

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 04/22/13;
Decision Issued: 04/23/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10053; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR
Ruling Request received 05/06/13; EDR Ruling No. 2013-3601 issued 05/28/13;
Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling
Request received 05/06/13; DHRM Ruling issued 05/29/13; Outcome: AHO's
decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10053

Hearing Date: April 22, 2013

Decision Issued: April 23, 2013

PROCEDURAL HISTORY

On September 12, 2012, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior.

On September 27, 2012, 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 April 1, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 22, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Power Plant Lead Worker. He has been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility has towers outside of the fenced perimeter of the Facility. The power plant is located approximately 50 to 75 feet from one of the towers. An employee drives a vehicle around the outside of the fenced perimeter to observe the conditions of the fence and to pick up and drop off employees at the towers as they change shifts. The employee driving the vehicle around the perimeter is referred to as the "rover patrol."

On July 8, 2012, the Officer was working in the tower outside of the perimeter of the Facility. At the end of her shift, she descended from the tower. She stood outside of the power plant and waited for the rover patrol. She waited approximately ten minutes. The temperature was over 100 degrees and she wanted to avoid the heat and sun. She opened the door to the power plant and entered. She stood at the front door looking out of the window in the door waiting for the rover patrol. She did not walk around the building or cross the yellow line demarking an area around the boilers reserved for power plant employees. Grievant was in an office to the Officer's right approximately ten feet away. He observed the Officer standing at the door. He asked her what she was doing. The Officer explained why she was in the power plant. Grievant told her she could not wait there and if she was not there to use the facilities,

she would have to go. At that moment, roving patrol reached the Officer's location. The Officer apologized, told Grievant to have a good day, and left the power plant.

Prior to July 2012, the Supervisor verbally counseled Grievant that employees were permitted to come into the power plant and use facilities and microwave and vending machines as long as they did not do anything to the power plant equipment.

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

Disruptive behavior is a Group I offense.⁴ Grievant had been instructed by his supervisor that security staff could enter the power plant and use the facilities and microwave and vending machines as long as they did not do anything to the power plant equipment. Grievant should have understood from this instruction that the power plant was open to security staff as long as they did not access the power plant equipment. Grievant was discourteous to the Officer and upset her to the point that she felt it necessary to report her interaction with Grievant to her supervisors. Grievant had no authority to instruct the Officer to leave the power plant. Grievant had no business related need for the Officer to leave the power plant. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

Grievant argued that no policy existed to prohibit Grievant from telling the Officer to leave the power plant. This argument fails. Grievant was not given the authority to instruct the Officer to leave unless she was accessing the power plant equipment. The Officer was not accessing power plant equipment. Grievant and the Officer were in separate chains of command. The Officer ultimately reported to the Warden. Grievant did not report to the Warden. He ultimately reported to the Operations Director through the division of environmental services unit.

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

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(2)(e).

Grievant argued that the behavior was not disruptive. For example, Grievant's behavior did not disrupt the Facilities operations or undermine security. In order for behavior to be disruptive, it must disrupt some part of the Agency's operations. When an employee is distracted from her other duties because she was upset by the behavior of another employee, that distraction is a disruption to the Agency's operations and is sufficient to establish disruptive behavior.

Grievant argued that the power plant contained equipment that could be dangerous to staff and, thus, it was appropriate for him to ask the Officer to leave. This argument is not persuasive because the Officer did not walk across the yellow line or take action to endanger herself or Grievant.

Grievant argued that the Agency failed to timely respond to his grievance as part of the Step Process under the grievance procedure manual. To the extent the Agency failed to timely respond to his grievance, that matter should have been responded to by the Office of Employment Dispute Resolution prior to the appointment of the Hearing Officer. There is no basis for the Hearing Officer to reduce disciplinary action for delays during the Step Process as may have occurred during this grievance.

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 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 I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

⁵ *Va. Code § 2.2-3005.*

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.⁶

[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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer