

**COMMONWEALTH OF VIRGINIA**  
Department of Human Resource Management  
Office of Employment Dispute Resolution

**DECISION OF HEARING OFFICER**

In re: Virginia Department of Corrections (DOC)

**Case Number: 11579**

Hearing Date: October 8, 2020

Decision Issued: December 17, 2020

**PROCEDURAL HISTORY**

Grievant's employment as a Corrections Officer was terminated on July 20, 2020, because of a workplace incident that occurred on July 7, 2020. The Group 11 Notice alleged that Grievant had refused, in a disruptive and aggressive manner, a supervisor's order to go to his assigned post. At the time of his termination Grievant had four active Group 11 Notices for failure to follow a supervisor's instruction, perform assigned work or otherwise comply with all applicable written policies and procedures. (Agency Ex. at pages 1- 4)<sup>1</sup>. According to the Notice "Termination in this case is warranted due to the accumulation of Active Group Notices" (Id)<sup>i2</sup>

On or around July 22, 2020, Grievant timely filed a grievance. (Grievance Form A) Effective August 6, 2020, the Department of Human Resource Management (DHRM) assigned the matter to the undersigned Hearing Officer. Due to the covid 19 pandemic and the resulting shutdown of most state operations, the hearing was ultimately held virtually on October 8, 2020 on the Google Meet platform hosted by the agency.

**APPEARANCES**

Grievant and advocate  
Agency advocate and Agency Representative  
Eight witnesses testified remotely for the Agency.

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<sup>1</sup> Unless specifically noted, references in this decision are to the handwritten number at the bottom right-hand corner of the agency's exhibits and the bates stamped number on the top right-hand corner of grievant's exhibits.

<sup>2</sup> More specifically, the termination Notice alleged that Grievant had failed to correct his "repeated disruptive, unprofessional, and insubordinate conduct " and engaged in "a pattern of failing to follow supervisors' instructions, perform assigned work or otherwise comply with all applicable established written policies and procedures".

Seven witness testified remotely for the Grievant<sup>3</sup>

### 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?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, aggravating circumstances existed that would overcome the mitigating circumstances?

### EXHIBITS

All parties submitted exhibits electronically to the Hearing Officer. The Agency submitted 82 pages of exhibits marked sequentially in the bottom right-hand corner. The Grievant submitted 239 pages of exhibits each bates stamped at the top right-hand corner. All exhibits were admitted without objection.

### BURDENS 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. Grievant has the burden of raising and establishing any affirmative defenses to the discipline and any evidence of mitigating circumstances related to the discipline. (GPM § 5.9). Grievant has the burden of proving his affirmative defense that his termination was the result of discrimination based on his race and national origin.<sup>4</sup>

**For the reasons that follow, I conclude that the current Notice was justified, and termination was the appropriate penalty in light of the accumulation of notices and therefore rule for the Agency.**

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<sup>3</sup> For purposes of confidentiality, unless otherwise stated, witnesses are identified in this decision in the order of their testimony.

<sup>4</sup> Grievant did not testify which is his right. However, there is no evidence offered as to Grievant's national origin.

## FINDINGS OF FACT

After carefully reviewing the evidence presented and observing the demeanor of each witness that testified the Hearing Officer makes the following findings of fact.

Grievant was employed as a Corrections Officer for approximately 10 years (6/7/2010 to 7/20/2020). In addition to the current termination Notice that is the subject of this case, Grievant had accumulated four active Group 11 Notices for failure to follow supervisors' instructions, perform assigned work or otherwise comply with all applicable written policies and procedures. (Agency exhibit at pages 25 to 36)

At approximately 5:30 a.m. on July 7, 2020, correctional officers were in muster (queuing up) to receive their duty assignments. The muster was conducted by the Watch Commander, a very experienced female Captain. Grievant should have been but was not in the muster. Grievant was in Tower 3. His post assignment that day was to Unit 2. He was instructed to report to Tower 2. Grievant went instead to the armory window and demanded in a loud voice to speak to the Watch Commander that was conducting the muster.

