

Issue: Group III Written Notice with Demotion (unprofessional conduct); Hearing Date: 01/23/13; Decision Issued: 01/28/13; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10003; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 02/07/13; EDR Ruling No. 2013-3534 issued 02/20/13; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution
Department of Human Resource Management

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 10003

Hearing Date: January 23, 2013

Decision Issued: January 28, 2013

PROCEDURAL HISTORY

Grievant was a security sergeant for the Department of Corrections (“the Agency”), with seventeen years of service with the Agency as of the offense date. On October 26, 2012, the Grievant was charged with a Group III Written Notice, with job demotion, for unprofessional conduct occurring on October 20, 2012. The Grievant had no prior, active disciplinary notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On December 27, 2012, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. Through pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, January 23, 2013, on which date the grievance hearing was held at the Agency’s facility.

Both parties submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency’s or Grievant’s Exhibits, accordingly.

APPEARANCES

Grievant
Advocate for Agency
Agency 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?

The Grievant requests rescission or reduction of the Group III Written Notice and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its *Standards of Conduct*, Operating Procedure 135.1, which defines Group III offenses to include acts of misconduct of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 4. Examples of a Group III offense include acts of physical violence or fighting and verbal abuse.

The Grievant's Employee Work Profile (EWP) for his supervisory position requires a demonstrated ability to analyze and resolve problems effectively. The core responsibilities include communication skills and support for professional, considerate and consistent patterns of communication with offenders, staff, and others, both inside and outside the facility. The EWP also requires the Grievant to demonstrate respect toward all staff and offenders. Agency Exh. 3.

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a security sergeant, with approximately 17 years of service with the Agency. The Grievant admitted that he cursed an inmate that escalated to a physical altercation. Based on the Grievant's admission, I find the Agency has proved the Group III Written Notice. The Agency's assistant warden testified that the discipline was mitigated down to demotion instead of termination because of the Grievant's otherwise meritorious work tenure.

As for the Group III Written Notice, it states:

On 10/20/12 you engaged in acts of unprofessional conduct with Offender [R]. Per your admission, while opening the back door of the dormitory for recreation you and Offender [R] had a verbal confrontation involving vulgar language which led to a physical fight. Evidence shows you provoked the verbal confrontation. This action led to minor injuries and could have led to a major concern for the other staff responding to the 1033 and/or caused a serious breach of security.

The Grievant asserts that the inmate was the instigator of the altercation and that he (the Grievant) was merely defending himself.

A security captain testified that officers are not allowed to curse—such conduct is unacceptable. He also testified that the Grievant was an excellent supervisor.

The chief of security testified that the Grievant admitted that he cursed the inmate prior to the altercation, and that security staff should always try to back away from any confrontation and call for assistance if needed. The chief of security testified that the policy is to avoid any physical confrontation as it presents a risk to staff, offenders, and potential liability for the Agency and the Commonwealth. The chief of security testified that the Grievant's EWP requires him to ensure a safe and secure confinement. The chief of security also testified that supervisory personnel, like the Grievant, receive enhanced training on conflict resolution. Investigation of this altercation was ultimately turned over to the Agency's outside investigator who concluded that the Grievant's charged offense was founded.

Testifying for the Grievant were two facility counselors and two corrections officers who were unanimous in their opinions that the Grievant was a good supervisor and asset to the institution. The Grievant's good work tenure is apparently conceded by the Agency through its own evidence and disciplinary mitigation.

The Grievant described himself as outspoken by nature, and he testified he does not condone cursing. However, the Grievant admitted, following a verbal exchange with the inmate, that he cursed the inmate by stating, "Fuck that, I am not going to keep open doors [for] you." This statement was in the Grievant's handwritten account. The physical altercation started with the inmate striking the Grievant, at which point the two started wrestling around. There were minor injuries to both the Grievant and the inmate. The Grievant takes issue with aspects of the investigation, the extent of interviews, information obtained from inmates, and the lack of contact from the outside investigator. However, based on the unrefuted account from the Grievant, the Agency has met its burden of proving that the Grievant inappropriately cursed the inmate and the exchange led directly to an altercation, regardless of who struck first. Other facts that the Grievant disputes are irrelevant to the core basis for the discipline.

The Group III Written Notice and demotion is necessarily a harsh consequence. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, *even if he would levy lesser discipline*, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.* A hearing officer does not have the same discretion for applying mitigation as management does.

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" Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management." 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. The Grievant produced no such mitigating evidence.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been

charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant and all security personnel must interact with a challenging population of inmates, and it is incumbent, for obvious security reasons, for staff conduct to adhere to strict expectations. The Grievant's conduct put the Agency at risk, and, while strict in its application, warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers. Accordingly, I find no mitigating circumstances that permit the hearing officer to reduce the Agency's action regarding the Group III Written Notice as outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice with demotion 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 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 14th St., 12th 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 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 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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.