



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11920**

Hearing Date: April 5, 2023  
Decision Issued: April 19, 2023

**PROCEDURAL HISTORY**

On November 23, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for various offenses.

On December 12, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 13, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 5, 2023, a hearing was held by remote conference.

**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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 locations. Grievant had prior active disciplinary action. On October 14, 2022, Grievant received a Group II Written Notice for failure to follow policy and using obscene language.<sup>1</sup> The Agency alleged other active discipline action but did not present those notices as exhibits.

Grievant had an Instagram account that could be viewed by Agency employees. On September 19, 2022, Grievant wrote on her Instagram:

The body scanner at work is the best thing ever I swear it shows everything half of them dudes talk a good game but penis small AF but it's some I just be wanting to tell them ride it two more times just to make sure I'm seeing this right.<sup>2</sup>

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<sup>1</sup> The Agency presented evidence regarding the merits of the October 14, 2022. Since that notice is not before the Hearing Officer only its existence is relevant which must be established by presenting a copy of the notice.

<sup>2</sup> Agency Exhibit p. 27.

A DOC employee read Grievant's post and recognized that it was offensive and inappropriate. The employee reported Grievant's post to Agency managers.

On September 22, 2022, Major T and Officer O were escorting an inmate from the Support Building to the Housing Unit. Major T instructed staff to step aside so that they could pass through the gate. Grievant looked at the Inmate and said, "Do you have a cell phone up your ass?" The Inmate said, "No. Do you?" Grievant replied, "No, it's up yours." Major T told Grievant to be quiet. Major T and Officer O continued to escort the Inmate out of the area.

On October 11, 2022, Grievant entered the building and cursed at the inmates. Lieutenant R heard Grievant say "f—k you" and "I don't give a f—k" to inmates.

On October 13, 2022, the Unit Manager entered the Building Pod where Grievant was working. Grievant told the inmates to, "Lock the f—k down." Grievant was attempting to get the inmates to step into their cells from the open area. The Unit Manager heard Grievant tell the inmates to, "step the f—k in." Grievant continued yelling and cursing at the inmates. Grievant told one inmate if he had been at the f—king cell door when he was supposed to his ass could have been in. One inmate shouted out asking that his cell door be opened. An inmate called Grievant a b—ch. Grievant replied, "F—k your mamma!" The inmate became upset and said, "she cannot talk to us like that." The Unit Manager raised her hand towards Grievant and Sergeant E who was next to Grievant. The Unit Manager told Grievant she could not do that. Sergeant E told Grievant she could not do that. Grievant replied, "Nah they just doing that s--t cause she in here."

### **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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

Group III offenses include violation of DHRM Policy 2.35 and Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders.

Under Operating Procedure 135.2, the Agency operates a Healing Environment intended to make "positive, progressive changes to improve lives." Employees are expected to "exercise professional conduct when dealing with inmates" and "model a professional, healing, and supportive relationship" with inmates. Employee were expected to display courtesy and respect for inmates.

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<sup>3</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

DHRM Policy 2.35 governs Civility in the Workplace. This policy authorizes discipline for “[b]ehaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable. The Policy Guide for DHRM Policy 2.35 prohibits, “[h]umiliating others; making public statements with the intent of embarrassing a targeted person; impugning one’s reputation through gossip; Making unwelcome or suggestive comments or jokes.

Operating Procedure 135.6 governs Use of Social Media. This policy provides that employees should assume their social media will reflect on their employment with DOC. Employees are required to conduct themselves in a manner that supports the DOC mission and performance of their duties. Employee are required to be respectful and professional of DOC employees.

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Grievant inappropriately asked an inmate if he had “a cell phone up your ass.” She insulted inmates by saying “f—k you” and “f—k your mamma.” Her actions were contrary to Operating Procedure 135.2 and DHRM Policy 2.35. In addition, Grievant suggested she was using the Agency’s body scanner to evaluate the genitals of male employees and that she was misusing the body scanner to repeat her evaluation. Her statement was public, humiliating, and offensive. Her actions were contrary to Operating Procedure 135.6 and DHRM Policy 2.35. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant disputed the Agency’s disciplinary action but did not testify or present any evidence to contradict the Agency’s evidence. Grievant received adequate due process.

*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>4</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 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

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<sup>4</sup> Va. Code § 2.2-3005.

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**.

### **APPEAL RIGHTS**

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</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>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.