Grievant's loud outburst at the armory window was disruptive and interfered with the count that was underway in master control.

The Watch Commander left the count and spoke to Grievant at the armory window and ordered him to immediately go to unit 2 his duty assignment. She assured him that she would talk to him at his duty station when she finished the count to resolve his concerns. Grievant refused and argued with the Watch Commander in a loud and aggressive manner. Grievant also threatened to go home if he was not assigned the shift he expected. Grievant eventually went to his assigned post.<sup>5</sup>

Grievant's delay in immediately going to his assigned post disrupted agency operations : it delayed the count and could have resulted in overtime for the night shift personnel he and other officers were relieving.

All witnesses who overheard Grievant's argument with the Watch Commander confirmed that Grievant was loud and aggressive. (See for example testimony of Agency Witness 1, 2, 3 & 7) The Hearing Officer credits their testimony over the Grievant's assertion in the due process procedure that the Captain was loud, argumentative, and unprofessional. (Agency Ex. at p. 7 et seq.)

Witnesses confirmed, and the Hearing Officer finds that corrections officers are required to promptly obey all lawful commands unless the order placed them or others in harm's way

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<sup>5</sup> The Watch Commander's July 7, 2020 statement is Agency Ex. at p. 74)



and to raise any concerns the officer may have with the order at the appropriate time and place.

Grievant purposely failed to promptly follow a lawful order from his superior officer and argued about his compliance with the order at the wrong place and time.

The overwhelming weight of the witnesses' testimony was that they had not experienced or observed assignment preferences given to white officers. Moreover, this finding is supported by a black lieutenant (Agency Witness 3) whom Grievant claimed was aware of the preference for white officers. The witness testified credibly that white officers were not preferentially assigned duty posts. The Hearing Officer finds that assignment preferences were not given to white officers.

According to that same witness, Grievant's refusal to promptly obey the Watch Commander's order was insubordination.

Since approximately 2009, the correctional facility where Grievant worked followed a system that a Watch Commander sent an email to all officers asking for volunteers for upcoming shifts. Officers routinely volunteer for specific shifts but were not guaranteed they would be assigned to the shift they had volunteered for. Assignments were based on the needs of the facility. And it was left to the Watch Commander to assign or reassign any officer to a duty station that met the needs of the institution.

The record in this case indicates that between May of 2018 and August of 2019 Grievant received four Group 11 Notices for failure to follow a supervisor's instruction, perform assigned work or otherwise comply with applicable written policy or procedure. (Agency Exhibits at pages 25 to 36)

There is no evidence to remotely suggest that these Notices demonstrate that he was targeted because of his race and or national origin.

There is no evidence in this case regarding Grievant's national origin.

### **ANALYSIS AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for the orderly administration of state employees and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate

grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989)

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides in pertinent part:

*It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints....  
To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.*

"In disciplinary actions, the agency must present its evidence first and show by a **preponderance of evidence** that the disciplinary action was warranted and appropriate under the circumstances. Grievance Procedure Manual. **The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline** (GPM) § 5.8.

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60. *"The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness."* A legitimate goal of the policy is to *"enable agencies to fairly and effectively discipline and/or terminate employees.... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination."* Id. (Agency Ex. 5)

The policy requires that employees *"[c]omply with the letter and spirit of all state and agencies policies and procedure, the Conflict of Interest Act, and Commonwealth laws and regulations"* and *[c]onduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties"*.

The severity of an infraction determines which of three levels of disciplinary actions an agency chooses to administer. Group 111 offenses *"include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, ... constitute illegal or unethical conduct; ... or other serious violations of policies, procedures, or laws."*

The Department of Corrections implements the Standards of Conduct applicable to all state employees through Operating Procedure (OP) 135.1 Standards of Conduct , effective July 1, 2018 as amended. (Agency Ex. at p. 47 et seq.)

