



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11886**

Hearing Date: February 10, 2023  
Decision Issued: March 27, 2023

**PROCEDURAL HISTORY**

On July 28, 2022, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for unsatisfactory performance, failure to follow instruction/policy, safety rule violation, and gross negligence.

On August 24, 2022, 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 September 26, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 10, 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 employs Grievant as a Canine Corrections Officer at one of its facilities. He had been employed by the Agency for approximately two years. No evidence of prior active disciplinary action was introduced during the hearing.

On June 18, 2022, an Inmate broke apart a television and used a piece to form a sharpened knife approximately 7 inches long. He was in a cell with a door that had a tray slot for food trays to be delivered to and removed from the Inmate. The Inmate threatened to stab corrections officers who came near the cell. Corrections staff sprayed the inmate with O.C. spray several times but it was ineffective. Agency management decided it was necessary to remove the Inmate from the cell using a cell extraction team. A cell extraction occurs when corrections officers enter an inmate's cell and remove the inmate from that cell.

The cell extraction team consisted of six or seven corrections officers wearing helmets and protective gear. They formed a line to enter the cell, if necessary. The first and second officers carried shields. Behind them were other corrections officers who were responsible for restraining one of the Inmate's limbs so that the Inmate could be placed in handcuffs and leg irons. Grievant was responsible for controlling a dog ("canine").

The Inmate's cell door was made of metal and slid from right to left to open and left to right to close access to inside the cell. The cell opened into the pod floor containing other cells.

Agency managers took over two hours to develop an appropriate plan to remove the Inmate from the cell. They decided that Grievant and the canine would be positioned to the right side of the cell door opening. They would open the door slightly to allow the Inmate to stick his arm and knife through the opening but without being able to move his body outside of the cell. Once the Inmate had his arm through the opening, they would close the door to pin the Inmate's arm. Once the Inmate's arm was pinned, the canine would engage the Inmate's arm to force the Inmate to drop the weapon. If the Inmate was able to get out of the cell, the canine would engage the Inmate on the floor to protect the corrections staff. The Captain supervised the extraction team.<sup>1</sup> He made it clear that the canine was not to enter the cell.

The extraction team was positioned facing the cell door. Grievant held the canine's lead (or leash) tightly in his hand. After the Inmate rejected an order to present himself to be handcuffed, several corrections officers slid the cell door from right to left so that the door would open a few inches. The Inmate turned his right shoulder towards the opening and moved his right elbow through the opening. Corrections officers pushed the door from left to right to try to pin the Inmate's arm. The Inmate pulled his elbow back into the cell preventing the corrections officer from pinning his arm. Corrections officers again pulled the door from right to left to open to create a 6" to 8" opening. The Inmate approached the opening but did not stick his arm through the opening. Grievant presented the canine to the opening and facing the Inmate. Grievant allowed the canine to enter the cell and engage the Inmate. The Inmate used the knife repeatedly to stab the top of the canine's head. Corrections officers opened the door wider and the extraction team rushed in to the cell following the canine. As the extraction team passed into the cell, Grievant remained outside of the cell but had to release the lead as it was pulled from him. While the extraction team was on top of the Inmate trying to restrain him, the canine bit the leg of one of the corrections officers. The Captain instructed Grievant to remove the canine. Grievant entered the cell and removed the canine.

After the incident ended, the Agency determined that the canine did not suffer significant injury to his head. The corrections officer who was bitten received medical treatment for his wound.

### **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

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<sup>1</sup> The Warden told the Captain not to put the canine into the cell.

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>2</sup>

Operating Procedure 435.3 governs Canines. Under this policy the Statewide Canine Coordinator is “The DOC Administrative Manager who coordinates canine training and field operations and who provides leadership and guidance to the Canine Operations Unit staff.” Under this policy:

While one of the greatest values of Patrol Canine Teams lies in the deterrence effect of their presence, the use of a patrol canine is authorized only when the circumstances justify such use.

1. The Canine Officer should be constantly aware that Corrections Officers are only authorized to use the amount of force necessary to overcome resistance, mitigate an incident, or gain control and that the use of canine under such circumstances constitutes the use of force or the implied use of force; see Operating Procedure 420.1, Use of Force.
2. In determining the amount and/or type of force to be used, the Canine Officer should take into consideration all circumstances known to them.
3. Patrol canines will not be directly used to extract inmates from cells or other small enclosed spaces except as necessary for the safety of staff and other inmates. The Facility Unit Head and the Statewide Canine Coordinator must approve the utilization of a patrol canine for extraction purposes.

Group II offenses include, “Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure.”<sup>3</sup> Group III offenses include, “Violating safety rules where there is a threat of physical harm.”<sup>4</sup>

Operating Procedure 435.3 sets forth a safety rule prohibiting canines to be used in cell extractions without the approval of the Warden or Statewide Canine Coordinator. Grievant released the canine to enter the cell to initiate the cell extraction without the approval of the Warden or Statewide Canine Coordinator. At the moment Grievant released the canine, all of the Inmate’s body was inside the cell. Grievant violated a safety rule where there was a threat of physical harm to the canine and corrections officers. Grievant should have foreseen that once the canine entered the cell the extraction team would follow swiftly and deliberately. The lead Grievant held to control the canine was released as the extraction team entered into the cell. Grievant should have foreseen that presenting the canine into the cell and having the extraction team follow could have resulted in him losing control of the canine contrary to his obligation to remain in control

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(XIII)(B)(1).

<sup>3</sup> See, Operating Procedure 135.1.

<sup>4</sup> Operating Procedure 135.1(XIV)(B)(7).

of the canine. Grievant's obligation to retain control of the canine was also a safety rule. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to thirty workdays. Accordingly, Grievant's ten workday suspension must be upheld.

Grievant argued that he acted within his authority to decide to engage the canine. He argued that he was not negligent because the lead was pulled from him as the extraction team entered the cell.

The Agency's written notice is poorly written. The Agency alleged "gross negligence", but the phrase is not defined in State disciplinary policy and Grievant did not engage in gross negligence as defined by Virginia case law. The Agency should have stated Grievant violated a safety rule by presenting the canine into the Inmate's cell. Instead, the written notice recites facts relating to the entire incident (some of which were not disciplinary in nature) and then focuses on Grievant's release of the lead to the canine. Only because Grievant violated a safety rule by presenting the canine into the cell did that result in Grievant losing control of the lead to the canine. In other words, Grievant's initial safety rule violation caused him to lose control of the lead to the canine which was another safety rule violation. Despite the Agency's poorly written notice, the notice adequately informed him of the allegations against him.

*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>5</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

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

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<sup>5</sup> Va. Code § 2.2-3005.

## 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.