

Issues: Group II Written Notice (failure to follow instructions), Group I Written Notice (disruptive behavior), and Termination (due to accumulation); Hearing Date: 08/12/09; Decision Issued: 08/13/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9150, 9151; Outcome: No Relief – Agency Upheld in Full.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9150 / 9151**

Hearing Date: August 12, 2009  
Decision Issued: August 13, 2009

**PROCEDURAL HISTORY**

On February 11, 2009, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions. Also on February 11, 2009, Grievant was issued a Group I Written Notice of disciplinary action with removal for disruptive behavior. Grievant was removed from employment based on the accumulation of disciplinary action.

On February 24, 2009, Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 17, 2009, the EDR Director issued Ruling No. 2010-2362, 2010-2363 consolidated the two grievances for a single hearing. On July 27, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 12, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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. 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 been employed by the Agency since 1998 until her removal effective February 11, 2009. The purpose of her position was:

Maintains security, custody, and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observes and records their behavior and movement to ensure their safe and secure confinement.<sup>1</sup>

Grievant had prior active disciplinary action. On September 17, 2006, Grievant received a Group III Written Notice with suspension for failure to follow policy that resulted in a weakening of security. On September 27, 2006, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions.<sup>2</sup>

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<sup>1</sup> Agency Exhibit 4.

<sup>2</sup> Agency Exhibit 6.

An inmate was found with marijuana inside the Facility. He told Agency staff that Grievant gave him the marijuana. On February 5, 2009, the Agency used a dog trained to detect drugs to determine if Grievant was in possession of marijuana. The dog alerted to Grievant suggesting Grievant was in possession of drugs. The dog alerted to Grievant's vehicle in the parking lot. Grievant was strip-searched in accordance with Agency policy. No drugs were found on Grievant's body. She was given a drug screen which had to be sent to the lab for testing. Grievant met with the Warden and the Sergeant in the Agency's conference room. The Warden told Grievant about the Agency's investigation. He asked her if she had a cell phone and Grievant said she did not have one. He asked her for a number where he could call her once the Agency received the test results. He told her that she could no longer work at the Facility pending the results of the drug screen. If the test was negative, Grievant would be able to return to work and would be paid for the time she was absent from work. The Warden instructed Grievant to leave the Facility and advised her she could not be on the Agency property without permission from the Agency.

Grievant left the conference room meeting and walked down the hall to the front entry area. She noticed Officer S who was her friend. She began telling that officer what had happened to her. Officer S was called away to perform another task. Grievant indicated she would remain in the front entry area until Officer S returned.

Approximately three to five minutes after Grievant left the conference room, the Warden instructed the Sergeant to make sure that Grievant had left the Facility. The Sergeant went to the front entry and observed Grievant standing there. The Sergeant told Grievant she had to leave the Facility. Grievant said she was waiting on Officer S. The Sergeant began escorting her to her vehicle.<sup>3</sup> As the Sergeant followed Grievant, she became upset. Grievant was yelling that she did not need to be escorted to her vehicle. The Sergeant advised Grievant that her vehicle would not be searched. Grievant yelled, "Search my f—king car. I ain't got nothing" and attempted to hand her car keys to the Sergeant. The Sergeant said he did not want Grievant's key. Grievant continued to yell and curse. Grievant said she "would get [Captain Y] for lying on her" and that she would "see all of your asses in court." Grievant said "all of you all are bitches" and "I am not coming back here" as she got into her vehicle. As Grievant drove out of the parking lot, she was yelling and waving her hands.

Several days later, the Agency learned that the drug test was negative.

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<sup>3</sup> The Warden also told the Sergeant to make a visual inspection of Grievant's vehicle to see if she had a cell phone in her vehicle.

## 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>4</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>5</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>6</sup>

“[F]ailure to follow a supervisor’s instructions” is a Group II offense.<sup>7</sup> The Warden was one of Grievant’s supervisors. He instructed Grievant to leave the institutional grounds and advised her that she could not be at the Agency’s Facility until she was granted permission to do so. Grievant did not leave the Facility. Instead, she stopped to speak with another employee about what had happened to her. Grievant remained on the Facility grounds even though she had been informed that she could not be present on the Agency’s property without permission. Grievant failed to comply with a Supervisor’s instruction thereby justifying the issuance of a Group II Written Notice.

“[D]isruptive behavior” is a Group I offense. Grievant’s behavior was disruptive because she yelled at the Sergeant while she was angry, she cursed repeatedly, she threatened to get Captain Y, and she referred to the Sergeant and Agency staff as bitches. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

[A]ccumulation of two Group II offenses normally should warrant removal.”<sup>8</sup> With the disciplinary actions arising in this grievance, Grievant as accumulated, one Group III Written Notice, two Group II Written Notices, and one Group I Written Notice. Based on the accumulation of disciplinary action, the Agency’s decision to remove Grievant from employment 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 Employment Dispute Resolution....”<sup>9</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

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<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

<sup>8</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(C)(2).

<sup>9</sup> *Va. Code § 2.2-3005.*

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 II Written Notice of disciplinary action with removal is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice with removal is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main St. STE 301  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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>10</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>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.