OP 135.1 in pertinent part states as follows:

**3. “All employees must comply with all applicable governmental laws, rules and regulations, Commonwealth’s policies, DOC operating procedures, and the behaviors and performance expectations outlined herein.**

**7(h) Work cooperatively to achieve work unit and agency goals and objectives.**

**7(i) Create and maintain a Healing Environment within the DOC by treating coworkers, supervisors, managers, subordinates, offenders, and other stakeholders with respect, courtesy, dignity, and professionalism; be open to communication and collaboration with colleagues in a manner that generates trust and teamwork.**

**7(l) Resolve work-related issues and disputes in a professional and constructive manner and through established business processes, and**

**7(m) Conduct themselves at all times in a manner that supports the mission of the DOC and the performance of their duties.**

Similarly, to Policy 1.60 applicable to all state employees OP 135.1 ranks unacceptable behavior into **“three groups according to the severity of the behavior, with Group 1 being the least severe and Group 111 being the most severe.”**

OP 135.1 (B(1)(b) expressly authorizes mitigation or aggravation of offenses as the circumstances warrant.

**“Mitigating circumstances may ... include consideration of an employee’s long service with a history of otherwise satisfactory work performance.”**

OP 135 B(2)(a) and (b) respectively state that,

**“ Aggravating circumstances include factors related to an offense, such as seriousness of the misconduct or previous record of the same type of offense, which indicate a higher or more severe level of disciplinary action is appropriate” and “The DOC may consider any unique impact that a particular offense has or could have on the DOC and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.”**

OP 135 D (1) and (2) respectively state that Group 11 Offenses



***“include acts that are severe in nature (than a Group 1) and are such that an accumulation of two Group 11 offenses normally should warrant termination”***

***“Group 11 offences include but are not limited to: a. Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy or procedure.”***

And OP 135.1 3 (b) and (c) respectively state that

***“Absent mitigating circumstances, the accumulation of two active Group 11 offenses should normally result in termination” and “remain active for three years from the date of issuance.”***

The Department of Human Resource Management (DHRM) has issued Policy 2.35 Civility in the Workplace, effective 1/1/19 (Agency Ex at page 67 et seq. The policy expressly prohibits bullying which is defined as

***“Disrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person... The behavior typically is severe or pervasive and persistent, creating a hostile work environment...”***

OP 145.3 states in pertinent part

***1V(A) It is the responsibility of all employees ... to maintain a non-hostile, bias-free working environment, and to ensure that employment practices are free from workplace harassment, of any kind, cyber-bullying, bullying, retaliation, or other inappropriate behavior;***

***1V(D) Any employee who engages in conduct determined to be harassment, cyber-bullying, bullying, and/or other inappropriate behavior... will be subject to disciplinary action under OP 135.1, Standards of conduct, which may include termination from employment.***

OP 145.3 defines bullying as

***Disrespectful, intimidating, aggressive, and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person.***

#### **APPLICABLE POLICIES**

DOC took the disciplinary action in this case pursuant to Operating Procedure 1.35.1 ( Failure to Follow instructions and/or policy, disruptive behavior, insubordination) and DHRM Policy 2.35, Civility in the Workplace” (Agency Ex at p. 1 et seq.) and OP 145.3 , Equal

Employment Opportunity, Anti-Harassment, and Workplace Civility. (Agency Ex. at p. 1) (Agency Ex. at p 37 to 73)

### **Grievant Engaged in the conduct described in the Written Notice**

Grievant was given a lawful command from his superior officer to go to his correct duty station on the early morning hours of July 7, 2020. It was imperative that he obey the order, not only because it was his duty as a corrections officer to do so, but because he was relieving the night shift. Rather than promptly obeying the order, he argued loudly with his superior officer in the presence of other correctional officers that a certain shift was promised to him and accused the officer of giving the assignment to a white officer. He continued to argue even after he was shown the written duty roster (Agency Ex. at p.78).

