

Issue: Group I Written Notice (abusive language); Hearing Date: 08/12/11; Decision Issued: 08/15/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9658; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9658

Hearing Date: August 12, 2011
Decision Issued: August 15, 2011

PROCEDURAL HISTORY

On February 24, 2011, Grievant was issued a Group I Written Notice of disciplinary action for use of obscene or abusive language in violation of the Agency's workplace violence policy.

On March 24, 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 27, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 12, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant 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 employs Grievant as a Corrections Officer at one of its Facilities. He has been employed by the Agency for approximately 14 years. The purpose of his position is "to provide security and supervision of adult offenders at [Facility] as well as other locations as needed e.g. (Hospitals, courts, other facilities as needed)."¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

At approximately 7:30 a.m., inmates at the Facility are expected to be out of their beds and to have made their beds.

On February 1, 2011, Officer W was working in the Control Booth in the Building. Grievant entered the floor area near the inmates. Grievant's objective was to conduct a shakedown of some of the inmates to determine if any of them possessed contraband. He considered the shakedown to be a priority. Officer W observed Grievant entering the area and began yelling at him through the tray slot and through the glass window in the Control Booth. It was necessary for her to yell at Grievant because if she spoke in a normal voice he would not have heard her through the Control Booth glass. She yelled instructions to Grievant that he was to get the inmates out from under the covers of their beds. Officer W's tone and manner of communication was abrasive and unnecessarily

¹ Agency Exhibit 5.

confrontational. She told Grievant that it was her building and that she ran the building. She spoke with authority she did not have and in the demeanor and manner contrary to enhancing teamwork.

Grievant had not worked with Officer W before. He was offended by her tone and demeanor and became angry. He was upset that the inmates had noticed that Officer W was speaking to him in a disrespectful manner. He asked Officer W to let him into the Control Booth. Once inside the Control Booth, Grievant said that he was doing shakedowns. Officer W said Grievant should let her work the floor and she would get the inmates from under their covers. Grievant began yelling and screaming at Officer W. Grievant said “f—k that petty ass s—t you talk about, I’m doing shakedowns. I am the only motherf—ker who cares about drugs and weapons. F—k that, if anything happened, you motherf—kers ain’t going to do s—t. I am the only f—king one that is going to do anything. Officer W picked up the telephone and called the Lieutenant’s office. She told the Lieutenant that Grievant’s behavior was unacceptable. Grievant said, “yeah, call those punk ass supervisors, you won’t punk me in front of inmates.”

The Lieutenant sent another corrections officer to relieve Grievant of his post.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Operating Procedure 130.3, Workplace Violence, prohibits violence in the workplace. Workplace violence includes, “harassment of any nature such as stalking, shouting, or abusive language.” “[U]se of obscene or abusive language” is a Group I offense.⁵ On February 1, 2011, Grievant shouted at Officer W. He used obscene and abusive language such as telling Officer W “you motherf—kers ain’t got a do s—t.” The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice of disciplinary action.

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(3).

Officer W engaged in behavior that may have justified some response from Grievant. Grievant's response on February 1, 2011, however, greatly exceeded a response that would have been appropriate. Grievant should have addressed his concerns with a supervisor rather than confronting Officer W, displaying extreme anger and cursing at Officer W. Grievant's response to Officer W's comments was so excessive as to justify disciplinary action.

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...."⁶ 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.

Grievant contends the disciplinary action should be mitigated because he believes the Agency has inconsistently applied disciplinary action.

Grievant presented evidence showing that Officer W had cursed at other employees, had been disrespectful to other employees, and was not well liked by her coworkers. For example, Officer W approached Sergeant D while he was in the armory and demanded to know why he was there. Even though he had already explained to Officer W why he was there, Officer W displayed anger and continued to demand an explanation. In addition, Officer W made the Institutional Safety Officer wait several minutes to pass through the doors she controlled. When he told Officer W that he did not appreciate her making him wait, she told the Institution Safety Officer "don't be banging on my f—king door." The Institutional Safety Officer counseled Officer W but did not file an incident report with a supervisor. Approximately 3 years ago, Officer W was working in the laundry department and yelling at inmates. She used racial slurs against the inmates. The Hearings Officer heard Officer W and complained to her supervisor. Officer W was removed from the laundry department.

Based on the evidence presented, it is clear that Officer W sometimes behaved in a caustic manner towards her coworkers and especially towards those holding positions of authority. The Agency has not adequately supervised Officer W to end her inappropriate behavior towards her coworkers. The fact that the Agency has not properly supervised an employee is not, in itself, a mitigating circumstance in this case.

⁶ *Va. Code § 2.2-3005.*

On February 1, 2011, Officer W did not raise her voice when she spoke to Grievant in the Control Booth and did not curse at him. Officer W did not engage in behavior similar to Grievant's behavior such that the Agency's failure to discipline her would establish a basis for Grievant's claim that the Agency singled him out for disciplinary action.

The examples Grievant presented of undesirable behavior by Officer W raise questions regarding her ability to work with others at the Facility. The examples do not show that the Agency singled out Grievant for disciplinary action. The degree and intensity of Grievant's behavior on February 1, 2011 was significantly greater than the behavior Officer W displayed to her coworkers on other occasions. In addition, it is unclear whether Agency managers were aware of every instance of inappropriate behavior by Officer W. The Hearing Officer cannot conclude that the Agency inconsistently applied disciplinary action. 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 I Written Notice of disciplinary action 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 14th St., 12th 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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.