



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11552 / 11568 / 11569**

Hearing Date: November 10, 2020

Decision Issued: November 30, 2020

#### **PROCEDURAL HISTORY**

On March 31, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instruction as insubordination. On May 1, 2020, Grievant was issued a second Group II Written Notice for failure to follow policy. On May 1, 2020, Grievant was issued a third Group II Written Notice for failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

Grievant timely filed grievances to challenge the Agency's actions. The matter advanced to hearing. On July 8, 2020, the Office of Employment Dispute Resolution issued Ruling 2021-5130 consolidating these grievances for hearing. On June 29, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. A hearing was concluded by remote conference on October 2, 2020 and November 10, 2020.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Representative  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Lieutenant at one of its Facilities. She began working for the Agency in June 2015. No evidence of prior active disciplinary action was introduced during the hearing.

On March 13, 2020 at approximately 9:20 p.m., a Corrections Officer discharged a less than lethal weapon at an inmate. Grievant was supposed to ensure that the inmate was placed in the restrictive housing unit in accordance with the Agency's policies. At 9:20 a.m. on March 14, 2020, the inmate had not been placed in the restrictive housing unit. Before leaving the Facility, Grievant had assigned Sergeant R to move the inmate to the restrictive housing unit.

Grievant was at her home and in the process of going to sleep. The Warden called Grievant and told Grievant to return to the Facility to complete the task of placing the inmate in the restrictive housing unit. The Warden gave this instruction three times. Grievant refused to return to the Facility because she was exhausted. Grievant knew

that if she attempted to drive to the Facility, she might endanger herself and other drivers. Grievant told the Warden she had assigned Sergeant R to complete the task.

If an inmate believed he was experiencing a medical emergency, the inmate could file an emergency medical grievance. A corrections officer was to deliver the grievance to the Medical Unit. Staff in the Medical Unit were expected to answer the grievance within eight hours so the inmate could receive treatment within 24 hours.

On April 4, 2020, Inmate L submitted an emergency grievance requesting medical treatment. Nurse K believed it was necessary to see Inmate L in the Medical Unit. Nurse K called Grievant and asked that Inmate L be escorted to the Medical Unit. Grievant told Nurse K, "that's not essential, he can come over tomorrow." Nurse K sent another nurse to Inmate L's cell to speak to him while Inmate L was in his cell.

On April 4, 2020 at approximately 8:45 p.m., Inmate M set a fire inside his cell causing significant damage to the cell door. The fire burned a 6 inch by 8 inch hole in the cell door window. The hole was large enough for Inmate M to stick his arm and shoulder through the hole. Grievant did not notify the Major. The Warden was not notified.

## 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 follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.<sup>2</sup>

### Group II for refusing to return to work.

On March 14, 2020, the Warden instructed Grievant to return to the Facility to complete a task that should have been completed while she was working. Grievant understood the instruction but refused to comply with that instruction.

*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

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

<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

“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.

Mitigating circumstances exist to reverse the Group II Written Notice for failure to follow instructions. Grievant had finished working a 12 hour shift and was exhausted. She believed she was not capable of safely driving her vehicle to the Facility, performing the required task, and safety driving home. Her belief was supported by the evidence. Agencies may not force employees to engage in unsafe behavior including those circumstances when unsafe behavior could endanger public safety. Grievant assigned another supervisor to move the Inmate to the restricted housing unit. That employee any many other employees at the Facility could have moved the Inmate without Grievant being present at the Facility. The Agency’s discipline exceeds the limits of reasonableness.

#### Group II Written Notice for failing to follow Operating Procedure 720.1.

Operating Procedure 720.1 governs offender Access to Health Care. “Access to Care” is defined as “timely use of available health care resources within the facility to achieve the best outcomes.” Section IV(B)(2) provides:

##### Emergency complaints

Twenty-four-hour emergency medical services will be available and complaints handled immediately.

Medical requests should be triaged within 24 hours by a qualified health care professional or health-trained staff.

On April 4, 2020, an inmate filed an emergency grievance seeking medical treatment. Nurse K asked Grievant to bring the inmate to the Medical Unit. Grievant made a medical decision that the inmate’s needs were not essential and did not move the inmate to the Medical Unit. Grievant’s denied timely access to available health care resources contrary to the Agency’s policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow Operating Procedure 720.1.

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<sup>3</sup> Va. Code § 2.2-3005.

Grievant argued she asked Nurse K if it was essential to move the inmate at that time and Nurse K said “let me call you back” but did not later call Grievant. Nurse K’s testimony was credible that Grievant told her the matter was not essential. Grievant did not establish any motive for Nurse K to be untruthful. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant did not present mitigating circumstances to reduce or reverse this Group II Written Notice.

Group II Written Notice for failing to follow Operating Procedure 038.1.

Operating Procedure 038.1 governs Reporting Serious or Unusual Incidents. This policy defines Incident to include damage to State property. Section IV(A)(1) provides that “[t]imely and accurate reporting of incidents that occur in the Department of Corrections is essential for immediate response, investigation, and further action and support in the event of a crucial incident involving any employee, offender, or DOC property.” Section IV(A)(3) states, “[t]he reporting of incidents provides for a structured communication process that facilitates the timely exchange of information with, and between, all levels of employees.” Section IV(C)(1) provides, “serious or unusual incidents as defined in this operating procedure shall be reported by telephone to the Operations and Logistics Unit (OLU) Operations Center [telephone number].”

“Fire with minor damage or injuries” is a Class II incident. Section IV(E) requires Class II incidents “shall be reported to the OLU Operations Center by telephone [telephone number] or email [email address] as soon as practicable, no later than 4 hours following an incident or commencement of the incident.”

On April 4, 2020, Inmate I set a fire in his cell which caused minor damage to the cell door window. This was a Class II incident. Grievant was responsible for reporting this incident but did not report the Class II incident to the OLU Operations Center by telephone or email within four hours. Her actions were contrary to policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow Operating Procedure 038.1.

Grievant argued that the hole was minor property damage that did not require her to complete more than an internal incident report. This argument is not persuasive. The hole in the cell door window was six inches by eight inches. This would constitute minor damage. The damage was caused by a fire. The Agency has established that Grievant failed to report a Class II incident to the OLU Operations Center.

Grievant argued Facility managers relied on a “cheat sheet” to determine whether to report an incident to the OLU. Grievant did not present a copy of the “cheat sheet” or otherwise establish that the practice at the facility was different from the policy.

Grievant did not present mitigating circumstances to reduce or reverse this Group II Written Notice.

### Accumulation of Disciplinary Action

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two active Group II Written Notices. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

### Retaliation

Grievant argued the Warden issued disciplinary action in order to retaliate against her. The evidence showed that the Warden took disciplinary action because he believed Grievant failed to comply with policy and not as a form of retaliation.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to comply with a supervisor's instruction is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to comply with Operating Procedure 720.1 is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to comply with Operating Procedure 038.1 is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## **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*

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.