

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 10/17/07;
Decision Issued: 11/06/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8703; Outcome: No Relief, Agency Upheld In Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8703

Hearing Date: October 17, 2007
Decision Issued: November 6, 2007

PROCEDURAL HISTORY

On March 9, 2007, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance. On March 27, 2007, 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 September 18, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 17, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 Chief of Security at one of its facilities. The purpose of his position is:

Directs the activities of the Security Department, including scheduled and unscheduled events; develops, coordinates, and monitors work schedules and duty rosters; establishes reviews and evaluates post orders, post audits, job descriptions, policies and procedures; sits as a member of various committees. Ensures compliance documentation for standards set by BOC, ACA, and policies and procedures within DOC.¹

Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on March 17, 2005.²

On February 6, 2007, an Inmate walked through three gates and exited a secure perimeter at the Facility. He penetrated the Facility's security systems. He was not questioned by any employees until he was outside of the Administration building. If the

¹ Agency Exhibit 5.

² Agency Exhibit 7.

Inmate was planning on escaping, all he had to do was run. The Agency later removed from employment a Corrections Officer who opened the gate and permitted the Inmate to leave the secured perimeter. Several other employees working that day were also disciplined.

On February 7, 2007, the Regional Director sent the Wardens and Superintendents in his region an email stating:

Effective immediately, the following review of security procedures will be accomplished by your facility with a report to my office no later than [2/12/07] by noon. (Send your reports to [employee name] with copy to me.)

1. Ensure you review Directive 440 Attachment #1 and evaluate your perimeter security procedures and practices based upon this attachment and report your findings.
2. Ensure you review Operating Procedure 445.2 Attachment #6 section "Offender Movement & Perimeter Security and evaluate your perimeter security procedures and practices based upon this attachment and report your findings.
3. Further provide me documentation of the last time that you tested your entrance and exit procedures by your perimeter to ensure that they are working as established by policy and procedure. (Pedestrian Entry & Exit, Sallyport Entry & Exit). Please advise how you tested these procedures.
4. Review your trash, laundry, VCE truck Entry & Exit procedures to ensure that they are in compliance with policy and procedure. Please report your findings.
5. Meet with your Assistant Warden, Chief of Security and Captains to discuss your procedures and critique [them] from the standpoint [of whether there] are other improvements needed.

Let me emphasize, it is vital that we constantly test our security procedures to ensure we are meeting our Department Mission. As Warden/Superintendent you are responsible for ensuring your staff sharpness and alertness in all security procedures.³

At the direction of the Warden, Grievant drafted a report in response to the Regional Director's email. The report was reviewed by the Warden and then sent to the Regional Director on February 9, 2007, before the due date of February 12, 2007.

The Regional Director reviewed Grievant's report and concluded Grievant's job performance was inadequate.

³ Agency Exhibit 2.

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.”⁴ 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.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁷ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Agency contends Grievant's work performance was inadequate or unsatisfactory for four reasons:

1. Only one time during the calendar year 2006 was external security talked about.
2. No time during the year was there documentation to support that the external security systems were tested by you or the Captains.
3. Documentation of perimeter checks was inconsistently completed.
4. I found that during your department meetings that you could not document that you talked about the external security during the calendar year.

During the Third Step of the grievance process, the Regional Director informed Grievant of a fifth reason why the disciplinary action was issued, namely because the Inmate nearly escaped from the Facility.

- 1. Only one time during the calendar year 2006 was external security talked about.*

Grievant established a procedure whereby different institutional policies were discussed with different shifts of employees. Each week a new policy was discussed with employees before they began their shifts. During the week beginning April 10, 2006, Institutional Operating Procedure 461, Perimeter Security, was discussed with security staff at the Facility. During the week beginning January 22, 2007, Institutional

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁷ DOCPM § 5-10.15(B)(4).

