

# **COMMONWEALTH OF VIRGINIA**

*Department of Human Resource Management*

## **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

### **DECISION OF HEARING OFFICER**

**Case Number 11923**

**Hearing Date: 24 April 2023**

**Decision Issued:**

### **PROCEDURAL HISTORY**

The agency issued a Group II Written Notice of disciplinary action to the Grievant on 29 July 2022.

On 2 December 2022 the Grievant filed a timely grievance to challenge the Agency's action. The Grievant was dissatisfied with the outcome of the Third Resolution Step and requested a hearing. The Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer on 6 February 2023. A Pre-hearing Conference was held on 22 March 2023 at 1:00 p.m. The Grievant and counsel for the Department of Corrections were present. The Hearing was scheduled for 24 April 2023 at 9:00 a.m. via video conference.

The Grievant notified the Hearing Officer and counsel for DOC that he retained counsel as of 12 April 2023.

The Hearing was held on 24 April 2023 at 9:00 a.m.

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## **APPEARANCES**

Grievant  
Counsel for Agency  
Counsel for Grievant  
Witnesses

## **ISSUES**

1. Whether the Grievant engaged in the behavior as described in the Written Notice?
2. Whether this behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law and policy?
4. Whether there were any mitigating circumstances justifying a reduction or removal or 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 the 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. Grievant 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 FACTS**

After a review of the evidence and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

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At the time of the alleged violation, the Virginia Department of Corrections employed the Grievant as a K-9 officer at Wallens Ridge State Prison. The Agency did not present any evidence that the Grievant had any prior active disciplinary action at the hearing.

As a K-9 officer, the Grievant had two chains of command: one within the security department of Wallens Ridge and the second through the K-9 section of the Department of Corrections.

As part of his duties as a K-9 officer within the K-9 section, the Grievant could be required to serve at other facilities of the DOC as necessary. There was evidence presented by the Agency that there had been some problems with K-9 officers refusing to go to other facilities. This resulted in the Statewide Canine Coordinator issuing an email outlining the disciplinary actions to be taken should a K-9 officer refuse to go to another facility, i.e. that K-9 officer would be given a Written Notice. [Agency Exhibit p 32]

The Grievant was scheduled to go to Sussex State Prison for the week of 19 - 26 June 2022. According to the Written Notice, the Grievant did not go to Sussex as ordered. The Written Notice stated that this order was given by Sergeant Oakes on 17 June 2022.

The Agency presented an email from the Statewide Canine Coordinator removing the Grievant from K-9 service. This email was sent on 16 June 2022 at 9:14 p.m. [Agency Exhibit p 6]

The Grievant did not go to Sussex State Prison for the week of 19 - 26 June 2022.

In his statement in rebuttal to the Written Notice, the Grievant stated that K-9 officer [REDACTED] was going to go to Sussex in his place. The Grievant stated that he discussed this substitution rotation with Captain [REDACTED], head of security at Wallens Ridge State Prison. Captain [REDACTED] was not in the K-9 chain of command. The Grievant said that Captain [REDACTED] agreed with this substitution.

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Sergeant [REDACTED], who was the direct supervision in the Grievant's K-9 chain of command, stated that he had no problem with K-9 officers substituting their rotation to other state prisons. He also stated that this was done on occasions. As long as the rotation was covered, he did not have any problem with this practice.

The Grievant stated that the reason he did not want to go to Sussex State Prison for the week of 19 - 26 June 2022 was that he had a personal emergency: his mother-in-law was due for chemo therapy that week. His wife worked and could not take the days off; someone needed to care for the family and take the mother-in-law to chemo. Unfortunately, the Grievant did not inform anyone in either of his chains of command of his personal problem. He did not raise this issue in any of his statements concerning the disciplinary actions; neither of the wardens were aware of this; Sergeant [REDACTED] did not seem to know of this; the Statewide Canine Coordinator did not know of this. This oversight was never explained and certainly was raised at a late date.

### **CONCLUSIONS OF POLICY**

A Group II offense include "acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action."

"Failure to follow supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure" is clearly a Group II offense.

The question becomes whether the Grievant did fail to perform assigned work and/or follow his supervisor's orders.

The Grievant argues that he was removed as a K-9 officer as of 9:14 p.m. on 16 June 2022. Because of this, he could not go to Sussex State Prison as a K-9 officer on 19- 26 June 2022. The Grievant further argues that the Group II Written Notice states the misconduct happened on 17 June 2022, after he had been removed as a K-9 officer.

The Grievant further argues that it was an acceptable policy to allow K-9 officers to get substitutes to go on scheduled deployments. This argument is supported by the testimony of Sergeant [REDACTED], the Grievant's direct supervisor in the K-9 chain of command.

The facility chain of command apparently had no problem with the substitution of K-9 officers. However, this chain of command have no control of the K-9 policy.

## DECISION

For the reasons stated hereinafter, the Agency's issuance of a Group II Written Notice is hereby dismissed.

The Grievant's request to be allowed to reapply as a K-9 officer cannot be decided as the decision to allow him to reapply must come from the Statewide Canine Coordinator.

## APPEAL RIGHTS

The Grievant may request an administrative review by EDR within **15 calendar** days from the date this decision was issued. The request must be in writing and must be **received** by EDR with 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> Street, 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.

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You must also provide a copy of your appeal to the other party and to 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]

ENTERED this 25th day of April 2023.

/s/ Thomas E. Wray

Thomas E. Wray, 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.