

Issue: Group III Written Notice with Suspension (unprofessional and threatening conduct); Hearing Date: 02/26/19; Decision Issued: 03/18/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11305; 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: 11305

Hearing Date: February 26, 2019

Decision Issued: March 18, 2019

PROCEDURAL HISTORY

On September 17, 2018, Grievant was issued a Group III Written Notice of disciplinary action with a five day work suspension for unprofessional and threatening conduct.

On October 14, 2018, 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 7, 2019, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 26, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 employs Grievant as a Farm Supervisor at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On August 29, 2018, the Inmate was assisting Supervisor R transport vehicles back and forth between Facility D and Facility P. Grievant knew the Inmate as one who was sometimes confrontational and disrespectful to Agency employees. Grievant did not know Supervisor R who was a part-time Agency employee.

Grievant and a crew of inmates were working on a one lane dirt road bridge. Grievant was working near or below the level of the bridge. If a vehicle drove over the bridge too fast, it would "kick" dust, dirt, and rocks onto Grievant and his workers.

The Inmate drove a Rugged Terrane Vehicle (RTV) over the bridge at a low rate of speed causing dirt and dust to fall onto Grievant. This angered Grievant. The posted speed limit on the road was 15 miles per hour.

When Grievant observed the Inmate approaching the bridge again, Grievant threw an orange barricade traffic cone and it rolled in front of the RTV. The Inmate got out of the RTV and moved the traffic cone. Supervisor R drove his vehicle behind the

RTV and observed Grievant. Grievant yelled at the Inmate to slow down because Grievant did not like dust flying up from passing vehicles. The Inmate told Grievant to talk to his supervisor and pointed to Supervisor R. Grievant walked to Supervisor R's van and Supervisor R asked Grievant, "What's going on?" Grievant replied, "You need to make sure you and your worker slow the f—k down around here. We do not like to eat all of this f—king dust." Supervisor R responded that he would take care of it. Supervisor R and the Inmate drove their vehicles to the facility.

Supervisor R and the Inmate needed to take another vehicle across the bridge. For the second pass together, Supervisor R drove the RTV while the Inmate operated a vehicle and drove behind the RTV. Supervisor R wanted to ensure that the RTV and the Inmate's vehicle were moving at less than ten miles per hour to avoid affecting Grievant's work. After the RTV crossed the bridge, Grievant "waved down" Supervisor R who then stopped the RTV. Supervisor R began to open the door to the RTV. Grievant ran up to the RTV and forcefully pushed the door open. Grievant got close to Supervisor R's face and began yelling to "slow the f—k down". Supervisor R told Grievant to calm down and back up. After Supervisor R repeatedly said to calm down and back up, Grievant backed up and began walking away. Grievant pulled out his cell phone and asked Supervisor R what was his name. Supervisor R told Grievant his name. Supervisor R and the Inmate continued to their intended destination.

Supervisor R and the Inmate need to pass through the bridge a third time. Another employee driving a white truck also needed to cross the bridge and passed the Inmate in the RTV and Supervisor R in a vehicle. Three vehicles approached the bridge. Grievant started yelling and waving at the white truck to slow down. After Supervisor R crossed the bridge, Supervisor R looked in his rear view mirror to see that the Inmate passed the bridge successfully. Supervisor R observed Grievant pick up a rock and make a throwing gesture towards the RTV. The Inmate saw Grievant pretending to throw the rock at him.¹

The Captain interviewed the offenders working for Grievant. One offender admitted that Grievant threw an orange traffic code in front of the RTV as the Inmate approached the bridge. A second inmate admitted that Grievant "jerked the door open" on the RTV as it was coming to a stop while Supervisor R was driving the RTV.

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."² Group II offenses "include acts and behavior that are more severe in

¹ Grievant's arm motion was as if he were throwing a baseball overhand.

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

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

“Threatening or coercing persons associated with any state agency, including but not limited to employee, supervisors, volunteers, offenders, visitors, and students” is a Group III offense.⁵ On August 29, 2018, Grievant yelled and cursed at the Inmate and at Supervisor R. He approached Supervisor R and got so close to Supervisor R that Supervisor R had to repeatedly ask Grievant to back up. Grievant picked up a rock and made a throwing motion as if to throw the rock at the Inmate. Grievant’s behavior was threatening and coercive. 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 or in lieu of removal suspend an employee for up to 30 workdays. Accordingly, Grievant’s suspension must be upheld.

As part of the disciplinary action, the Agency required Grievant to contact the Employee Assistance Program for assistance in maintaining professionalism in the work place. Requiring an employee to contact EAP as part of a disciplinary written notice is not authorized by the Standards of Conduct. Accordingly, that portion of the Written Notice is reversed even though Grievant may have already completed the instruction.

Grievant denied the Agency’s allegations.⁶ He argued it was a matter of his word verses Supervisor R’s word and Supervisor R indicated he intended to “get” Grievant. The Agency believed Supervisor R over Grievant. The Agency’s conclusion is supported by the statements it received from inmates working with Grievant. Supervisor R’s testimony was credible. The Agency has met its burden of proof despite Grievant’s rejection of the Agency’s findings.

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”⁷ 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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ DOC Operating Procedure 135.1(V)(E)(I).

⁶ For example, he argued he was not physically capable of throwing a nearly 40lb orange cone into the road. The evidence showed that Grievant moved the orange cone into the road to stop the Inmate in the RTV. Whether Grievant picked up the cone and threw it a great distance is not likely. Grievant was able to move the cone with sufficient force that others perceived it as being thrown in the Inmate’s way.

⁷ Va. Code § 2.2-3005.

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 III Written Notice of disciplinary action with a five workday suspension 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