

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 05/23/13; Decision Issued: 05/28/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10077; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10077**

Hearing Date: May 23, 2013

Decision Issued: May 28, 2013

#### **PROCEDURAL HISTORY**

On March 20, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On March 20, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 17, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On May 23, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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 employed Grievant as a Corrections Officer at one of its facilities. The purpose of his position was to, "provide security, custody, and control of adult offenders resulting in a safe and secure environment for staff, offenders, and citizens of the Commonwealth of Virginia."<sup>1</sup> No evidence of prior active disciplinary action was introduced during the hearing.<sup>2</sup>

On January 15, 2013, Grievant was working as the control booth officer in a pod with approximately 195 inmates. The Floor Officer was assigned to work with Grievant by coordinating inmate movement among other duties. The Floor Officer left the pod to go to the restroom. The Floor Officer stayed away longer than Grievant expected and Grievant became frustrated because it became necessary for him to perform the Floor Officer's duties as well as his own. Grievant called the Floor Officer on the radio several times. The Floor Officer responded that he would return soon. While Grievant waited, he closed the doors to the pod and tried to establish order among the offenders. The Floor Officer returned to the floor. The Floor Officer spoke to Grievant through the control booth window and asked if Grievant had completed his master pass list. Grievant told the Floor Officer it was not Grievant's responsibility to complete the master pass list. The Floor Officer knocked on the control booth door and Grievant let the Floor

---

<sup>1</sup> Agency Exhibit 4.

<sup>2</sup> The Written Notice says Grievant had prior active disciplinary action, but that Written Notice was not introduced into evidence.

Officer inside the control booth. Grievant and the Floor Officer began yelling and arguing. The Floor Officer moved towards Grievant while yelling and pointing at Grievant. The Floor Officer pushed Grievant's head backwards and pushed Grievant with his body. Grievant pushed the Floor Officer back to keep the Floor Officer off of him. Grievant told the Floor Officer to leave the control booth. The Floor Officer would not leave the control booth. Grievant opened the door and shoved the Floor Officer out of the control booth. Grievant also went through the door and both men were outside of the control booth in a small vestibule. The control booth door closed and locked. Grievant was unable to enter his post in the control booth. Because he was outside of the control booth, Grievant caused a security breach. Another employee and a visitor to the institution were working on the floor with inmates. Had a fight or other disturbance occurred among inmates, Grievant would have been unable to respond and the employee and visitor would have been at risk of injury.

### **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."<sup>3</sup> 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."<sup>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>5</sup>

"Acts of physical violence or fighting" is a Group III offense. On January 15, 2013, Grievant shoved the Floor Officer out of the control booth as part of a heated argument with the Floor Officer. His action constituted physical violence and fighting. 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, Grievant's removal must be upheld.

Grievant argued that his actions were in self-defense. When the Floor Officer pushed Grievant and Grievant responded by pushing the Floor Officer to get the Floor Officer off of him, Grievant acted in self defense. When Grievant shoved the Floor Officer out of the control booth, however, Grievant was not acting in self defense. Grievant was not repelling an attack from the Floor Officer; Grievant was attempting to control the Floor Officer and move him out of the control booth.

*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

---

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

“in accordance with rules established by the Department of Human Resource Management ....”<sup>6</sup> 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 III Written Notice of disciplinary action with removal 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 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

---

<sup>6</sup> Va. Code § 2.2-3005.

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>7</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].

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.