

Issue: Group III Written Notice with Termination (physical conflict with another employee); Hearing Date: 08/28/19; Decision Issued: 08/29/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11052; 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: 11052

Hearing Date: August 28, 2017

Decision Issued: August 29, 2017

PROCEDURAL HISTORY

On May 19, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for her physical conflict with another employee.

On June 14, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 5, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2017, a hearing was held at the Agency's office. Grievant was informed of the hearing date but did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency Representative

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 employed Grievant as a Corrections Officer at one of its facilities. She had prior active disciplinary action consisting of a Group I Written Notice issued on December 7, 2016.

Grievant had conflict with another employee and with Officer S.

On February 7, 2017 at approximately 7:10 p.m., Grievant parked her vehicle at the bottom of Officer S's residence. She shut off the lights of her vehicle. Officer S walked towards the vehicle. Grievant turned the vehicle lights back on and backed out of the driveway onto the road. Grievant got out of the vehicle and walked towards Officer S. Officer S recognized Grievant and told her to get off of his property. Grievant continued to approach Officer S and he informed her again to get off of his property. Grievant said, "What up little bitch!" Officer S told her to leave. Grievant closed her fist and tried to punch Officer S. Officer S ducked backwards avoiding the hit. Grievant said "look at you flinch you pu--y." Officer S backed away while calling the 911 dispatcher. Grievant charged Officer S and began striking him in the face, shoulder and arm. Officer S backed away and he attempted to speak with the 911 dispatcher. Grievant charged him again. Officer S drew his concealed handgun and instructed Grievant to leave. Grievant said, "shoot me mother f—ker, I'd love to die." She charged Officer S again and he backed away. Grievant turned and went to her vehicle and drove away.

Officer S went to the Magistrate's office and filed charges for assault and battery against Grievant. He also obtained an emergency protective order against her. Grievant was convicted of assault but the charge of battery was taken under advisement by the court until a later date.

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

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

In the Agency's opinion, Grievant's behavior rises to the level of a Group III offense. The Agency's opinion is supported by the evidence. Grievant sought out Officer S at his home and initiated a fight with Officer S. Grievant's behavior is similar to several Group III offenses including "Acts of physical violence or fighting" and "situations that involved crimes against a person." Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

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"⁴ 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

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).

⁴ Va. Code § 2.2-3005.

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 III Written Notice of disciplinary action with removal 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]

[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

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.