

Issue: Group III Written Notice (using profanity towards Superior); Hearing Date: 12/07/10; Decision Issued: 12/09/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9445; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 12/22/10; EDR Ruling No. 2011-2862 issued 01/26/11; Outcome: Remanded to AHO.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9445**

Hearing Date: December 7, 2010  
Decision Issued: December 9, 2010

**PROCEDURAL HISTORY**

On May 4, 2010, Grievant was issued a Group III Written Notice of disciplinary action for using profane language towards the Watch Commander.

On June 3, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 2, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2010, a hearing was held at the Agency's office. The Hearing Officer found just cause to extend the time period for issuing this decision due to the unavailability of a party.

**APPEARANCES**

Grievant  
Grievant's Representative  
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?
5. Whether the Agency retaliated against Grievant?

### **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 employs Grievant as a Corrections Officer at one of its Facilities. The purpose of his position is to "[p]rovide security and supervision of adult offenders." He began working for the Agency in 2003. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 25, 2010, Grievant told the Lieutenant that he wished to speak to the Lieutenant after muster. The Lieutenant was serving as Watch Commander. After muster, Grievant told the Lieutenant that he needed to take family personal leave because his grandparents had nowhere to live. The Lieutenant responded that the Facility was short of staff and he could not afford to let anyone take leave. Grievant became angry and shouted at the Lieutenant "F--k you!" Who the f--k you think you are? I don't give a fuck about the shift being short, f—k you!" The Lieutenant instructed Grievant to go to the administration building and wait in the lobby until the Lieutenant could make a phone call. Grievant stated "I don't give a f—k who you call. Call [the Warden] and you make sure you tell her what I said." Grievant walked out of the muster room and slammed the door behind him. Grievant's outburst was overheard by several other corrections officers.

## 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>1</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>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

"[U]se of obscene language" is a Group I offense. On April 25, 2010, Grievant used obscene language when he said “F—k you” to the Lieutenant. The phrase “f-k you” is a pejorative reference to sexual behavior intended as an insult. The context of Grievant’s comment showed he intended to insult the Lieutenant.

The Agency’s Standards of Conduct states:

Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. \*\*\* Similarly, in rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance process, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

There exists in this case a basis to elevate the Group I offense to a Group II offense. Agency security employees wear uniforms, hold rank and are expected to comply with the orders of employees holding superior rank. Grievant directed his comments to a higher ranking employee who was working as the Watch Commander in charge of the Facility. Grievant spoke so loudly that several other employees could overhear his cursing of the Watch Commander. Grievant's comments to the Lieutenant amounted to insubordination. Respecting employees holding superior rank is material to the safe operations of the Agency's Facility. Insubordination undermines that respect.

The Agency contends that Grievant should receive a Group III Written Notice. Grievant's behavior is not listed as a Group III offense and did not otherwise rise to the

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

level of a Group III offense. The Agency's Standards of Conduct authorizes the elevation of a Group I offense to a Group II offense but it does not authorize the elevation of a Group I offense to a Group III offense. Accordingly, the Agency's disciplinary action must be reduced.

Grievant alleged that the Agency retaliated against him. No credible evidence was presented to support this allegation.

*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>4</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 is **reduced** to a Group II Written Notice.

## 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:

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<sup>4</sup> *Va. Code § 2.2-3005.*

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>5</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>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.