

Issue: Group III Written Notice with suspension (violation of safety rule); Hearing Date: 01/20/16; Decision Issued: 02/09/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10719; 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: 10719**

Hearing Date: January 20, 2016

Decision Issued: February 9, 2016

#### **PROCEDURAL HISTORY**

On August 4, 2015, Grievant was issued a Group III Written Notice of disciplinary action with a two day work suspension for violating a safety rule.

On August 26, 2015, 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 she requested a hearing. On November 17, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 20, 2016, a hearing was held at the Agency's office.

#### **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. 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. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received weapons training in February 2014 and January 2015 including how to disarm a Glock 23 handgun. She was supposed to remove the magazine from the weapon in the holster, remove the weapon from the holster, and "rack" the weapon three times. This would clear any bullets from the gun chamber. She was supposed to return the slider and then point the gun into a barrel full of sand. With the gun aimed into the barrel, she was supposed to pull the trigger to verify that no bullets were in the weapon.

On July 3, 2015, Grievant went on a "transportation run" and carried a Glock 23 handgun. She returned to the Facility and went to the Armory window to return her Glock 23. She charged the weapon without first removing the magazine from the weapon. This moved a bullet from the magazine into the chamber. Instead of racking the weapon three times which would have cleared a bullet from the chamber, she pointed it to the ground and pulled the trigger. She did not point the weapon into the sand barrel. A bullet fired out of the weapon and went two to three feet into the ground. Grievant's left middle finger caught in the ejection port. Sergeant L helped Grievant take her finger out of the weapon and then cleared the weapon.

## 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>

DOC Operating Procedure 430.1 governs Firearm Care and Safe Handling – Glock Model 23 Handgun. Section VII of Attachment 2 to the policy provides:

### Procedure for Returning Weapon to the Armory

1. The Officer will administrative unload the weapon and return all magazines to the Armory Officer.
2. The Officer will perform an Administrative Clear following these steps:
  - a. Remove magazine
  - b. Work the slide 3 times (rack, rack, rack)
  - c. Lock the slide back
  - d. Visually inspect the weapon to ensure it is clear of any ammunition
  - e. Pull the slide back and allow it to spring forward (do not hold the slide while it moves forward)
  - f. Insert fingers in magazine well
  - g. Insert the muzzle into a clearing barrel
  - h. Pull trigger
3. Lock the slide to rear and return the weapon to the Armory Officer.
4. Return all accessories.

“Violating safety rules where there is a threat of physical harm” is a Group III offense.<sup>4</sup> On July 3, 2015, Grievant attempted to unload her weapon in order to return it to the armory. She failed to ensure that the weapon was unloaded by complying with safety rules. She shot the weapon into the ground instead of into a sand barrel. She placed others around her in danger of physical harm from the bullet. 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. In this case, the Agency mitigated the disciplinary action to a two workday suspension which must be upheld.

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

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

<sup>4</sup> DOC Operating Procedure 135.1 (V)(D)(2)(g).

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.

Grievant argued that she typically worked in the Work Center without a Glock 23 and did not go on “transportation runs” when she would be required to carry a handgun. She argued that the Agency failed to provide her with post orders before sending her out on the transportation run. Grievant argued that the Agency failed to properly train her regarding how to disarm the Glock 23 handgun. She contends she would have benefited from additional training prior to assuming her post.

The evidence showed that Grievant received at least two trainings regarding use of the Glock 23 including training as to how to ensure that bullets were not in the weapon when she returned it to the armory. The Agency provided Grievant with adequate training and with adequate notice of the safety rule governing use of the Glock 23. 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 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

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<sup>5</sup> Va. Code § 2.2-3005.

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 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>6</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>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.