



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11640**

Hearing Date: April 23, 2021  
Decision Issued: May 12, 2021

**PROCEDURAL HISTORY**

On August 31, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. During the Grievance Step Process, the Agency reduced the disciplinary action to a Group I Written Notice.

On September 29, 2020, 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 January 4, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 23, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Representative  
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Lieutenant at one of its facilities. He most recently began working for the Agency in 2013. Grievant received favorable performance evaluations from the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant knew that if an incident of use of force occurred at the Facility he was to report immediately the matter to Facility managers and file an Incident Report.

Corrections Officers were authorized to use force to gain or maintain control of inmates, but only as a last resort.

On June 14, 2020, Grievant was working as the Watch Commander at the Facility. Officer R and Officer G began a search of a cell with two inmates inside sleeping. Once the cell door was open, they had to awaken the inmates. As Officer R and Officer G searched the cell, Inmate R began "running his mouth" saying, "you're just a stupid ass f—king fa—ot." Inmate R continued talking and became agitated. Officer R told Inmate R to step out of the cell and go to the front of the sallyport. Inmate R refused and reentered

the cell with Officer R and Officer G. Officer R told Inmate R to get out of the cell because they were not finished searching the cell. Inmate R refused and said Officer R better “get another Officer in here” which Officer R perceived as a threat. Officer R told the inmate to put his hands behind his back. Inmate R refused so Officer R grabbed Inmate R’s arm. Inmate R jerked his arm away from Officer R. Officer R grabbed Inmate R’s arm again and pulled out his handcuffs with his left hand. Inmate R used his closed fist to punch Officer R’s forearm. Inmate R kept pulling and jerking away from Officer R. Officer R and Officer G used their radios to call for assistance. Officer R tried to put Inmate R on the ground. Inmate R yelled, “you ain’t putting me on the f—king ground.” Officer R and Inmate R kept wrestling. Inmate R kept grabbing a table to prevent Officer R from pulling Inmate R to the ground. Officer R was finally able to put Inmate R in a “bear hug” and push and hold him against the wall using Officer R’s weight. Inmate R gave up and Officer R was able to put handcuffs on Inmate R.

Officer R and Officer G escorted Inmate R to the Shift Commander’s Office where Grievant was working. Officer R told Grievant that Inmate R hit Officer R. Officer R showed Grievant the mark left on his arm by Inmate R’s punch. Grievant asked Officer R what Officer R wanted to have done. Officer R said that Inmate R hit him and that was an assault and Inmate R should be “locked up” referring to being placed in the special housing unit instead of general population. Officer G told Grievant they had to use force on Inmate R and that Inmate R hit Officer R.

Inmate R told Grievant that he was in a bad mood because he had just woken up. He said he was having family problems and he did not want his breakfast to be taken from him. Inmate R apologized for the misunderstanding. Grievant released Inmate R to general population.

On June 14, 2020, Officer R drafted a Disciplinary Offense Report charging Inmate R with Disobeying an Order. Officer R wrote:

I then instructed [Inmate R] to place his hands behind his back so that I can place him in cuffs. [Inmate R] refused this order as well which resulted in me having to physically restrain him to place him in handcuffs. I am submitting the charge on [Inmate R] as he refused my order to walk to the sally port of the pod and refusing to be placed in handcuffs.<sup>1</sup>

Grievant reviewed the Disciplinary Offense Report.

On June 16, 2020, the Investigator contacted Grievant about a Use of Force incident on June 14, 2020. On June 17, 2020, Grievant asked Officer R and Officer G to prepare internal incident reports.

On June 17, 2020, Grievant wrote an Incident Report describing Use of Force and stating, in part:

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<sup>1</sup> Grievant Exhibit p. 12.

Narrative: On June 14, 2020 at 12:40 p.m. [Officer R] and [Officer G] entered D-1-12 to conduct a mash sweep. While they were in the cell searching, [Inmate R] began to get upset and made comments toward the Officers, [Inmate R] then tried to enter the cell to get into his bed. [Officer R] gave him an order to leave the cell at which time he refused. [Inmate R] then came into the cell and at that time, [Officer R] grabbed [Inmate R's] arm in attempt to handcuff the offender. [Officer R] advised that [Inmate R] grabbed his arm and then let go; [Inmate R] put his arms behind his back and was then handcuffed. This information was verbally told to [Grievant] by [Officer R] on June 14, 2020.

[Officer G] reported the same series of verbal events. Given the information by the involved staff at the time of the incident, [Grievant] didn't have enough information on the incident to show a use of force for the officer placing handcuffs on the offender. [Grievant] did not have access to the cameras to review the incident to validate the verbal reports of the officers.<sup>2</sup>

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

"[I]nadequate or unsatisfactory job performance" is a Group I offense.<sup>4</sup> In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On June 14, 2020, Officer R used force to subdue and restrain Inmate R. Officer R told Grievant that Inmate R hit Officer R and showed Grievant the mark on his arm. Officer R provided Grievant with a Disciplinary Offense Report stating that Officer R had to "physically restrain" Inmate R. Officer G told Grievant that the two officers had used force. Although Grievant was told of facts showing a use of force and that force was used, Grievant did not report immediately the use of force to the Warden or file an Incident Report on June 14, 2020. The Agency expected Grievant to report immediately any use

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<sup>2</sup> Agency Exhibit p. 7.

<sup>3</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

of force incident. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

Grievant argued that when he spoke with Officer R and Officer G on June 14, 2020, neither employee reported a use of force. He first learned that force was used on June 16, 2020 when contacted by the Agency's investigator. He asserted that had he been properly informed that force was used, he would have reported the matter immediately to the Warden and filed an Incident Report. Grievant's argument is not persuasive. The Agency has presented sufficient evidence to show that Grievant was informed of the facts and information showing force was used. The testimony of Officer R and Officer G was credible and sufficient to show that Grievant knew or should have known that force was used on June 14, 2020.

*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 Human Resource Management ...."<sup>5</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 I Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution

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<sup>5</sup> Va. Code § 2.2-3005.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Office of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 11640-R**

Reconsideration Decision Issued: June 25, 2021

**RECONSIDERATION DECISION**

This matter was remanded to the Hearing Officer by EDR Ruling 2021-5265 for further consideration of emails written by Officer R and Officer G requested by the Hearing Officer during the hearing on April 23, 2021. The Agency did not provide the emails and the Hearing Officer issued the decision 19 days later on May 12, 2021.

Upon remand, the Hearing Officer asked the Agency to provide the emails. The Agency did not provide an email from Officer R because Officer R represented that he had deleted his email regarding the incident when he moved to another facility. The Agency provided Officer G's email. That email confirms Officer G was in a position to hear the conversation between Officer R and Grievant. The email states that Officer R told Grievant the Inmate hit Officer R on the forearm and Grievant asked Officer R what he wanted to do. Officer R replied he wanted the Inmate placed in the restricted housing unit.

Officer G's email confirms many of the facts presented through Officer R and Officer G's testimony. It does not specifically state that Officer R told Grievant Officer R had used force. Although it does not state that Officer R told Grievant Officer R used force, it does not contradict the testimony of Officer G that Officer R told Grievant he used force.

Grievant argued Officer G's email was not sent immediately after the incident and a copy was not sent to Grievant and, thus, the Agency's case is not proven. However, there remains sufficient evidence to support the Agency's decision to issue disciplinary action in this case. Disciplinary action may be upheld based on hearing testimony alone. The testimony presented during the hearing is sufficient to uphold the Group I Written Notice. The Hearing Officer affirms the Original Hearing Decision.

## APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

Carl Wilson Schmidt, Esq.  
Hearing Officer