

Issues: Group II Written Notice with Suspension (failure to follow instructions/policy), and a second Group II Written Notice with Termination for abusive language and disruptive behavior; Hearing Date: 05/16/19; Decision Issued: 05/20/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11327, 11328; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11327 / 11328**

Hearing Date: May 16, 2019

Decision Issued: May 20, 2019

#### **PROCEDURAL HISTORY**

On November 28, 2018, Grievant was issued a Group II Written Notice of disciplinary action with a five work day suspension for failure to follow instructions. On November 28, 2018, Grievant was issued a Group I Written Notice for using obscene or abusive language. On November 28, 2018, Grievant was issued a Group I Written Notice for failure to follow instructions or policy. On December 18, 2018, Grievant was issued a Group II Written Notice with removal for using obscene or abusive language and disruptive behavior.

Grievant timely filed grievances to challenge the Agency's action. The matter advanced to hearing. On March 4, 2018, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 16, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On November 6, 2018, Grievant was expected to report to the Learning Team meeting which began at 5:15 p.m. The Sergeant, Sergeant H, and several other employees were already in the meeting room. Grievant reported to the meeting approximately five minutes late. The Sergeant handed Grievant a Tardy Slip and told Grievant to fill out the Tardy Slip. Grievant said, "there was a long line at the snacks. The Sergeant said, "Ok, I still need it filled out." Grievant "exploded in anger" and told the Sergeant, "kiss my ass", "f--k you" and "I don't give a f--k about being insubordinate." At the end of the meeting, the Lieutenant told Grievant, "you need to put your name on the tardy slip." Grievant refused to sign the Tardy Slip. The Sergeant put the Tardy Slip in the Watch Commander's basket for review.

Sergeant H was also in the meeting and observed Grievant's behavior. Sergeant H notified the Captain of Grievant's refusal to sign the Tardy Slip. Approximately one hour after the meeting, the Captain spoke with Grievant about his behavior during the meeting. The Captain asked Grievant what happened during the meeting. Grievant said he could not confirm nor deny. The Captain asked Grievant to write a statement or send an email about the meeting. Grievant replied, "you pretty much know I'm not going to do that." Grievant later completed the Tardy Slip by indicating the reason for him being late was, "False accusation."

The Control Booth had a tray slot allowing the Control Booth Officer to dispense items to inmates in the pod. For example, a Control Booth Officer could place a stack of paper towels in the tray slot ledge and then an inmate would take the paper towels to use for cleaning.

On November 28, 2018, Grievant was working in the Control Booth. Several inmates were standing near the tray slot. One of the inmates asked for paper towels. Grievant was busy and focused on other tasks. He began cursing at the inmates telling one of them to "get the f—k away from the booth." Grievant was irate and angry. He said, "f—k, s—t, and hell" as he directed his comments to the inmates. Grievant pushed a set of paper towels through the tray slot and the towels fell to the floor. Several inmates believed Grievant was being disrespectful to them. This angered them.

Corrections Officer E heard Grievant cursing and left the pod before Grievant pushed the paper towels through the tray slot. When Corrections Officer E returned to the pod, several inmates approached her to complain about Grievant cursing them. She noticed a pile of paper towels on the floor in front of the Control Booth slot. Corrections Officer E believed that there was a risk of riot or inmate disturbance because of how upset the inmates had become. Corrections Officer E called Lieutenant W by telephone to report the incident. A few minutes later, Sergeant S entered the pod to speak with the inmates. Sergeant S notified the Unit Manager of the inmates' concerns.

The Unit Manager entered the pod and spoke with several inmates. The inmates told her Grievant was disrespectful to them and that they would attack Grievant the next time he came onto the pod floor.

## **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

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

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>

### Group II Written Notice Failure to Follow Instructions

The Agency issued a Group II Written Notice for failure to follow instructions and two Group I Written Notices.<sup>4</sup> The Group I Written Notices are not distinguishable from the Group II in terms of the date of the incident and facts supporting the disciplinary action. The two Group I Written Notices are lesser included offenses and must be dismissed because the Agency issued a Group II Written Notice for failure to follow instructions.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>5</sup> Insubordination is a Group II offense. On November 6, 2018, Grievant was instructed to complete a Tardy Slip because he was tardy to a meeting at the beginning of his shift. Grievant refused to complete the Tardy Slip. Grievant “exploded in anger” and told the Sergeant, “kiss my ass”, “f--k you” and “I don’t give a f--k about being insubordinate.” Grievant’s behavior showed a refusal to follow a supervisor’s instructions. Grievant was insubordinate because he expressed contempt of the Sergeant’s authority to supervise as Grievant cursed the Sergeant. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s five workday suspension is upheld.

Grievant argued that he completed the Tardy Slip later in the day. Although Grievant may have signed the Tardy Slip later after speaking with the Captain, he clearly expressed his refusal to do so and did so in an insubordinate manner. Grievant’s insubordination is sufficient to support the issuance of the Group II Written Notice.

### Group II Written Notice – Obscene or Abusive Language and Disruptive Behavior

On November 28, 2018, Grievant used obscene language by cursing at inmates. He pushed paper towels through the Control Booth tray slot. Grievant’s behavior was disruptive because he caused the inmates to believe he was being disrespectful

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<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> It is unclear from the Grievance Form A whether Grievant appealed the two Group I Written Notices. Because he clearly appealed the Group II Written Notice for failure to follow instructions, the same wording is used in all three notices, the Agency presented the two Group I Written Notices as active, the Hearing Officer concludes Grievant intended to appeal the Group II Written Notice and the two Group I Written Notices.

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

towards them. The Agency has presented sufficient evidence to show that Grievant engaged in a Group I offense of using obscene language and being disruptive.

In rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

In this case, Grievant's behavior towards the inmates created the risk of riot or inmate disturbance. His actions also resulted in a threat to his safety in the event he left the Control Booth and began working in the pod with the inmates. Grievant created a material adverse impact on the Agency thereby justifying the Agency's decision to elevate the Group I offense to a Group II Written Notice.

Upon the issuance of two Group II Written Notices, an agency may remove an employee. Grievant has received two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

Grievant argued that the disciplinary action was excessive and that there was no basis for removal. The evidence showed that Grievant's behavior rose to the level of a Group II offense and justified the Agency's decision to remove him from employment.

### Mitigation

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>6</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.

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<sup>6</sup> Va. Code § 2.2-3005.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow instructions with a five workday suspension is **upheld**. The Group I Written Notice for obscene or abusive language is **rescinded**. The Group I Written Notice for failure to follow instructions is **rescinded**. The Group II Written Notice with removal for using obscene or abusive language and disruptive behavior 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>

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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 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