to transport the Inmate to the Facility. Neither the Captain nor Grievant testified during the hearing. There is insufficient evidence to uphold Grievant's assertion.

Grievant asserted he was denied due process because the Warden refused to accept his statement. To the extent the Agency denied Grievant procedural due process, that defect is cured by the hearing process. Grievant had the opportunity to present to the Hearing Officer any documents or evidence the Agency failed to consider during the Step Process.

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"³ 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

³ Va. Code § 2.2-3005.

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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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