



# ***COMMONWEALTH of VIRGINIA***

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

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

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

In re:

**Case Number: 11529**

Hearing Date: July 21, 2020  
Decision Issued: September 10, 2020

#### **PROCEDURAL HISTORY**

On March 25, 2020, Grievant was issued a Group III Written Notice of disciplinary action for gross negligence on the job that resulted in the death of a ward of the State.

On April 9, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 28, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 21, 2020, a hearing was held by audio conference.

#### **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 employed Grievant as a Housing Unit Manager at one of its Facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for overseeing the Housing Unit and supervising one Lieutenant, four Sergeants, four Case Workers, and sixteen to twenty Corrections Officers working several shifts.

Grievant's usual work shift began at 8 a.m. and ended at 4:30 p.m.

Grievant had a personal errand to take care of in the morning of August 21, 2019. On August 20, 2019, Grievant sent his subordinate, the Lieutenant, a text message saying he would "be in at 0930" on the following day. Grievant did not obtain permission from his Supervisor to be late. If Grievant had sought permission from his Supervisor to be late to work, the Supervisor would have granted his request.

On August 21, 2019, Grievant arrived at the Facility at approximately 10:02 a.m. He entered the Support Building at approximately 10:10 a.m. Grievant spoke with Counselor S about classification actions for several offenders. Grievant left Counselor

S's office and spoke with Counselor W at Counselor W's request. They discussed an annual review of an offender.

At approximately 10:37 a.m., an Inmate in the Housing Unit was assaulted by another inmate and died. Counselor S heard a radio call of an emergency in the Housing Unit. She went to tell Grievant and Grievant immediately left the Support Building headed towards the Housing Unit.

Grievant arrived at the Housing Unit at approximately 10:41 a.m.

Grievant determined that a Corrections Officer was not present on the Unit floor during mass movement as required by Facility practice. Grievant initiated disciplinary action against that Corrections Officer. Grievant also initiated disciplinary action against a Sergeant who was not in the Unit when expected. The Housing Unit Lieutenant also received disciplinary action for not being present in the Unit at the time of the inmate assault.

An internal investigation showed that no staff were near the inmates as required by Facility practice. If staff had been near the Inmate, the Agency believed that the likelihood of that Inmate's death would be much lower.

## **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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>1</sup>

"Failure to report to work as scheduled without proper notice to a supervisor" is a Group II offense.<sup>2</sup> On August 21, 2019, Grievant did not report to work at 8 a.m. as scheduled. He did not obtain permission from the Supervisor to be late to work. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an employee may be suspended for up to ten workdays. Accordingly, Grievant should be suspended for ten workdays.

Grievant argued that his Supervisor gave him permission to report to work late on August 21, 2019. The Supervisor denied this allegation and her denial was credible.

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>2</sup> See, Operating Procedure 135.1.

In extreme circumstances, a Group II Written offense may be elevated to a Group III Written offense depending on the unique impact on the Agency. There is no basis to elevate the Group II offense to a Group III offense in this case because if Grievant had sought permission from the Supervisor to report late to work, she would have granted that request. When Grievant was absent from the Housing Unit, the Lieutenant and Sergeant were in charge of the Housing Unit. Whether Grievant had permission or lacked permission to be late to work on August 21, 2019 did not affect the Facility's operations. There was nothing unique about Grievant's failure to obtain his Supervisor's permission to report to work late on August 21, 2019. Grievant reported to the Facility at approximately 10:02 a.m. He was delayed in reaching the Housing Unit while he engaged in work duties by speaking with two counselors.

The Agency argued Grievant engaged in gross negligence. The Agency's policy does not define gross negligence. There is nothing about Grievant's behavior that would meet the customary legal definition of negligence. Even if the Hearing Officer assumes Grievant's behavior was negligent, his behavior would not constitute gross negligence.

*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>3</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 further 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 **reduced** to a Group II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency may reduce Grievant's back pay to account for a ten workday suspension. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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<sup>3</sup> *Va. Code § 2.2-3005.*

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment 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 EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR 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 EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Office of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 11529-R**

Reconsideration Decision Issued: November 2, 2020

**RECONSIDERATION DECISION**

EDR Ruling 2021-5163 remanded this matter to the Hearing Officer:

Accordingly, EDR must remand the decision to the hearing officer to articulate his findings on the material issues of whether the grievant had supervisory responsibilities that he failed to meet as of August 21, 2019, as alleged by the Group III Written Notice, and whether the agency met its burden to prove that such failures constituted misconduct warranting a Group III Written Notice with termination under applicable law and policies.

No credible evidence was presented to show that Grievant failed to fulfill his supervisory duties. Grievant adequately assigned staff to the pod including a Lieutenant, Sergeant and Floor Officer. No credible evidence was presented to show that Grievant instructed his subordinates to disregard their post orders or performance expectations. In other words, Grievant was entitled to rely on his subordinates to complete their duties based on their training, experience, and post orders. Grievant notified the Lieutenant he would not be present in the following day and, thus, she was in charge of the Housing Unit. The Lieutenant was responsible for ensuring that the Sergeant and Floor Officer were their appropriate locations because she was in a position to observe their work performance. Grievant was not in the position to observe the performance of his subordinates because he was running an errand. His absence would have been approved had he notified his supervisor of his need to be absent from work. When Grievant learned his subordinates failed to perform their duties, he initiated disciplinary action against them. Grievant did not engage in gross negligence justifying the issuance of a Group III Written Notice.

The Original Hearing Decision correctly resolved this grievance.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

Carl Wilson Schmidt, Esq.  
Hearing Officer