

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 10/10/12; Decision Issued: 10/11/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9908; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9908**

Hearing Date: October 10, 2012

Decision Issued: October 11, 2012

#### **PROCEDURAL HISTORY**

On July 2, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a one workday suspension for threatening an offender.

On July 2, 2012, 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 September 1, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 10, 2012, 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 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 Food Operation Director A at one of its facilities. Grievant had prior active disciplinary action. On November 22, 2011, Grievant was issued a Group II Written Notice for unauthorized use of State property or records.

On June 7, 2012, the Facility was on lockdown and the inmates were being fed in their cells. The Inmate worked in the kitchen and was ending his shift. The Corrections Officer "shook down" the Inmate to make sure he was not in possession of anything inappropriate. The Corrections Officer noticed that the Inmate had a large lunch bag with him. The Corrections Officer checked the bag and noticed eight or nine hamburger patties and five to six buns inside the bag. The Inmate told the Corrections Officer that the food was for his lunch and for his dinner and he did not intend to come back for dinner. The Inmate told the Corrections Officer that the Kitchen Supervisor had given him permission to take the food. The Inmate's statements were untruthful. The Corrections Officer believed the Inmate and let him pass.

After the Inmate left, the Corrections Office went to the Assistant Director and told her what had happened. She said the Inmate was not authorized to take the items and to bring the Inmate back to the kitchen. The Assistant Director told Grievant about her conversation with the Corrections Officer. Grievant said the Inmate needed to be charged with an offense and he should be brought back to the kitchen. The Corrections Officer called staff in another building and told them to send the Inmate back to the kitchen.

The Inmate returned to the kitchen and went to Grievant's office. Grievant instructed the Inmate to get the supervisor who gave him permission to keep the food. The Inmate brought to Grievant's office Ms. L, the Food Service Supervisor. Grievant asked Ms. L if she gave the Inmate permission to take the food. Ms. L said "no" and that she watched the Inmate take food and walk away with it. Grievant told Ms. L she could return to her duties and she left. The Inmate became upset. Grievant told the Inmate to leave. When the Inmate refused to leave, Grievant said he would call the Watch Commander. Grievant began to pick up his telephone. While Grievant was dialing, the Inmate reached over and pushed the button on the telephone to end the call. The Watch Commander called Grievant and asked if everything was all right. Grievant said "yes" and explained part of what was going on. The Inmate had left Grievant's office but then returned.<sup>1</sup> Grievant was handling some items such as medical gloves. The Inmate said those items were his and then smacked them out of Grievant's hands. Grievant then called the Watch Commander and told her about the Inmate's behavior. The Watch Commander said she would send a supervisor to the kitchen.

The Corrections Officer went to the front of the building to let out some workers. While standing in the front of the dining hall, the Inmate told Ms. L "F—k [Grievant] and f—k this job. They can have it!" The Corrections Officer began to "shake down" the Inmate so he could leave the building but the Corrections Officer received a call from the Assistant Director advising him that the Inmate could not leave the kitchen. The Corrections Officer and the Inmate walked to the area in front of Grievant's office. Grievant came out of his office and said he had called the Watch Commander and that she was sending a supervisor to the kitchen to escort the Inmate to the segregation unit because the Inmate went to Ms. L and called her a lying ass to her face. Grievant said the Inmate needed to go to the segregation unit with no stops in between and to be locked up. The Inmate did not respond to Grievant's comments but looked at Grievant. Grievant said to the Inmate, "If you feeling froggy just jump over here; I'll put you down real quick. I will use reasonable force." Grievant became louder and told the Inmate, "So go ahead and come on over here if you feeling froggy and I'll beat that ass." The Inmate did not say anything to Grievant. The Inmate looked at the Corrections Officer and said "You hear this, right?" The Corrections Officer did not respond to the Inmate. The Corrections Officer told the Inmate to go to the dining hall and wait for the Sergeant to arrive. The Sergeant came to the kitchen and escorted the Inmate out of the building.

## **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

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<sup>1</sup> At some point, the Inmate called Ms. L a "lying motherf--ker."

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

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>5</sup> DOC Policy 130.1 governs “Rules of Conduct Governing Employees Relationships with Offenders.” The policy provides that “Employees of the DOC shall exercise a high level of professional conduct when dealing with offenders to ensure the security and integrity of the correctional process.” In addition, the policy addresses courtesy and respect. It states, “At all times, employees should be respectful, polite, and courteous in their communication and interaction with offenders, as well as with citizens and other employees. Such practices are primary factors in resolving issues, maintaining order, control, and good discipline, and redirecting behavior to a more positive result.”

Grievant acted contrary to DOC Policy 130.1 on June 7, 2012 because he threatened to use reasonable force to put the Inmate “down real quick” and “beat that ass.” Grievant’s comments were not respectful, polite, or courteous. Grievant’s comments served to challenge the Inmate and could have resulted in a physical conflict.

Grievant argued that the Agency’s investigation was not complete because not all witnesses were interviewed. He contends he was denied procedural due process. This argument fails. Grievant could have called any witnesses to testify during the hearing. To the extent the Agency’s investigation was incomplete or denied Grievant procedural due process, Grievant’s opportunity to present evidence at the hearing served to eliminate any deficiencies in the investigation and to cure any defects in Grievant’s denial of due process.

Grievant argued that he did not say the words claimed by the Corrections Officer. For example, he did not say “feeling froggy” or “beat that ass.” The Corrections Officer’s testimony was credible. He wrote his account of the incident with a few hours of the incident. The Agency has presented sufficient evidence to meet its burden of proof.

Grievant argued that if the Corrections Officer had performed his job and not allowed the Inmate to leave with the food items, the incident would not have happened. Whether the Corrections Officer failed to perform his job duties would not excuse or

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

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

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

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

mitigate Grievant's behavior. Grievant was responsible for how he interacted with the Inmate regardless of whether the Corrections Officer performed his job duties.

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>6</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 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 a one workday suspension 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before

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<sup>6</sup> Va. Code § 2.2-3005.

the hearing, you may request that EDR 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:

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

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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>7</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>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.