

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 05/11/18;  
Decision Issued: 05/14/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11190; 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: 11190**

Hearing Date: May 11, 2018

Decision Issued: May 14, 2018

#### **PROCEDURAL HISTORY**

On October 26, 2017, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On November 20, 2017, 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 April 2, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 11, 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 locations. No evidence of prior active disciplinary action was introduced during the hearing.

On October 2, 2017, Grievant was responsible for supervising an Inmate in an Emergency Hospital Room. Officer K was also working with Grievant. The Emergency Hospital Room was open to the public. Grievant was expected to remain alert in case an Inmate's family member or friend attempted to contact the Inmate.

On October 2, 2017, the Assistant Warden was conducting rounds in the Emergency Room area. The Assistant Warden approached the Room. The Room was dark but the Assistant Warden could see the outline of a Corrections Officer's Hat. The Assistant Warden entered the room and observed the Inmate laying on a gurney and restrained correctly. Grievant was sitting beside Officer K. His elbows were down and his wrists were up. He was resting the cheeks of his face on the palms of his hands. Grievant was looking down at the floor. Grievant did not notice the Assistant Warden enter the room. Officer K spoke to Grievant and Grievant opened his eyes. The Assistant Warden asked why the lights were out and was advised that the lights did not work. The Assistant Warden flipped the light switch and the lights turned on to illuminate the room.

## 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.”<sup>1</sup> 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.”<sup>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>4</sup> 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 corrections officers supervising inmates in the Emergency Room to be alert at all times. On October 2, 2017, Grievant was seated with his face in his hands looking downward. He did not notice when the Assistant Warden entered the room. Grievant was not alert. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that on October 2, 2017, he was in the room with the Inmate and Officer K. He was tired. He had his cap on. He was watching TV and the room was dark. Grievant asserted that he was alert, Officer K spoke to him and he answered. Grievant did not testify or present other testimony to his arguments. The only evidence before the Hearing Officer is the evidence presented by the Agency. There is no factual basis to reverse the disciplinary action.

*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

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

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

<sup>5</sup> Va. Code § 2.2-3005.

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 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>

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

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer