



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Numbers: 11679 / 11680

Hearing Date: July 20, 2021
Decision Issued: August 6, 2021

PROCEDURAL HISTORY

On November 16, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On February 26, 2021, Grievant was issued a Group III Written Notice with removal for failure/refusal to obey safety rules/instructions that resulted in weakening of security.

Grievant timely filed grievances to challenge the Agency's actions. On March 22, 2021, the Officer of Employment Dispute Resolution issued Ruling 2021-5234 consolidating the two grievances for hearing. On April 5, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 20, 2021, a hearing was held by remote conference. Grievant did not participate in the hearing. He sought a continuance but did not provide a reason sufficient to establish just cause to grant the request.

APPEARANCES

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 Lieutenant at one of its facilities. Grievant had prior active disciplinary action. On March 23, 2020, Grievant received a Group I Written Notice for unsatisfactory job performance.

Cell doors at the Facility malfunctioned. Inmates were able to open the doors after the doors had been locked by staff. The Agency installed padlocks on the outside of each cell door. Grievant was expected to keep the padlocks locked except when inmates were exiting or entering their cells.

Grievant was responsible for ensuring operating procedures were followed by staff working at the Facility. When he went to a cell door to let an inmate out, he was to unlock the padlock, instruct the Control Booth Officer to open the door and let the inmate out of the cell. Once the inmate was out of the cell and the door was closed, Grievant was to replace the padlock on the cell. He was to ensure other staff also followed these procedures.

The Warden instructed that beginning on April 14, 2020, only six inmates could be outside of their cells inside the pod at any one time. The Agency adopted this protocol in response to COVID19.

On June 22, 2020, the Chief of Housing and Programs sent staff including Grievant a memo stating:

There should only be 6 cell doors open at a time when the officer is allowing offenders access to the outside recreational area. *** As each offender comes out of the cell, each cell door must be secured with a padlock.¹

On October 19, 2020, Grievant was assigned to work in the Housing Unit. Several cell doors were not secured with padlocks. Approximately 15 inmates were outside of their cells at one time. Grievant knew that more than six inmates were outside of their cells at one time.

On January 4, 2021, Grievant allowed 13 to 15 inmates out of their cells and into the pod. Padlocks were not properly secured in cell doors. This allowed inmates to reenter and exit their cells freely. Grievant knew that more than six inmates were outside of their cells at one time.

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.” 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 behavior of such a serious nature that a first occurrence normally should warrant removal.”²

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.³ Grievant was instructed to keep cell doors padlocked except when allowing inmates to enter or exit their cells. He was also instructed not to let more than six inmates out of their cells onto the pod floor at one time.

Grievant acted contrary to a supervisor’s instruction. On October 19, 2020, Grievant allowed more than six inmates out of their cells at one time. He failed to secure the cells with padlocks once those inmates were out of their cells. The Agency has

¹ Agency Exhibit p. 63.

² See, Virginia Department of Corrections Operating Procedure 135.1.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions. On January 4, 2021, Grievant repeated this behavior thereby justifying the issuance of a second Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

The Agency argued Grievant should receive a Group III Written Notice for failing to follow an instruction that weakened security on January 4, 2021. The Agency did not present sufficient evidence to show that security was weakened. The Agency only showed that Grievant failed to follow instructions. The Group III Written Notice must be reduced to a Group II Written Notice.

Grievant asserted that the policy did not apply to the housing unit in which he was working. The evidence showed the policy applied to his housing unit.

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action on November 16, 2020 is **upheld**. The Agency's issuance on February 26, 2021 of a Group III Written Notice is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

⁴ Va. Code § 2.2-3005.

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]

[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

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