Operating Procedure 461 was again discussed with staff. A few weeks later, the near escape occurred. Given the short length of time between discussions of Institutional Operating Procedure 461 and the near escape, it is unclear how having that policy discussed more frequently in 2006 would have made any difference at the Facility. In addition, if Grievant had increased the number of times staff discussed Institutional Operating Procedure 461, the result would have been fewer discussions of other relevant policies at the institution. The Agency has not shown that Grievant knew or should have known to increase the number of times security staff at his Facility discussed Institutional Operating Procedure 461. The Agency has not established this allegation against Grievant.

2. No time during the year was there documentation to support that the external security systems were tested by you or the Captains.

During the course of his training at the Academy and on the job, Grievant received training informing him of his obligation to check the Facility's external security system at least twice a year. There are several ways Grievant could have tested the Facility's external security system. First, he could have had someone dress as an inmate and attempt to exit the Facility. Second, he could have questioned staff in various posts regarding knowledge of policies relevant to the post. Third, he could have had a visitor try to enter or exit without proper identification to see how security staff responded. And fourth, he could have observed where there was a breach of security and then perform a security assessment of that breach to determine how to resolve the problem. Grievant did none of these. The Agency has presented sufficient evidence to support this allegation.

3. Documentation of perimeter checks was inconsistently completed.

On a daily basis, Corrections Officers walk around the Facility's perimeter. They inspect the inner perimeter fence, outer perimeter fence, perimeter gates, manholes, storm drains, and lighting. They complete a Perimeter Inspection Report describing their findings. One of the questions asked on the form is, "Was security check completed prior to release of inmates?" The Corrections Officer is supposed to check either a yes or no box to answer the question. The Report is then to be reviewed and signed by a senior security employee and then submitted to Grievant. Grievant received several Perimeter Inspection Reports in which the question was not answered by the Corrections Officer performing the inspection.⁸ Grievant took no action in response to these incomplete reports. Grievant should have taken some action with respect to the incomplete reports. His failure to do so establishes this allegation of the Agency against him.

4. I found that during your department meetings that you could not document that you talked about the external security during the calendar year.

⁸ These dates included: 6/30/06, 7/22/06, 8/6/06, 9/24/06, 10/1/06, 11/25/06, 12/30/06, and 1/1/07.

Grievant held periodic meetings with his subordinate supervisors. He prepared agendas for the meetings. Grievant did not document that they talked about external security during those meetings. His only documentation consisted of writing "Short Cuts (Security)". The Agency has established this allegation.

5. *Near Escape*

Grievant was not responsible for the near escape that occurred on January 6, 2007. None of his actions or inactions enabled the Inmate to exit the secured perimeter of the Facility. A Corrections Officer failed to comply with her post orders by opening the gate and enabling the Inmate to exit. If the Corrections Officer had complied with her post orders, she would not have permitted the Inmate to exit. Grievant drafted the Corrections Officer's post orders. No evidence was presented showing deficiencies in those post orders. The Corrections Officer had been employed by the Agency for several years. On a quarterly basis, she would sign a statement indicating that she had read and understood her post orders. Grievant was entitled to rely upon her assertion that she understood her post orders. Merely because Grievant holds the rank of Major and the Corrections Officer reported to Grievant does not make Grievant liable for the misbehavior of the Corrections Officer.

Although the Agency has not established all five of the allegations against Grievant, the remaining allegations are sufficient to justify the Agency's disciplinary action. In particular, Grievant did not adequately test the perimeter security system at the Facility. He overlooked missing information in Perimeter Inspection Reports. Accordingly, the Group I Written Notice must be upheld.

Grievant argues the Agency did not engage in progressive discipline. He contends the Agency should have counseled him prior to issuing a Written Notice. Although progressive discipline is encouraged under the Agency's Standards of Conduct, the Agency is not required to counsel employees before issuing Written Notices. Grievant's argument fails.

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 Employment Dispute Resolution...."⁹ 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

⁹ Va. Code § 2.2-3005.

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 I Written Notice of disciplinary action 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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 give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.