

Issue: Group II Written Notice with suspension (failure to follow policy); Hearing Date: 09/16/15; Decision Issued: 10/05/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10654; 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: 10654

Hearing Date: September 16, 2015
Decision Issued: October 5, 2015

PROCEDURAL HISTORY

On June 3, 2015, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow policy.

On June 8, 2015, 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 August 10, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 16, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Counsel
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 Sergeant at one of its facilities. He has been employed by the Agency for approximately 29 years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 29, 2014, Grievant was working as the Watch Commander of the work unit at the Facility. He was supervising one male and two female correctional officers. Grievant received a "snitch note" informing him that the Inmate was in possession of contraband. Grievant decided that the Inmate should be strip searched to find the contraband.

Two officers escorted the Inmate to the bathroom. Grievant told the two officers to attend to other duties. Grievant received training regarding the Agency's policy that two corrections officer must be present during a strip search. Grievant conducted a strip search of the Inmate by himself. The Inmate had sewn a pouch into his long johns underwear. Inside the pouch, Grievant found two clear plastic bags. Inside the first clear plastic bag was 24 or 25 small envelopes made from magazine paper. Inside the second clear bag was a green leafy substance. Grievant easily recognized these items as contraband.

Grievant collected the two plastic bags and their contents and submitted them to the Agency as contraband. He did not collect the Inmate's long johns as evidence. He did not retain the "snitch note".

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

DOC Operating Procedure 445.1(VII)(B)(1) provides that, “[s]trip searches may be conducted any time there is reasonable belief that any offender might be concealing contraband or other prohibited material on their person.” Subsection 2 provides, “[s]trip searches shall be conducted by trained DOC employees of the same gender as the offender being searched.” Subsection 4 provides, “[o]ne Corrections Officer and one other DOC employee, both of whom are of the same gender as the offender, shall accompany the offender into an appropriate area where privacy can be ensured.”

On July 29, 2015, Grievant strip searched the Inmate by himself. He knew the Agency’s policy was for two officers to conduct strip searches. He had another male officer who could have assisted with the search. Grievant acted contrary to policy.

Grievant argued that strip searches had been conducted by one officer in the past and that management was aware of this. Insufficient evidence was presented to show that Agency managers were aware that strip searches were being conducted by only one corrections officer.

DOC Operating Procedure 445.2 defines Contraband to include, “State or personal property, regardless of how acquired, that has been modified or altered without written authorization.” Under Section IV(A)(2)(a), “[o]nce detected, contraband shall be removed from the possession of an offender and disposed of in accordance with Operating Procedure 802.1, Offender Property.”

Because the Inmate’s long johns had been altered, the clothing was contraband. Grievant should have taken the long johns from the Inmate and disposed of them in accordance with policy. Instead, Grievant let the Inmate retain the long johns.

Grievant argued that when the Inmate was returned to the main facility, staff at the main facility should have confiscated the long johns. The evidence showed that the Inmate had other clothing to wear and Grievant could have confiscated the underwear.

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).

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant's three work day suspension must be upheld.

Grievant argued that the Agency took too much time to issue disciplinary action. Approximately 11 months from the date of the offense to the date of the written notice. Although the Agency should have issued disciplinary action on a more timely basis, the delay does not affect the outcome of 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"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. 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 II Written Notice of disciplinary action with a three work day 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

⁴ Va. Code § 2.2-3005.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.