

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 07/26/19; Decision Issued: 08/15/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11354; 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: 11354**

Hearing Date: July 26, 2019  
Decision Issued: August 15, 2019

#### **PROCEDURAL HISTORY**

On February 7, 2019, Grievant was issued a Group II Written Notice of disciplinary action with a two workday suspension for failure to follow a supervisor's instruction.

On February 22, 2019, 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 May 13, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 26, 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 employs Grievant as a Corrections Officer at one of its Facilities. No evidence of prior active disciplinary action was introduced during the hearing.

When employees are late to arrive at the Facility, they are required to fill out tardy slips. The tardy slips are kept in the watch commander's office. Staff are allowed to enter the office to obtain tardy slips.

Grievant was drafted to report to work at 5:30 a.m. on January 8, 2019. Grievant called Captain M and told Captain M that he was running late and would be at the Facility at 6 a.m. At 6:20 a.m., Grievant called to say he would arrive in ten minutes. At 6:40 a.m., Grievant arrived at the Facility. When Grievant entered the Facility, Captain M told Grievant to stop by the watch office and fill out a tardy slip.

At the end of Grievant's shift, Captain M handed Grievant a tardy slip and advised Grievant to fill out the tardy slip before he left for the day. Grievant did not fill out the tardy slip before he left the Facility.

Grievant met with the Warden on February 7, 2019. The Warden asked if Grievant had filled out a tardy slip. Grievant said he had not done so.

## 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>1</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>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</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>4</sup> On January 8 2019, Captain M instructed Grievant to fill out a tardy slip. Grievant did not comply with that instruction thereby justifying the Agency’s decision to issue a Group II Written Notice for failure to follow instructions. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. In this case, the Agency suspended Grievant for two workdays. Accordingly, the Agency’s decision to suspend Grievant for two workdays is upheld.

Grievant argued Captain M did not tell Grievant to complete a tardy slip. Captain M testified that he instructed Grievant to complete a tardy slip on January 8, 2019. His testimony was credible. The Agency has presented sufficient evidence to show that Grievant was instructed by Captain M to complete a tardy slip.

Grievant argued that two days after January 8, 2019 he was asked why he did not complete a tardy slip and he said that no one asked him to complete a tardy slip. Assuming this is true, it means Grievant knew he was obligated to complete a tardy slip a few days after January 8, 2019 yet he did not complete a tardy slip as of February 7, 2019 when he met with the Warden.

Grievant argued the Agency failed to provide him with progressive corrective action. For example, the Agency did not first counsel Grievant rather than deciding to issue a written notice. The Standards of Conduct encourages progressive corrective action but does not require it. The Agency was free to issue a written notice without having first counseled Grievant.

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

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

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

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>5</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 with a two workday suspension 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  
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

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<sup>5</sup> Va. Code § 2.2-3005.

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.