Grievant argues that he had volunteered for, and was promised his duty assignment to Tower 3, and not Unit 2. That argument is thoroughly refuted by the experienced officers that testified the Watch Commander has the authority to assign officers as the needs of the institution dictate.

The Findings of Fact that are carefully articulated above demonstrate that Grievant's conduct was insubordinate, disruptive, disrespectful, and severe, in violation of OP 135.1 and 145.3.

### **The Agency's discipline was consistent with law and policy.**

Grievant's advocate argues that Grievant's conduct was at best a Group 1 violation and should not result in his termination. She argues that Grievant was targeted for discipline because of his race and national origin. Because no evidence was offered to establish grievant's national origin the Hearing Officer dismisses that argument summarily.

OP 135 D (1) and (2) respectively state that Group 11 Offenses

***"include acts that are severe in nature (than a Group 1) and are such that an accumulation of two Group 11 offenses normally should warrant termination"***

***"Group 11 offences include but are not limited to: a. Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy or procedure."***

The refusal of a lawful order by a superior is serious and under certain circumstances could lead to disastrous consequences in a correctional facility. In this case Grievant had accumulated 5 active Group 11 Notices, the common theme of which was his failure to follow a supervisor's instruction, perform assigned work, or otherwise comply with all applicable written policies and procedures. Termination was therefore appropriate unless there were mitigating circumstances to compel a lesser penalty.

**There were no mitigating circumstances justifying a reduction or removal of the disciplinary action**



In hearings contesting formal discipline, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (11) the behavior constituted misconduct, and (11) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated unless under the record evidence, the agency's discipline exceeds the limits of reasonableness."(GPM at § 5.9).

OP 135.1 (B(1)(b) expressly authorizes mitigation or aggravation of offenses as the circumstances warrant.

***"Mitigating circumstances may ... include consideration of an employee's long service with a history of otherwise satisfactory work performance."***

OP 135 B(2)(a) and (b) respectively state that,

***"Aggravating circumstances include factors related to an offense, such as seriousness of the misconduct or previous record of the same type of offense, which indicate a higher or more severe level of disciplinary action is appropriate" and "The DOC may consider any unique impact that a particular offense has or could have on the DOC and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms."***

Grievant had ten years of service when his employment was terminated. That factor is outweighed by the seriousness of the offense and its impact on agency's operations. Refusing a lawful order from a superior officer is serious and could potentially lead to major consequences in a correctional environment. Moreover, the refusal was made in the presence of other officers and could impact employee morale if not immediately addressed. In addition, was relieving the night shift and his refusal could potentially result in overtime pay to affected night shift personnel.

Grievant's advocate argued that Grievant was termination was in retaliation for complaining on several occasions of racial discrimination. This is an affirmative defense. **The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline** (GPM) § 5.8. Grievant has not met his burden.

It is worth noting that throughout the many opportunities he had to provide his defense during the internal due process procedure, Grievant never claimed that he was discriminated against. Instead, he wrote "In general, I believe that some are getting more privileged "sic" than the other "sic" only because they're friends with higher authority and they are placed where they want at all time." (Agency Ex. at p. 7 & 9)

It is abundantly clear that there is no evidence to remotely suggest that the five Group Notices the grievant received were based on his race. Indeed, Grievant's own witness (No 3), an African American corrections officer at the same facility, testified that a group notice he received for tardiness was not based on his race. The Hearing Officer acknowledges that another Grievant witness (No 7), an African American Officer, testified that he was fired because of his race. The Hearing Officer discounts that testimony as contrary to the weight of the evidence, speculative with no supporting evidence and offered by a disgruntled former employee.

### **DECISION**

The disciplinary action of the Agency is affirmed.

## 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 Employment Dispute Resolution (EDR)  
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>6</sup>

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<sup>6</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].





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Neil A.G. McPhie  
Hearing Officer

December 17, 2020

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