

Issue: Group III Written Notice with demotion, transfer and pay reduction; Hearing Date: 07/20/17; Decision Issued: 08/09/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11018; Outcome: No Relief – Agency Upheld;
Administrative Review: Ruling request received 08/23/17; EEDR Ruling No. 2018-4611 issued 09/12/17; 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: 11018

Hearing Date: July 20, 2017
Decision Issued: August 9, 2017

PROCEDURAL HISTORY

On February 23, 2017, Grievant was issued a Group III Written Notice of disciplinary action for violating policy and workplace violence.

On March 17, 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 May 11, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 20, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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. 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 the grievant as Chief of Housing and Programs until his demotion, disciplinary pay reduction, and transfer to Unit Manager at another institution. He has been employed by the Agency for approximately 13 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency teaches its employees how to de-escalate conflict with inmates. Grievant knew how to de-escalate conflict with inmates. Grievant provided training to new staff regarding how to de-escalate conflict with inmates.

Building E housed approximately 100 inmates. The inmates lived in a "dormitory style" pod with inmates sleeping in bunk beds instead of staying cells.

Contraband was found in the recreation yard at the Facility on January 4, 2017. Agency managers decided to close the rec yard to inmates on January 5, 2017. These managers failed to tell the corrections officers in Building E. The Building E officers opened the recreation yard on January 5, 2017. The Sergeant entered Building E and told the employees to close the recreation yard. Inmates who were in the recreation yard were force to return to their pod. They became angry that the rec yard was closed. Several inmates were cursing and yelling.

Grievant entered the pod and was with the Sergeant and Lieutenant. Inmates gathered around Grievant. Grievant began telling the inmates that the recreation yard was closed because contraband was found in the yard on the prior day. Inmates began

yelling and cursing at Grievant. Inmates asked why they were being punished for the actions of one inmate. Grievant said it (contraband) was not acceptable and he had some ideas about this. One of the inmates said, “f—k you, [Grievant’s last name]”. Another inmate said, “you can carry your fat ass somewhere and lose some weight.” Grievant told the inmates to return to their bed areas. Grievant yelled and cursed at the inmates.

At some point, the argument became so heated that the Sergeant and Lieutenant became concerned about safety. They stepped between Grievant and a group of inmates.

Grievant turned to leave the Building. Inmates were yelling “f—k up [Grievant’s last name]”. Grievant said, “Kiss my ass!” He yelled this loud enough for inmates to hear him.

The Sergeant testified that Grievant contributed to the conflict and that the Sergeant was concerned for his safety because of Grievant’s behavior.

After Grievant left the Building, several inmates asked to file grievances. Several filed grievances complaining about the recreation yard being closed and several wrote grievances complaining about Grievant’s behavior.

The Lieutenant and Sergeant heard Grievant’s comments. Someone told them not to write internal incident reports until asked to do so. When the Warden returned to work from her vacation, she learned of the incident. The Lieutenant and Sergeant wrote incident reports on January 24, 2017 about what they observed on January 5, 2017.

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

Workplace violence includes “verbal abuse occurring in the workplace by employees” and “includes but is not limited to” ... “harassment of any nature such as ...

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

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

abusive language.” Grievant was in a heated argument with several inmates. The argument was so heated that other employees had to step between Grievant and the inmates to ensure a physical conflict did not occur. As Grievant was leaving he said, “Kiss my ass!” Grievant’s statements were intended to be insulting. They were “fighting words”⁴ that could have caused some of the Inmates (who were already angry at Grievant) to try to fight Grievant. Grievant’s words were harsh and amounted to abusive language. 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 remove an employee. In lieu of removal, an agency may demote, transfer, and implement a disciplinary pay reduction. According, the Agency’s decision to demote Grievant with a disciplinary pay reduction and transfer to another Facility must be upheld.

Grievant argued that the level of disciplinary action was too harsh. The evidence showed that Grievant was a good employee whose behavior could have been addressed by lesser disciplinary action such as by the issuance of a Group I for obscene language. The Hearing Officer cannot reduce disciplinary action simply because he would have issued a different level of disciplinary action. Once the Agency has met its burden of proof, the Hearing Officer can only reduce disciplinary action if mitigating circumstances exist.

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”⁵ 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.

Grievant was honest with the Agency regarding his comments to the inmates. He was experiencing stress because he had a sick family member in January 2017. These factors are not sufficient to establish mitigating circumstances. In light of the

⁴ "Fighting words" are personally abusive epithets that are inherently likely to induce the ordinary person to react violently.

⁵ *Va. Code § 2.2-3005.*

standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.⁶

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction 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.

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]

⁶ The Sergeant and Lieutenant should have written incident reports on January 5, 2017. Their failure to do so is not a mitigating circumstance because they appeared to have a sufficient recollection of the events to establish what happened on January 5, 2017.

^[1] 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

Carl Wilson Schmidt, Esq.
Hearing Officer