

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 07/31/14; Decision Issued: 08/19/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10393; 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: 10393

Hearing Date: July 31, 2014
Decision Issued: August 19, 2014

PROCEDURAL HISTORY

On April 22, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence.

On May 15, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 16, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 31, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately one and a half years prior to his removal effective April 22, 2014. No evidence of prior active disciplinary action was introduced during the hearing.

On October 28, 2013 at approximately 12:08 a.m., Grievant was conducting cell checks in the Housing Unit. To perform a cell check, he was expected to look through a window in the cell door and observe the inmate inside the cell. Grievant walked to the second floor of the housing unit and began walking from cell to cell to check the status of each inmate. Grievant looked into the Cell and observed the Inmate's body in the dark. Grievant used his flash light to obtain a better view of the Inmate. The Inmate did not respond to Grievant's calls to identify himself. Grievant concluded that the Inmate might have hung himself but Grievant was not sure. Grievant knew that he was not authorized to enter a cell without another corrections officer being present so he decided to call Officer K.

Grievant used his radio to ask Officer K to call him. Grievant went downstairs to the control room to wait for Officer K's telephone call. Officer K was in another building eating a meal. Officer K called Grievant on the telephone and Grievant told Officer K that he thought he "might have a guy hanging in a cell." Officer K immediately left his building and a minute or two later arrived at the Housing Unit. Officer K met Grievant at the bottom of the stairs in the Housing Unit and they quickly walked up the stairs and to Cell 32.

Officer K looked inside the cell and observed the Inmate's back. He did not have a flash light but could see the Inmate's silhouette in the dark. Officer K signaled to the control booth officer to open the cell door. Officer K entered the cell and turned on the light as Grievant also entered the cell. The Inmate had created a ligature using shoe laces and hung himself from the bars on a window towards the top of the cell wall.

Officer K attempted to lift the Inmate while Grievant attempted to get the shoelace off of the Inmate's neck. Neither Grievant nor Officer K observed any signs of life from the Inmate. After freeing the Inmate from the ligature, they placed him on the floor and began CPR.

At some point while in the cell, Officer K used his radio to notify staff that an inmate was hanging in his cell and announce a need for assistance. The Sergeant and medical staff heard the radio call and quickly went to the cell.

The Sergeant and medical staff arrived at the cell shortly after Officer K and Grievant had entered the Cell. A blanket was used to lift the Inmate and place him on a gurney. The Sergeant began chest compressions on the Inmate in an attempt to revive him. Grievant and Officer K began helping move the Inmate toward the medical unit. Once the Inmate was in the medical unit, Grievant performed chest compressions on the Inmate.

Approximately three and a half minutes passed from the time Grievant observed the Inmate non responsive and when Grievant and Officer K returned to the cell and called for help.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

Grievant's Post Order provided:

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

Remain aware of your surroundings and the activities of the offender population at all times. If any unusual activities are observed, immediately report the events to a supervisor. Also, report the events to any available Officers who may lend assistance, if necessary. Relate all pertinent information to the Control Room Officer for documentation purposes in the logbook.

Ensure any injury or illness to assigned staff or the offender population is address appropriately, and the proper medical care is provided. Report these occurrences to the supervisor immediately. Complete an Incident Report documenting each event.⁴

“Failure to ... comply with applicable established written policy” is a Group II offense.⁵ An inmate who might be attempting or committing suicide is an unusual event that Grievant should have reported immediately to his supervisor. He could have used his radio to call for assistance the moment he observed that the Inmate was non-responsive and might have hung himself. Grievant failed to comply with his Post Orders thereby justifying the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

The Agency presented evidence to support its contention that immediate notification was essential for inmate safety. By failing to call immediately for help upon observing the Inmate being non-responsive, Grievant delayed the arrival of medical help by approximately three minutes. It is not known whether the Inmate was already dead when Grievant first observed the Inmate or whether the Inmate died after Grievant observed the Inmate and the medical team arrived.

If the Inmate had been alive at the time Grievant first observed the Inmate and Grievant had called for assistance, it is possible the Sergeant and medical staff could have gotten to the Inmate before he died. The possibility that timely medical care could have avoided the Inmate’s death is sufficient to elevate the disciplinary action from a Group II offense to a Group III offense.⁶

⁴ Agency Exhibit 5.

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁶ The Agency alleged Grievant’s behavior was gross negligence. Grievant’s behavior was not gross negligence as defined in law. It is possible that the Agency used that phrase because the consequence to Inmate may have been life threatening and the consequences to the Agency entrusted with the Inmate’s safety may have been extreme.

Grievant argued that he had not been trained regarding how to respond to emergencies such as offender suicides. This argument is not persuasive. Grievant received training regarding his Post Orders and signed the Post Orders to indicate his understanding of the Agency's expectations for his job performance while at that post.

Grievant argued that Operating Procedure 720.7 required medical responses to be made within four minutes and the Inmate received medical treatment within four minutes. This argument is not persuasive. Grievant's Post Order required that he respond immediately. Grievant's Post Order is controlling in this case.

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"⁷ 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 contends the disciplinary action should be mitigated because he was a relatively new employee. Length of service, standing alone, is not a basis for mitigation. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency failed to provide him with procedural due process because it denied him the opportunity to fully present his defenses prior to his removal. This argument does not affect the outcome of this case. Grievant had the opportunity to present to the Hearing Officer any defenses and evidence that the Agency may have inappropriately disregarded. The hearing cured any defect created by the Agency with respect to procedural due process.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

⁷ *Va. Code § 2.2-3005.*

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 14th St., 12th 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 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 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.⁸

⁸ 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