

Issues: Group I Written Notice (abusive language), Group III Written Notice (falsifying a document) and Termination; Hearing Date: 12/12/11; Decision Issued: 12/13/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9717; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9717

Hearing Date: December 12, 2011
Decision Issued: December 13, 2011

PROCEDURAL HISTORY

On July 14, 2011, Grievant was issued a Group I Written Notice of disciplinary action for using obscene and abusive language. On July 14, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying an official document.

On August 4, 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 November 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On December 12, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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. 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. The purpose of his position was to "provide security and supervision to adult offenders."¹ Grievant had prior active disciplinary action. On August 25, 2009, Grievant received a Group III Written Notice.

An Inmate alleged that Grievant altered the Inmate's food and made disparaging statements to the Inmate. As part of the Agency's investigation, Grievant met with the Special Agent and provided a written statement. On May 12, 2011, Grievant wrote:

I, [Grievant] have never gotten into any heated discussions or arguments with [the Inmate]. I have never threatened him or messed with any of his food. I think [the Inmate] had made these allegations because he had asked me to get something from another inmate ... and deliver it to him. I refused and then he started making these allegations.²

¹ Agency Exhibit 3.

² Agency Exhibit 1.

The Special Agent learned information that made him believe that Grievant had been untruthful in his statement. The Special Agent contacted Grievant and met with Grievant again. The Special Agent told Grievant that he believed Grievant was untruthful and asked Grievant for a second statement. On May 23, 2011, Grievant provided a second statement:

I have been informed that I am being interviewed concerning allegations that I made threats towards [the Inmate] on April 11, 2011 I need to add some information to this statement that I did not previously tell [the Special Agent]. [The Inmate] and I have been having problems for about 6 weeks. On April 11, 2011 it finally came to a head. [The Inmate] was talking his normal trash and I just got tired of it. I told him he was an "old fa--ot Gump" and I told him he was not paying my bills or taking care of my family so he could suck my d--k. I did not threaten to have him taken care of when he got back into general population. I maintain that I did tell [the Lieutenant] and [Mr. W] about the problems I was having [with the Inmate] and they did not do anything about it. Again, all of this started when [the Inmate] got pissed when I would not violate policy and bring him something from another inmate³

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."⁴ 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."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

"[U]se of obscene or abusive language" is a Group I offense.⁷ Webster's New Universal Unabridged Dictionary defines "obscene" to include "offensive to morality or decency; indecent; depraved; *obscene language*." "Abusive" is defined to include, "using, containing, or characterized by harshly or coarsely insulting language; *an abusive author; abusive remarks*."

³ Agency Exhibit 1.

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁷ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(3).

Grievant called the Inmate an “old fa--ot gump” and told the Inmate to “suck my d--k.” Grievant’s objective was to insult and offend the Inmate in response to a conflict between Grievant and the Inmate. Grievant’s comments were directed at the Inmate’s sexual orientation and sexual behavior and served to demean the Inmate. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for the use of obscene or abusive language.

Group III offenses include:

Falsifying any records, including but not limited to all work administrative related documents generated in the regular an ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents.⁸

Blacks Law Dictionary (6th Edition) defines “falsify” as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

New Webster’s Dictionary and Thesaurus defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

On May 12, 2011, drafted a statement as part of an investigative interview in which he denied getting into any heated discussions or arguments with the Inmate. Grievant’s statement was false. Grievant knew that he had gotten into an argument with the Inmate that became so “heated” that Grievant made statements intended to insult the Inmate. Grievant’s statement was an official State document. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying an official State document. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, 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...”⁹ 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

⁸ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(2).

⁹ Va. Code § 2.2-3005.

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 argued that he knew of employees at the Facility who had received Group III Written Notices but had remained employed by the Agency. Grievant did not present any sworn testimony regarding his assertion. There is no evidence upon which the Hearing Officer can conclude that the Agency has 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**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**. The Agency's decision to remove Grievant from employment 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.¹⁰

[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

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