

Issue: Group II Written Notice (failure to follow instructions); Hearing Date; 03/20/14; Decision Issued: 03/24/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10276; Outcome: No Relief - Agency Upheld; **Administrative Review: DHRM Ruling Request received 04/10/14; DHRM Ruling issued 04/29/14; 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: 10276**

Hearing Date: March 20, 2014  
Decision Issued: March 24, 2014

**PROCEDURAL HISTORY**

On October 25, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On October 22, 2013, 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 she requested a hearing. On February 10, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 20, 2014, 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 employs Grievant as a Senior Correctional Officer at one of its facilities. The purpose of her position is to "provide security over adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement."<sup>1</sup>

Grievant received training regarding the Agency's procedures to transport inmates by ambulance to hospitals. Not all security staff at the Facility received this training.

On September 27, 2013, Grievant was working the front gate post. An inmate suffered chest pains and was close to "coding". The inmate needed to be transported immediately by ambulance to the nearest hospital. The Lieutenant called Grievant by telephone and told her "we have an emergency run going out and [Grievant] would be going with [Officer J]. The Lieutenant told Grievant that the restraints have been "pulled" and that the offender is on 2-1 hall waiting to be restrained for transport and that an ambulance had been called. Grievant said, "I am not in the mindset to go on a run today." The Lieutenant asked, "[w]hat does that mean?" Grievant responded, "I guess I can't refuse?" The Lieutenant informed her she could not refuse and instructed her to report to the 2-1 hall. Grievant said, "I will speak to [Major] and she hung up the telephone.

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<sup>1</sup> Agency Exhibit 3.

Grievant called the Major. The Major called the Lieutenant and said to get someone to replace Grievant at the front gate so that the Lieutenant and Major could speak with Grievant. After approximately ten minutes, another employee was chose to go on the transportation run in Grievant's place. During their meeting, the Major asked Grievant what she meant by not being in a state of mind to go on the transportation run. Grievant restated that she was not in the mindset to go on the run but again failed to explain what that phrase meant.

## 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>2</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>3</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>4</sup>

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.<sup>5</sup> On September 27, 2013, Grievant was instructed by the Lieutenant to assist in the emergency transportation of an inmate to a hospital. Grievant failed to perform her assigned duties and failed to comply with the Lieutenant's instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant did not testify and did not call any witnesses during the hearing. It is unclear why she failed to perform her assigned duties. She argued that she should not have been forced to go on the transportation run if she lacked the mental capacity to do so. She argued that going on the transportation run might have put others at risk. The Agency admitted that if she had said she lacked the mental capacity to perform her duties, the Agency would have removed her from her post and not permitted her to perform the transportation run but added that Grievant never said she lacked the mental capacity to perform her duties. Grievant wrote a statement after the incident claiming she told the Lieutenant and the Major that she was not "mentally stable" enough to go on the transportation run. Without testimony to support this assertion, the written statement does not rise to a level higher than the credible testimony of the Lieutenant who testified Grievant referred to "mindset." Grievant was given two opportunities to

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

explain what she meant by “mindset”. The Lieutenant asked her what she meant when Grievant said “mindset”. The Major asked her why she could not go on the transportation run and she restated the word, “mindset” without offering further explanation. Operating Procedure 135.1(IV)(H)(2) provides, “[e]mployees should report to their supervisor any conditions or circumstances, as they become known, which will prevent employees from performing effectively or from completing their assigned tasks.” Grievant did not disclose a valid reason for her to disregard the Lieutenant’s instruction. Based on the evidence presented, there exists a basis to support the Agency’s decision to take disciplinary action against Grievant.

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 ....”<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 II Written Notice of disciplinary action 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

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<sup>6</sup> Va. Code § 2.2-3005.

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  
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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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