

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 07/30/18;
Decision Issued: 08/10/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11220; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11220

Hearing Date: July 30, 2018
Decision Issued: August 10, 2018

PROCEDURAL HISTORY

On February 5, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

On March 5, 2018, 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 6, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 30, 2018, a hearing was held at the Agency's office.

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 Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Corrections Officers working at the Facility were expected to accept their post assignments even if they did not want to perform the duties at a particular post. If they disagreed with a post assignment, employees were expected to speak with the supervisor privately to explain their objection. Because the Agency's corrections officers operate in a para-military structure with employees holding rank, subordinate employees were expected to follow the orders of employees holding superior rank.

On January 11, 2018, Grievant worked her regular shift but was "drafted" to continue working in the next shift which began at approximately 6:15 p.m.

The Sergeant was conducting the "muster", a short briefing for the Sergeant to assign staff to posts throughout the facility and communicate any issues of significance. Grievant and two other corrections officers were meeting with the Sergeant. The Facility practice is for corrections officers to accept their assignments whether they wanted the assignment or not. The Sergeant began speaking to staff and giving them post assignments. Grievant interrupted the Sergeant said, "I'm not going to do that. I

am not staying to do no painting.¹ I'm not doing it. You can tell [the Superintendent and Ms. K]. Grievant's tone was insubordinate towards the Sergeant. The Sergeant told Grievant that they could discuss her concerns after the meeting.

Later in the evening, the Lieutenant told Grievant to assist with breaks by relieving officers from their posts. Grievant responded, "Why can't your officers break each other. This is ridiculous."

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.

The Agency expected Grievant to perform her duties as assigned without expressing refusal in front of other corrections officer. On January 11, 2018, Grievant refused to perform a work assignment in front of other corrections officers during a muster. Grievant's tone was disrespectful towards the Sergeant. Grievant's work performance was unsatisfactory to the Agency.⁶ The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she did not say she would not "do painting" but rather questioned why she had to do painting. Grievant already had an assignment "running showers" and she believed it was unnecessary to reassign her to supervising inmates

¹ Grievant was referring to a post that involved supervising inmates who were painting.

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

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

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

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

⁶ Questioning a superior officer's authority in front of other corrections staff could have caused an "uproar" according to the Superintendent.

who were painting. The evidence showed that Grievant refused her work assignment and did so using a disrespectful tone of voice.

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”⁷ 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 I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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 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.

⁷ Va. Code § 2.2-3005.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.