

Issue: Group III Written Notice with Termination (safety rule violation, obscene/abusive language, disruptive behavior, threat, inmate abuse); Hearing Date: 03/04/19; Decision Issued: 03/06/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11299; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11299

Hearing Date: March 4, 2019

Decision Issued: March 6, 2019

PROCEDURAL HISTORY

On October 17, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for safety rule violation, obscene or abusive language, disruptive behavior, threats or coercion, and inmate abuse.

On November 5, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 10, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for February 15, 2019 but at Grievant's request was moved to March 4, 2019. On March 4, 2019, a hearing was held at the Agency's office. Grievant was notified of the hearing date and time but did not appear.

APPEARANCES

Agency Party Designee
Agency Counsel
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 employed Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On September 17, 2018, Officer M was working in the control booth and the Lieutenant was working as the floor officer in the pod. Grievant returned to the control booth. As he entered the control booth, the telephone was ringing. Grievant rushed to answer the phone. At the same time, an offender was complaining about abdominal pain. The phone rang again and Grievant took the phone receiver and tossed it on the desk without answering the call. Grievant exclaimed, "This is like a war zone. I can't take it!" The Offender knocked on the window to the control booth. Grievant yelled at the Offender, "What the f—k are you doing?" Grievant banged on the window yelling, "You need to get the f—k away from my window. I'm going to write you up you f--king inmate. I don't take orders from you!" The Offender called Grievant a red fat bi--h. Grievant responded, "If I could get through this window, I will f--k you up!"

Officer M attempted to exit the control booth to go on break and to inform the Lieutenant of Grievant's behavior. Officer M asked Grievant to open the control booth door so she could exit. Officer M calmly told Grievant he did not need to curse at the

offenders. Grievant responded by punching the glass in the booth door. Officer M thought Grievant may have broken the window. She became concerned that Grievant had created a safety risk because if the window was broken an inmate could reach inside and take control of the pod.

As Grievant opened the door for Officer M, Grievant said, "I'm done. These f—king inmates get away with everything!"

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

Group III offenses include, "Threatening or coercing ... offenders."⁴ On September 17, 2018, Grievant banged on the window of the control booth, yelled at the offender, and threatened "I will f--k you up" to the Offender. 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. Accordingly, the Agency's decision to remove Grievant 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 Human Resource Management"⁵ 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

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁴ See, DOC Operating Procedure 135.1(E)(2)(I).

⁵ *Va. Code § 2.2-3005.*

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 III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.^[1]

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer