

Issue: Group III Written Notice with Termination (failure to participate in investigation);  
Hearing Date: 08/01/11; Decision Issued: 08/02/11; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 9646; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9646**

Hearing Date: August 1, 2011  
Decision Issued: August 2, 2011

**PROCEDURAL HISTORY**

On December 29, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to participate in an administrative investigation.

On January 27, 2011, 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 July 5, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 1, 2011, a hearing was held at the Agency's office.

**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?

### **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 Lieutenant prior to his removal effective December 29, 2010. He had been employed by the Agency for approximately 33 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant owned a propane grill that was located at the worksite. The grill was used to cook food for many events including events attended by Agency employees. On November 6, 2009, an Inmate tried to ignite the propane grill at the worksite but operated the equipment incorrectly thereby suffering 2<sup>nd</sup> degree burns to his face, neck and hands. The Inmate alleged he was ordered by Grievant to prepare food on the grill which was used for Grievant's catering business.

The Agency began an investigation of the accident and the Inmate's allegation. The Investigator met with Agency's managers on December 4, 2009 and was informed of the allegations. The investigation sought to question individuals with knowledge of the incident. Part of his procedure involved having witnesses provide written statements and then review and sign their statements. It was necessary for witnesses to meet with the Investigator in person. The Investigator attempted to have Grievant meet with him at the Facility. Once the Investigator realized that Grievant would not meet with him, he contacted the Facility manager and asked the managers to make

Grievant appear at the Facility. Grievant stopped working at the Facility in December 2009, shortly after the Inmate was hurt.

As of December 17, 2009, Grievant was unable to work due to a medical concern. On December 17, 2009, Grievant submitted but did not complete paperwork to retire. He changed his proposed retirement date to April 2010. Agency managers closed the investigation because they expected Grievant to retire. Grievant did not retire. When Agency managers learned that Grievant had not retired, they reopened the investigation. On September 23, 2010, Grievant submitted a new application for retirement effective January 1, 2011.

The Personnel Practices Supervisor called Grievant on the telephone and told Grievant he had to report to the Facility on Friday, November 5, 2010 to meet with the Investigator regarding the investigation. Grievant indicated that he would meet with the Investigator. On November 5, 2010, Grievant called the Personnel Practices Supervisor and told her that he had a previous appointment and could not meet with the Investigator. Grievant did not meet with the Investigator.

On December 2, 2010, the Chief Warden called Grievant on the telephone and ordered Grievant to report to the Facility on December 6, 2010 to meet with the Investigator. The Chief Warden stated his instruction to Grievant at least three times. Grievant understood the instruction but failed to appear at the Facility on December 6, 2010.

## 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>

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in

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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).

disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

Grievant was instructed by the Chief Warden, the highest-ranking employee at the Facility, to report to the Facility to meet with the Investigator. He understood the instruction, but failed to comply with the instruction. Failure to follow a supervisor’s instruction is a Group II offense. In certain extreme circumstances, an offense listed as a Group II offense may constitute a Group III offense based upon the impact that the particular offense had on the agency. In this case, there exists a basis to elevate the level of discipline from a Group II offense to a Group III offense. The Agency was investigating allegations against Grievant that could have resulted in disciplinary action. In addition, the Agency was attempting to respond to legal action brought by the injured Inmate. Grievant’s refusal to participate in the investigation had a materially adverse impact on the Agency. The Agency describes Grievant’s behavior and the impact on the Agency as conduct unbecoming a Corrections Officer. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that the allegation against him that he was using a propane grill for his personal business was untrue. There is insufficient evidence to show that Grievant was using a propane grill for his personal business. It is not necessary, however, for the Agency to show that Grievant was engaging in personal business to support the disciplinary action. Grievant was disciplined for failing to participate in the Agency’s investigation of the allegations against him.

Grievant argued that his doctor advised him not to report to the Facility because of his health. He presented as an exhibit a note, dated July 22, 2011, from his medical provider stating, “[Grievant was] under my care from 12-09 thru 1-11 and was not released to work during this time.” Insufficient evidence was presented for the Hearing Officer to conclude that Grievant was unable to report to the Facility to meet with the Investigator. Although he may have been unable to perform his regular job duties as a Corrections Lieutenant, it is unclear why Grievant could not have met at the Facility to speak with the Investigator.

*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-

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<sup>4</sup> Va. Code § 2.2-3005.

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.

Grievant seeks to have the disciplinary action reduce so that he can leave the Agency with a “clean record” to reflect his approximately 33 years unsatisfactory job performance with the Agency. Although the Agency could have considered Grievant’s length of service with the Agency and reduced or eliminated the disciplinary action, the Hearing Officer does not have a similar level of discretion under the EDR Rules for Conducting Grievance Hearings. Only in extraordinary cases, will length of service and otherwise satisfactory job performance be mitigating circumstances under the Rules. Grievant’s case is not extraordinary. In light of the standard set forth in the Rules, 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 III Written Notice of disciplinary action 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>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.