

Issue: Group III Written Notice with Suspension (violation of safety rule where there is threat of bodily harm); Hearing Date: 11/07/18; Decision Issued: 11/27/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11272; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 12/07/18; EDR Ruling No. 2019-4823; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

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

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

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

In re:

**Case Number: 11272**

Hearing Date: November 7, 2018  
Decision Issued: November 27, 2018

#### **PROCEDURAL HISTORY**

On May 30, 2018, Grievant was issued a Group III Written Notice of disciplinary action with a ten work day suspension for leaving her weapon in a Physician's Office restroom.

On June 27, 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 October 1, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 7, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Counsel  
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 the Facility. She had been employed by the Agency for approximately five years. No evidence of prior active disciplinary action was introduced during the hearing.

When transporting offenders outside the Facility, Grievant carried a Glock 40 handgun. The gun was loaded. Grievant kept the weapon in a holster on a utility belt she wore.

On March 1, 2018, Grievant and three other officers were responsible for transporting three offenders using two vehicles. Grievant and Officer J were in the first vehicle carrying three offenders. Officer M and Officer L were in the second vehicle without offenders. The Officers in the second vehicle were to trail the first vehicle and provide oversight of the first vehicle.

The two vehicles travelled from the Facility to the Physician's Office. Their trip lasted approximately 45 minutes. The offenders were treated by the Physician and then returned to the first vehicle. Grievant went to the single stall restroom in the Physician's Office area. She entered the restroom. She removed the Glock 40 weapon from her holster and placed it between the hand rail and the wall. When Grievant left the

restroom, she forgot to take her weapon with her. She entered the first vehicle with Officer J and they began driving back to the Facility. The second vehicle followed.

The Medical Assistant who worked at the Physician's Office went into the restroom and observed Grievant's weapon. The weapon was placed between the hand railing attached to the wall and the wall. The weapon was faced down with the safety on. The Medical Assistant took the weapon out of the restroom and put it in a locked drawer. She called the local Sheriff's Office. A Deputy Sheriff came and took possession of Grievant's weapon.

The Medical Assistant was surprised but not scared when she observed the weapon. She was concerned that the weapon was in the restroom because the restroom was available to children, drug seeking patients, and other inmates who visited the Physician.

As the two vehicles approached the Facility, Grievant's vehicle pulled to the side of the road. Grievant realized she had forgotten her weapon and was panicking. Grievant tapped the side of her hip and Officer J realized what had happened. The second vehicle moved next to Grievant's vehicle. Grievant exited her vehicle and went to the second vehicle. She told Officer L to get out of the vehicle and into the first vehicle. Grievant got into the second vehicle with Officer M and told Officer M they had to go back to the Physician's Office. Grievant did not explain why they had to go back. Officer M made a "U-turn" and began driving back to the Physicians' Office. Grievant told Officer M that she had "messed up" and left her weapon at the Physician's Office.

Officer J returned to the Facility and told the Lieutenant what had happened.

When they returned to the Physician's Office, Grievant went inside to locate her weapon. Grievant met the Medical Assistant who told Grievant that they had turned the weapon over to the local Sheriff's office.

Grievant left the Physician's Office and went to the second vehicle. Officer M told her she needed to call someone. Officer M called the Facility and asked for the Lieutenant. Officer M was informed the Lieutenant was aware of the situation and was on her way to the situation. Grievant called the Lieutenant as well using Officer M's State cell phone. The Lieutenant was in route to the Sheriff's Office. The Lieutenant told Grievant she knew what had happened and for Grievant to return to the Facility.

The Lieutenant went to the local Police department to retrieve Grievant's weapon.

## **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>

Operating Procedure 430.1 governs Armory Operation and Maintenance. Attachment 2 of this policy governs Firearm Care and Safe Handling Glock Model 23, .40 Caliber Handguns. Attachment 2 provides:

This weapon will not be transferred between officers except when being issued and returned at the armory. This weapon will only be removed from the holster to be placed in a gun locker, or when necessary to use lethal force.<sup>4</sup>

Group III offenses include “[v]iolating safety rules when there is a threat of physical harm.” Grievant was obligated to comply with the safety rule of keeping her weapon in her holster while she was at the Physician’s Office. Grievant failed to comply with that safety rule on March 1, 2018. There was a threat of physical harm because the gun was loaded and available to children or drug seeking patients who could have misused the weapon if they had found it before the Medical Assistant found it. 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 in lieu of removal for up to 30 workdays. Accordingly, Grievant’s ten work day suspension must be upheld.

Grievant argued the Agency could have issued a lesser, more appropriate level of punishment. Although it is clear that Grievant realized she made a significant mistake and that the Agency’s corrective action could have involved a lesser level of disciplinary action, the Agency’s level of disciplinary action is consistent with the Standards of Conduct. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

*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

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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> Agency Exhibit 5.

<sup>5</sup> Va. Code § 2.2-3005.

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.

Grievant did not contest the Agency's facts and assertion that disciplinary action as warranted. Grievant object to the level of punishment contending it was too harsh. She argued that other employees had engaged in similar behavior yet received lesser punishment. The evidence showed that on August 15, 2015, the Facility Warden issued a Group III Written Notice to a corrections officer who used the restroom at a medical center and left her weapon in the restroom. Approximately 15 minutes later, another corrections officer found the weapon and returned it to the first corrections officer who was later disciplined. The first officer had been working for the Agency for 11 years without prior active disciplinary action. She did not receive a suspension. On August 4, 2015, the Facility Warden issued a Group III Written Notice with a two work day suspension to a second corrections officer. That officer cleared her weapon at the armory window and the weapon discharged firing a round into the ground. This second officer had been employed by the Agency for 19 years. On April 18, 2016, the Facility Warden issued a Group III Written Notice to a third employee who was involved in discharging a weapon with a loaded magazine insert without first doing an admin unload, rack the bolt three times, lock the bolt to the rear, place thumb in the magazine well, and conduct a visual inspection of the chamber while the bolt is locked to the rear. This third corrections officer had an active Group III Written Notice and had been employed by the Agency for three years. This third corrections officer was removed from employment. On October 19, 2016, the Facility Warden issued a Group III Written Notice with a fifteen day suspension to a fourth corrections officer who failed to search another officer who was carrying a loaded weapon. The other officer entered the secured compound with a loaded weapon that inmates could have seized.

Based on the above examples, the Hearing Officer cannot conclude that the Agency treated Grievant differently from similarly situated employees.<sup>6</sup> The circumstances of the first corrections officer most closely align with the facts of Grievant's case. That first corrections officer received a Group III Written Notice without suspension. That first officer had 11 years of service and her weapon was found by another officer within 15 minutes. No outside law enforcement were involved in retrieving the weapon. These additional factors are sufficient to support the Agency's conclusion not to suspend the first officer even though the Agency chose to suspend

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<sup>6</sup> Grievant also presented two Group I Written Notices issued to corrections officers who failed to report their observations of other employees who had left their service weapons unattended. These two examples were not of employees similarly situated with Grievant.

Grievant. The other examples are not of similarly situated employees. Nevertheless, those three other employees, however, received Group III Written Notices.

In light of the standard set forth in the Rules, 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**.

## 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