

Issue: Group III Written Notice with Suspension (gross negligence on the job);  
Hearing Date: 08/19/16; Decision Issued: 08/24/16; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 10847; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10847**

Hearing Date: August 19, 2016  
Decision Issued: August 24, 2016

#### **PROCEDURAL HISTORY**

On April 11, 2016, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for gross negligence on the job. The Written Notice incorrectly stated his first name. A corrected Written Notice was mailed to Grievant approximately five days later. The issue date remained the same.

On May 9, 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 July 19, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 19, 2016, a hearing was held at the Agency's office.

#### **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. 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 Corrections Officer at one of its Facilities. Grievant's Facility sent offenders into the community to perform civic projects including remodeling buildings. One of Grievant's duties included supervising offenders when the offenders were working outside the Facility.

On January 27, 2016, Grievant attended a Muster at the beginning of his shift. He was reminded, "All work details shall be under direct supervision at all times."<sup>1</sup> This meant he had to keep the offenders within his line of sight.

The Security Post Order for Work Coordinator required the employee to:

Maintain Direct Supervision of work gangs inside and outside the confine of the perimeter fence. Ensure that unauthorized contacts are not made with detainees while under your supervision. Provide assistance and support to other staff when you are not assigned to a work detail.<sup>2</sup>

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> Agency Exhibit 4.

On January 29, 2016, Grievant was assigned to be a Work Coordinator supervising a work crew of nine detainees in the community. No other security staff were assisting him. He took the detainees to the work location, a church, and the detainees entered the building. At approximately 10:15 a.m. the Offender told Grievant he needed to use the restroom. Grievant said the Offender could use the portable toilet outside and next to the building. Grievant told the Offender he had 15 minutes to use the portable toilet.

Grievant could have positioned himself so that he could watch the Offender enter the portable toilet while he watched the other detainees in the building. Grievant did not continue to observe the portable toilet.

The Offender left the work detail in the building. Instead of entering the portable toilet, he walked approximately a quarter of a mile to a local food store. He entered the food store at approximately 10:31 a.m. The Offender purchased tobacco products.<sup>3</sup> Tobacco products would be contraband when in the possession of an inmate. The Offender left the store and returned to the work detail.

A woman working in the food store recognized the clothing worn by the Offender as that of an inmate. She called a Major working at another Agency facility and reported her concerns. In the early afternoon of January 29, 2016, the Major went to the work site and told Grievant that one of his detainees had been observed in the local food store. Grievant went to the local food store and spoke with the woman who identified the offender who entered the store.

Prior to issuing disciplinary action, Agency managers met with Grievant and asked him about the incident and any defenses he may have to possible disciplinary action. Grievant described the incident and explained that he thought this type of incident had occurred before. An Agency employee went to the local food store and viewed security video recordings to determine if any other detainees had entered the store previously. The employee was unable to identify any other detainee entering the food store.

## **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.”<sup>4</sup> 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

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<sup>3</sup> The Offender used change he found inside the Church to purchase the tobacco items.

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

warrant removal.”<sup>5</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>6</sup>

“Gross negligence on the job that results (or could have resulted) in the escape, death, or serious injury to a ward of the State or serious injury of a State employee” is a Group III offense.<sup>7</sup> Grievant had an obligation to supervise the Offender. He had a duty to protect the public from the detainees under his control. An escaped detainee has little to lose and may cause harm to others. Grievant’s failure to exercise appropriate supervision of the Offender undermined public safety thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal, an agency may suspend an employee for up to 30 workdays. In this case, the Agency chose to suspend Grievant for ten work days. Grievant’s suspension must be upheld.

Grievant argued that the disciplinary action was too severe. The Agency could have elected to issue lesser disciplinary action to address Grievant’s inappropriate behavior. The Agency chose to issue a Group III Written Notice with a ten workday suspension and, that decision is authorized by the Standards of Conduct and supported by the facts of this case.

Grievant argued he was denied procedural due process. Procedural due process requires that an employee received adequate notice of the allegations against him or her and be afforded the opportunity to challenge the Agency’s evidence before a impartial decision maker. The Grievance Procedure embodies the requirements of procedural due process for State employee grievances. In this case, the Agency provided Grievant with adequate procedural due process. It provided Grievant with the opportunity to rebut the Agency’s allegations against him. To the extent the Agency may have failed to provide Grievant with adequate due process, the grievance hearing cured any defects. Grievant was given the opportunity to present to the Hearing Officer any evidence and argument against the Agency’s written notice.

*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 ....”<sup>8</sup> 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

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<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D)(o).

<sup>8</sup> 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 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 ten workday suspension is **upheld**.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>9</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.