

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 07/13/16; Decision Issued: 07/14/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10824; 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: 10824

Hearing Date: July 13, 2016

Decision Issued: July 14, 2016

PROCEDURAL HISTORY

On November 18, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On December 18, 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 she requested a hearing. On June 1, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 13, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Officer at one of its Facilities. She had been employed by the Agency for approximately 28 years. No evidence of prior active disciplinary action was introduced during the hearing.

On March 4, 2014, the Major sent Watch Commanders a memorandum regarding "Weapons on Roving Patrol." The memorandum stated, in part, "The staff that is assuming the post will retrieve the handgun from the Armory along with 36 rounds."¹ Grievant learned of the Facility's requirement that she obtain her handgun and rounds from the Armory and return them to the Armory.

On October 21, 2015, Officer P was working in the master control. Officer P was responsible for dispensing and receiving weapons and ammunition from the Armory.

Grievant was working at her post in roving patrol. She was in possession of a handgun and 12 bullets in three clips for a total of 36 bullets.

Officer F entered the Facility. He was not carrying any weapons or bullets. He went to the master control and attempted to obtain a handgun and bullets from Officer P. Officer P gave Officer F a handgun but did not give him bullets. She told Officer P to get the bullets from Grievant who was already on her shift at her post. Officer F went to the roving patrol post and told Grievant that Officer P told him to get the bullets from

¹ Agency Exhibit 4.

her. Grievant gave her three ammunition clips to Officer F. Grievant left the roving patrol post and went to master control. She gave Officer P her handgun and left the Facility. She did not contact a supervisor or otherwise inform the Agency that policy regarding the bullets had not been followed.

On the following day, Officer P's shift had ended and another employee was working in master control. This other employee counted the rounds and noticed that a round was missing. The Agency investigated how the round may have gone missing and realized the violation of the Facility's practice regarding the exchange of ammunition with the roving patrol post.

The Agency did not take disciplinary action against Grievant for losing a round. The Agency took disciplinary action against Grievant for failing to properly exchange her clips of bullets.

The Agency took disciplinary action against Officer P, Officer F, and two other officers engaging in similar behavior.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁵ 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.

On October 21, 2015, Grievant was in possession of a handgun and 36 bullets while working on the roving patrol post. She obtained these items from the master control officer and knew she was expected to return these items to the master control officer at the conclusion of her shift. Officer F entered the Facility and received a handgun from Officer P. Officer P told Officer F to obtain the bullets from Grievant.

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Officer F approached Grievant at the roving patrol post and asked for her bullets. Grievant gave Officer F her bullets. She should have refused to give her bullets to Officer F and told Officer F that he was not fit to relieve her because he was not armed. Alternatively, she could have used her radio to call for a supervisor to obtain permission to transfer her bullets to Officer F. Instead, Grievant left the Facility. Her behavior was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant argued that she could not have left her post without giving her rounds to Officer F because leaving him unarmed would have resulted in disciplinary action against her. She argued she was put in a position where regardless of what action she took, she would face disciplinary action. The evidence showed that Grievant should have remained on the post until she was properly relieved of her post. She received training regarding this obligation. Since Officer F could not properly relieve her, she should have remained on the post until he had his own set of bullets. Grievant could have contacted a supervisor and asked for guidance.

Grievant argued that she often attempted to call a supervisor and no one responded. No evidence was presented to show that a supervisor was unavailable on October 21, 2015. Grievant made no attempt to contact a supervisor. It may have been the case that if she had called a supervisor on October 21, 2015, a supervisor may have responded to Grievant.

Grievant argued that supervisors were aware of Officer P's practice. No persuasive evidence was presented to identify any supervisor who was aware of Officer P's practice and sanctioned it.

Grievant argued that orders for the roving patrol post were missing on October 21, 2015 and that sometimes items listed for discussion during the morning shift meeting are not always discussed. The evidence showed that Grievant was aware of the procedure the Facility expected her to follow when she was leaving her post.

Grievant argued that she did not lose the missing bullet and if she had been given documents relating to Officer H she could have shown that conclusion. The evidence showed that Grievant was not disciplined or blamed for losing the round.

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"⁶ 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-

⁶ Va. Code § 2.2-3005.

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 argued that the disciplinary action was unnecessary. The Hearing Officer may very well have disciplined employees in this case differently from the way the Agency issued disciplinary action in this case. That difference of opinion, standing alone, is not a basis to mitigate the disciplinary action. The action taken by the Agency does not exceed the limits of reasonableness. 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 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 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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.