

Issues: Group III Written Notice with Termination (violation of EEO policy and abusive language), and a second Group III Written Notice with termination (unsatisfactory performance, failure to follow policy, workplace harassment, disruptive behavior); Hearing Date: 02/04/16; Decision Issued: 02/09/16; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10723; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/13/16; EDR Ruling No. 2016-4342 issued 04/26/16; Outcome: Request denied – untimely; Administrative Review: DHRM Ruling Request received 04/13/16; DHRM Ruling issued 05/17/16; Outcome: Request denied - untimely.**

DECISION OF HEARING OFFICER  
IN RE: CASE NO. 10723  
HEARING DATE: February 4, 2016  
DECISION ISSUED: February 9, 2016

PROCEDURAL HISTORY

Grievant received two Written Notices<sup>1</sup> on October 5, 2015 for actions which occurred on August 15, 2015. Grievant was charged with violating Operating Procedure Policy's § 101.2<sup>2</sup>, 130.3<sup>3</sup>, 135.1<sup>4</sup>, 1.80<sup>5</sup>, 2.05<sup>6</sup> as well as Offense Codes 11, 13, 32, 33, 36 and 37<sup>7</sup>. There were three meetings prior to the Written Notice. The meeting dates were August 17, 2015<sup>8</sup>, September 3, 2015<sup>9</sup> (changed from September 2) and September 11, 2015. A Hearing Officer was assigned to this matter on November 23, 2015. A phone conference was held on December 7, 2015. The hearing was finally scheduled (rescheduled several times) on February 4, 2016.

APPEARANCES

Agency Advocate  
Agency representative as witness  
Agency additional 5 witnesses  
Grievant's Advocate  
Grievant as witness  
Grievant additional 6 witnesses

ISSUES

- 1) Did Grievant make racial and/or derogatory remarks to another officer during work hours?
- 2) Did Grievant make verbal threats to another employee?
- 3) Did Grievant's behavior undermine her ability to perform her job effectively?

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<sup>1</sup> Agency exhibits 15 and 18

<sup>2</sup> Agency exhibit 16

<sup>3</sup> Agency exhibits 19 and Grievant exhibit 1

<sup>4</sup> Agency exhibit 21

<sup>5</sup> Agency exhibit 20

<sup>6</sup> Agency exhibit 17

<sup>7</sup> See Agency exhibit 15 and 18

<sup>8</sup> Agency exhibit 11

<sup>9</sup> Agency exhibit 14

## BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

## APPLICABLE LAW and POLICY

The Agency relies on Operating Procedure 101.3 “Standards of Ethics and Conflict of Interest”, Operating Procedure 135.1 “Standard of Conduct”, Operating Procedure 130.3, Operating Procedure 101.2, 1.80 and 2.05 as well as Offense Codes 11, 13, 32, 33, 36 and 37.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Virginia Department of Corrections Operating Procedure 135.1 (IV) (C), *Standards of Conduct*, states, “[t]he list of offenses in the procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”<sup>10</sup>

## FINDING OF FACTS

On the evening on August 15, 2015 Grievant was expected to be on duty for the night shift. Grievant arrived at work wearing non-issued boots. Two Correctional Officers had a conversation about Grievant, her misplaced boots, her current companion and her dating habits. One of the two, CO #2, had previously dated Grievant but the relationship had ended. CO #1, later in the evening, was in the presence of Grievant and conveyed to Grievant the emotionally charged statements that CO #2 had allegedly made about Grievant.

