

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 08/18/17; Decision Issued: 08/21/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11047; 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: 11047**

Hearing Date: August 18, 2017

Decision Issued: August 21, 2017

#### **PROCEDURAL HISTORY**

On March 3, 2017, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On March 30, 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 she requested a hearing. On June 26, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 18, 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. 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 Counselor at one of its facilities. She began working for the Agency in 2008. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility hired inmates to perform jobs such as custodial jobs within the Facility. Vacant jobs were posted and inmates applied for the positions. Inmate applicants were interviewed for positions and then selected or rejected for the positions.

Grievant reported to Supervisor 1.

On February 14, 2017 at 12:38 p.m., Supervisor 1 asked Grievant who prepared job listings for inmates. Grievant described the process:

Supervisor has a document to post job opening with begin and end dates. (I CAN PUT IT ON THE POD WHEN I MAKE MY ROUNDS) no applications will be received or reviewed outside those dates. I will screen the applications eligible per criteria by supervisor. Supervisor interviews and hires and makes job description documentation that is in policy for each job. (The grievance dept. got complains from offenders when I was

in HU4 about this.) Supervisor keeps track per pod with a list for the control booth.<sup>1</sup>

Supervisor 1 responded, "Please do. Thanks."

On February 15, 2017 at 4:07 p.m., Grievant replied:

I have reviewed applications for LT. Due to CORIS being so slow I am almost finished. I will NOT be updating work rosters and printing due to the increase to my caseload and upcoming programs that counselors will implement.

At 4:39 p.m., Supervisor 1 sent Grievant an email stating:

Counselor [Grievant], I have directed you to help do this and you will follow that directive.

At 4:41 p.m., Grievant replied:

No, for the reasons I stated.<sup>2</sup>

Supervisor 1 went to Grievant's desk and asked her again to perform the task. Grievant refused.

### **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>3</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>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>5</sup>

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<sup>1</sup> Agency Exhibit 5. Grievant's reference to "supervisor" was not to Supervisor 1 but rather to the supervisor of the inmates.

<sup>2</sup> Agency Exhibit 5.

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

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>6</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.

On February 14, 2017, Supervisor 1 instructed Grievant to perform certain duties with respect to inmate job postings. Grievant informed Supervisor 1 that she would not perform those duties. When instructed to perform the duties a second time, Grievant again refused to perform the duties. Supervisor 1 spoke with Grievant in person and Grievant continued to refuse to complete the task. Grievant was expected to perform duties that included following the instructions of her supervisor. The task was within the scope of Grievant’s job duties. Grievant’s refusal to perform was unsatisfactory performance to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant asserted that she had a heavy workload and that affected her ability to perform the additional duty. The evidence showed that the task would have taken less than an hour and not adversely affected her workload or caused her to work overtime.

Supervisor 1 was described as not “a people person”. It does not appear that Grievant refused to comply with the instruction because of Supervisor 1’s stern tone.

*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>7</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.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

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<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

<sup>7</sup> Va. Code § 2.2-3005.

## 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>

[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

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