

Issues: Group II Written Notice (failure to follow instructions and failure to work OT as required), and Termination (due to accumulation); Hearing Date: 06/21/19; Decision Issued: 07/11/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11345; 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: 11345**

Hearing Date: June 21, 2019

Decision Issued: July 11, 2019

#### **PROCEDURAL HISTORY**

On March 4, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and refusal to work overtime as required. Grievant was removed from employment based on the accumulation of disciplinary action.

On April 2, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 15, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 21, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
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?

### **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 employed Grievant as a Corrections Officer at one of its facilities. Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on November 29, 2017 for failure to follow policy and refusal to work overtime.

One of Grievant's Conditions of Employment was to work special assignments.

Grievant worked at the Facility. The Second Facility had significant staffing shortages and the Agency needed temporarily to assign employees from the Facility to work at the Second Facility. The Second Facility was located approximately a two hour drive away from the Facility. The Agency asked for volunteers from the Facility to work at the Second Facility. If no one volunteered, the Agency selected employees from a list of employees. Employees were selected on a rotating basis. The Agency began sending corrections officers to the Second Facility in 2018.

On February 3, 2019, the Captain told Grievant that he would need to work at Second Facility from February 11, 2019 through February 17, 2019. Grievant told the Captain that only making male officers work was discrimination and he would not work the week at Second Facility.

On February 6, 2019, Grievant met with the Major and Captain. The Major asked Grievant, "Why are you refusing to go to [Second Facility]?" Grievant said, "That is discrimination that you are only sending male officers." The Major then asked if Grievant knew what a BFOQ (Bona Fide Occupational Qualification) post was. Grievant said, "I do." The Major then said, "That [Second Facility] is a BFOQ post. It was put out by the region. That is the reason you have to go to [Second Facility]." Grievant replied, "It is still discrimination by not sending female officers."

Grievant presented the Captain with a Statement dated February 6, 2019:

I [Grievant's name] refused to go to [Second Facility] for the reason of Discrimination against male officers by not sending Female officers.<sup>1</sup>

The Captain advised Grievant that his refusal to work at Second Facility could result in disciplinary action.

Grievant did not work at Second Facility from February 11, 2019 through February 17, 2019.

On March 4, 2019, Grievant met with Warden, Major, and Ms. B to discuss possible disciplinary action. During the meeting, Grievant asked, "Why are you not sending female officer to [Second Facility]?" The Warden replied, "The trailer they had set up for females did not have a Certificate of Occupancy, which has changed since they have a new trailer." Grievant asked, "If that is the case, then why were other accommodations not made for females to go? Like putting them in hotel rooms since there is a city with hotels not far away?" The Warden answered, "That does not pertain to why we are here." Grievant replied, "That it does. If you were sending females then we would not be having this meeting because I would have went."

## 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>

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

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

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

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

“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> Grievant was instructed to go work at the Second Facility from February 11, 2019 through February 19, 2019. The instruction arose from the Agency’s legitimate business needs. The Agency selected male employees on a rotating basis. Grievant failed to comply with the instruction thereby justifying the issuance of a Group II Written Notice. The Agency presented evidence showing that it gave Group II Written Notices to other employees who refused to go to Second Facility.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove him from employment.

Grievant argued his behavior was protected because the Agency was discriminating against him for complaining about discrimination based on sex.

On August 25, 2016, the Equal Employment Opportunity Commission issued *EEOC Enforcement Guidance on Retaliation and Related Issues*. This guidance provides:

Refusing to obey an order constitutes protected opposition if the individual reasonably believes that the order requires him or her to carry out unlawful employment discrimination. Protected opposition also includes refusal to implement a discriminatory policy.

The Agency employed male and female corrections officers who were obligated to perform special assignments. The Agency discriminated against male corrections officers by requiring only male corrections officers to work at the Second Facility. The Agency had a legitimate non-discriminatory reason for refusing to send female corrections officers to the Second Facility – it could not house female officers in the barracks since the barracks for females did not have a certificate of occupancy. In other words, the Agency’s discrimination was permissible under the circumstances of this case.

The question becomes whether Grievant’s belief that the Agency was improperly discriminating against him was reasonable. Grievant has the burden of proof on this defense. The Major informed Grievant on February 6, 2019, that the post at the Second Facility was a Bona Fide Occupational Qualification post. Grievant understood what this meant. Upon learning this information, Grievant’s refusal was no longer reasonable. Grievant should have complied with the instruction.

*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

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

“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.

Grievant presented evidence showing that other corrections officers had been instructed to report to the Facility to work because of a pending lockdown but those employees refused. Grievant argued that he was not being treated similarly to those employees. The evidence showed that Facility managers initiated disciplinary action against those employees refusing to work overtime but did not take disciplinary action because some Facility managers failed to timely issue disciplinary action. Seven employees refused to work overtime and were given notices of substandard performance. The Major initiated disciplinary action 42 days after the lockdown and because of the passage of time, the Warden could not issue disciplinary action. The Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action. It appears the other employees did not receive disciplinary action as an administrative oversight. In light of the standard set forth in the Rules, 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 with removal is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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

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<sup>6</sup> Va. Code § 2.2-3005.

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 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.<sup>[1]</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>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.