Grievant became enraged. Grievant called CO #2 on the phone and used abusive language. Grievant then left that area to go to the area where CO #2 was stationed. She kicked at the door to get in and “cornered” CO #2 berating him in a loud voice using derogatory, abusive and threatening language. As CO #2 left the room, Grievant threw a

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<sup>10</sup> Agency exhibit 21

gatorade bottle on the floor in the direction of the door<sup>11</sup>. Grievant then went back to her job and later reported the incident to her Superiors<sup>12</sup>. No other person who was present for any of the incidents reported it to their Superior.<sup>13</sup>

There are no written statements of Grievant in evidence. There are written statements in evidence from 6 other persons.<sup>14</sup>

In testimony, under oath, Grievant stated she was angry about the statements reported to have been made about her. She admitted she did talk to CO #2 by phone, she did go to his location and have a conversation with CO #2 and she reported that she threw a plastic bottle at the floor. She admitted to making a remark about “keying a car” but stated it never happened. It was only said to show what she was capable of doing. She denied using racially charged words and denied that any offender was present in the near vicinity when the incidents occurred.<sup>15</sup>

Written statements and testimony of other witnesses indicated Grievant was very upset after receiving the statements made to her by CO #1, did use vulgar language, did “corner” CO #2 and did use racial slurs. She did throw a plastic bottle, did use threatening language and the incident did occur where inmates could see and hear the controversy.<sup>16</sup>

#### OPINION

Grievant’s emotional outburst is not only unprofessional it is potentially dangerous behavior in a facility where authority and control are very important.

I find that Grievant did violate Operating Procedure 135.1 B (2) c, d, e; 135.1 C (2) H Written Code offenses 11, 32, 36, 37 and 73; and did meet the definition of prohibited conduct. The Written Notices given to Grievant on October 5, 2015 cite Operating Procedures 101.2, 130.3, 135.1, 1.80 and 2.05 as well as Offense Codes 11, 13, 32, 33, 36 and 37.

Certainly Grievant should have exercised restraint and dealt with any personal matter outside of her employment. Her dangerous behavior cannot be condoned.

I have also considered mitigating circumstances. Grievant did take the requested anger management class.<sup>17</sup> She did cooperate with the investigation.

I am most impressed that CO #1 received no discipline. His behavior was characterized by the Warden in testimony as “unprofessional”.<sup>18</sup> His comments were

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<sup>11</sup> Collective Agency exhibits 1, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 14

<sup>12</sup> Agency exhibit 8

<sup>13</sup> Oral testimony of Warden Boehm

<sup>14</sup> See footnote 11 supra, Agency Exhibit 2 and 3

<sup>15</sup> Oral testimony of Grievant

<sup>16</sup> Oral testimony of 6 witnesses

<sup>17</sup> Agency exhibit 15 and 18 Section IV

<sup>18</sup> Oral testimony of Warden Boehm

inflammatory, unnecessary and not pertinent to his employment. For the Agency to overlook the impact of negative gossip among employees asks for discord in a group that needs to work as a unit.

### CONCLUSION

- 1). I find that Grievant did make derogatory remarks towards another CO. I am unable to confirm by preponderance of the evidence that Grievant's abusive language specifically included the word "Nigger".
- 2). I find, even by Grievant's own omission, that she threatened CO #2 and his personal property.
- 3). I find the incident as a whole displayed Grievant's inability to control her behavior in the workplace. The behavior was not only unbecoming of an officer but also dangerous. Her job duties included being an authority figure to the inmates which she was to both guard and protect. Lack of control undermines that image.

In light of my finds, I feel Grievant is properly charged with violation of four (4) Group I violations; Operation Procedure 135.1 B(2)c "use of obscene or abusive language"; B(2)d "inadequate or unsatisfactory job perform"; B(2)e "disruptive behavior"; and a collective Group I for Code Offenses; 11 "unsatisfactory performance"; 32 "violation of DHRM Policy 1.80 workplace violence"; 36 "obscene or abusive language"; 37 "disruptive behavior" and 73 "threats or coercion". She engaged in prohibitive conduct thus violating Operational Procedure 135.1C(2)l. This is a Group III Offense reduced to a Group II as the threat did not involve bodily harm.

CO #1 was not disciplined in any way although he clearly violated Operational Procedure 135.1B(2)e "disruptive behavior". I rescind the Grievant's Group I discipline of Operational Procedure 135.1B(2)e as proper mitigation.

### DECISION

I find Grievant's discipline for three Group I and one Group II violations to be valid and her termination from employment **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 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>19</sup>

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

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Sondra K. Alan, Hearing Officer

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<sup>19</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.