



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11604

Hearing Date: January 29, 2021
Decision Issued: February 18, 2021

PROCEDURAL HISTORY

On July 28, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On July 31, 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 October 26, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representative
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 employs Grievant as a Lieutenant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On March 23, 2020, Grievant was working as the Shift Commander at the Facility. Her shift began at 5:45 p.m. and ended at 6:15 a.m. the following day. Grievant was in charge of the Facility during her shift. Six officers typically work on the shift but there were only five working on March 23, 2020.

On March 23, 2020, the Inmate attempted suicide and needed to be taken to the Hospital to stay overnight. The Inmate was a Level 1 or Level 2 security inmate. She was placed in "general population" at the time.

Anyone wishing to enter the Facility had to be searched for contraband prior to entering. No one worked at the entry during the night shift. The Facility's practice was that an employee would be called from another post to go to the entry post to conduct the search. On March 23, 2020, Grievant and Officer F entered the Facility without being searched.

The Inmate was placed in restraints. Grievant escorted the Inmate to the Transportation Vehicle by herself. The Inmate was transported to the Hospital by corrections officers.

When the Inmate returned to the Facility, the Inmate was put in a “strip cell” on constant watch. The Inmate was supposed to be placed in a safety smock made of material that the Inmate could not use to harm herself. Constant watch required a Corrections Officer to be close to the Inmate to constantly watch the Inmate and be ready to respond in the event the Inmate attempted to harm herself.

Grievant attempted to locate the smock, but could not find it. The Inmate was given a night gown to wear instead of the smock. When a Corrections Officer was on break, Grievant watched the Inmate on a video monitor in Master Control as she performed her other duties. When the next shift began, another employee quickly found the safety smock in the storage area where Grievant looked but could not find the smock.

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.”¹

The Agency alleged Grievant allowed Officer F to “set up weapons and ammunition for herself.” The Agency has not established that this allegation forms a basis for discipline. The evidence showed that Officer F was behind Grievant and Grievant could not see how Officer F was obtaining her weapons and ammunition. Officer F received her weapon from another employee.

The Agency alleged Grievant and Officer F entered the Facility without being searched. The front entry post was abandoned at the time Grievant and Officer F entered the Facility. For Grievant and Officer F to be searched at front entry, Grievant would have had to call another officer to come to the front entry to complete the search or Grievant could have searched Officer F and Officer F could have searched Grievant. Grievant should have ensured that she and Officer F were searched before entering the Facility. The Agency has not identified the policy provision violated by Grievant. At most, her actions rose to a Group I offense for unsatisfactory performance.

The Agency alleged Grievant escorted the Inmate to the Transportation Vehicle by herself even though policy required two officers to escort the Inmate. The Agency relied

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

on Operating Procedure 410.3 which governs Offender Movement Control. This policy provides, "Corrections Officers will always escort offenders while being moved in restraints." This language is not sufficient to place Grievant on notice that the Inmate had to be escorted by two corrections officers. The sentence focuses on the obligation to escort, not the number of people escorting an offender. The Agency should have written that two officers must escort an offender in order to give employees proper notice of its expectation. This allegation does not form a basis for disciplinary action.

The Agency alleged Grievant failed to have an employee in front of the Inmate watching the Inmate who was on Constant Watch. The Agency has established this allegation. On October 21, 2019, Grievant attended a Call to Order with several other employees. During the meeting, Grievant was instructed that:

Constant watch requires a person to sit in front of the cell and constantly watch the offender while making documentation every 15 minutes.²

In addition, Operating Procedure 730.5 governs MHS Behavioral Management and requires a, "Corrections Officer will physically observe the offender on a continuous and uninterrupted basis and will maintain a clear and unobstructed view of the offender at all times."

Grievant allowed a Corrections Officer watching the Inmate to go on break without being relieved by another officer. In the event the Inmate attempted to injure herself, no one would have been within a close distance to stop the Inmate. Grievant was watching the Inmate by video camera, but was performing other duties. She was not constantly watching the Inmate and she was not in a position to prevent the Inmate from harming herself. Grievant's actions were contrary to the Agency's policy and instruction she received.

Grievant argued that policy did not require an employee to be in front of the Inmate monitoring the Inmate. Grievant argued she only watched the Inmate on the video monitor because she had to let a correction officer take a break. The evidence showed that the Agency's policy and instruction required a corrections officer to be close to the Inmate at all times. Grievant should have had a second officer take over observation duties for the officer going on break.

The Agency alleged Grievant could not find the safety smock in the storage area even though it was easily found by another employee. The evidence showed that Grievant looked for the smock in a messy storage area and was unable to find it. At most, this allegation would rise to a Group I offense for unsatisfactory performance.

Upon consideration of the Agency's allegations, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

² Agency Exhibit p. 90.

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 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 claimed her actions were affected by the Facility’s limited staffing. Grievant was responsible for ensuring proper staffing. To the extent inadequate staffing was a mitigating circumstance, Grievant’s failure to ensure full staffing was an off-setting aggravating circumstance. In light of the standard set forth 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 II Written Notice of disciplinary action 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.

³ Va. Code § 2.2-3005.

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.