



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11681

Hearing Date: August 3, 2021
Decision Issued: August 23, 2021

PROCEDURAL HISTORY

On December 2, 2020, Grievant was issued a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for failure to obey an instruction that resulted in a weakening of security.¹

On December 23, 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 April 19, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 3, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

¹ The Written Notice does not accurately state the alleged offense. The wording of the Written Notice, however, adequately informed Grievant he was being disciplined for violating a safety rule where there was a threat of physical harm.

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 until his demotion to Sergeant with a transfer and disciplinary pay reduction. He has been employed by the Agency for approximately 19 years. No evidence of prior active disciplinary action was introduced during the hearing.

On November 13, 2020, the Unit Manager called Grievant and instructed Grievant to escort the Inmate from Housing Unit 1 to Housing Unit 3. Housing Unit 3 was a restrictive housing unit. The Unit Manager also sent Grievant an email instructing Grievant to utilize the SRT team because of the Inmate's prior assaultive behavior. It was "common knowledge" among staff that the Inmate had assaulted staff. Grievant asked the SRT Officer with the strike force to provide assistance. The SRT Officer refused to assist with the escort. Lieutenant C assisted Grievant with escorting the Inmate by pushing a cart with the Inmate's property.

The Inmate's left hand was in a bandage. Grievant placed a handcuff on the Inmate's right arm and the other handcuff on the cloth belt loop of the Inmate's jump suit/smock. The Inmate's left arm was not restrained. Grievant did not use waist chains or leg irons to restrain the Inmate. The Inmate did not have "medical documentation" or supervisory approval to be handcuffed contrary to policy.

Grievant, the Inmate, and Lieutenant C walked approximately 50 to 75 feet from Housing Unit 1 to Housing Unit 3.

When the Inmate reached Housing Unit 3, he observed Lieutenant C2, a staff member he did not like. The Inmate became combative and disruptive. The Inmate was instructed to go into one cell and he refused. He broke free of Grievant and went to another cell. The Inmate was able to pull the handcuff from the belt loop freeing his right arm. It also enabled him to swing the handcuff as a weapon. The Inmate fought three security staff as they attempted to restrain him. The Inmate hit Lieutenant C2.

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

Operating Procedure 420.2 governs Use of Restraints and Management of Offender Behavior. Section V(B) states that "Offenders assigned to General Detention or RHU status must be restrained in handcuffs with their hands behind their back whenever the offender is outside the cell or other secured area such as a shower." Section V(B)(c) states, "Some offenders have medical conditions that prevent being restrained with their hands behind their back. With appropriate medical documentation, the Shift Commander or higher authority may authorized restraints in front of such an offender using a waist chain.

"Violating safety rules where there is a threat of physical harm" is a Group III offense.³ Properly restraining an inmate was a safety rule. Grievant failed to properly restrain the Inmate which resulted in physical harm. Grievant's behavior justified the Agency's decision to issue 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 demote, transfer, and impose a disciplinary pay reduction. Accordingly, the Agency's decision to

² See, Virginia Department of Corrections Operating Procedure 135.1.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

issue Grievant a Group III Written Notice with a demotion, transfer, and disciplinary pay reduction must be upheld.

Grievant argued that his employee work profile had been altered. Whether Grievant's EWP had been altered would not affect the outcome of this case since Grievant was disciplined for failing to properly secure an inmate.

Grievant argued that it was not clear the Inmate was assaultive and required full restraints. The evidence showed that it was well known among staff that the Inmate was assaultive and he was being placed in a restrictive housing unit intended for more violent inmates. No policy or training authorized Grievant to attach a handcuff to a cloth belt loop on an inmate's clothing.

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.

Grievant argued that similar incidents occurred and the Agency treated those employees differently from how he was treated. Grievant presented several examples of incidents occurring after he was disciplined. These examples do not show that at the time Grievant's disciplinary action was issued, the Agency inconsistently disciplined employees. Grievant presented two examples prior to the date he received disciplinary action. Grievant presented evidence regarding an incident on November 27, 2020. The incident report presented does not show circumstances similar to Grievant's case because it involved an inmate refusing to remove restraints. Grievant presented evidence of an incident on January 15, 2019 where an Inmate was placed in four point restraints to prevent him from harming himself. When his restraints were removed, a Lieutenant failed to place the restraints back on the Inmate. It is unclear what level of disciplinary action was taken, but the matter was referred to Agency managers with a recommendation of the issuance of a Group III Written Notice. Grievant also received a Group III Written Notice. The Hearing Officer cannot conclude based on this evidence that the Agency inconsistently applied disciplinary action. If two employees receive a Group III Written Notice but only one is demoted that fact alone does not establish that one employee was singled-out for disciplinary action.

⁴ *Va. Code § 2.2-3005.*

The Hearing Officer cannot conclude that at the time the Agency was issuing the Written Notice in this case that the Agency singled-out Grievant for disciplinary action. In light of the standard set 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 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