



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11515**

Hearing Date: July 30, 2020  
Decision Issued: August 19, 2020

#### **PROCEDURAL HISTORY**

On January 24, 2020, Grievant was issued a Group II Written Notice of disciplinary action with a transfer, demotion to a lower pay band, and a 5% disciplinary pay reduction for failure to follow instructions.

On February 22, 2020, 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 11, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 30, 2020, a hearing was held by audio conference due to the corona virus pandemic.

#### **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 Chief of Security at one of its facilities until his demotion to Captain and transfer to a different facility. Grievant has been employed by the Agency for approximately 18 years. Grievant had prior active disciplinary action. On June 12, 2019, Grievant received a Group II Written Notice for failing to follow a supervisor's instructions.

Grievant was instructed by the Warden and Assistant Warden to review and submit weekly overtime reports. Grievant did not review the reports and submit them in a timely manner.

The Assistant Warden instructed Grievant to conduct an After Action Review of the third quarterly shakedown. Grievant did not conduct an After Action Review as directed.

The Assistant Warden instructed Grievant to submit supporting documentation for each area inspected during the quarterly security readiness assessment. The Assistant Warden sent Grievant an email on September 6, 2019 requesting documentation to support the reviewed standards for the quarter. The report was due to the regional office on October 15, 2019. Grievant provided no documentation for the last quarterly security readiness assessment.

The Warden and Assistant Warden instructed Grievant to take corrective actions as outlined in the ACA pre-audit inspection. Grievant was instructed to ensure deficiencies and/or recommendations for security areas were addressed and corrected. Grievant failed to provide any feedback or corrective action documentation regarding actions he took to ensure the deficiencies were corrected and recommendations were implemented.

The Warden and Assistant Warden instructed Grievant to review and revise security staff rosters to ensure all posts, especially critical audit areas such as the kitchen and yard, were adequately staffed with appropriate personnel. Grievant presented rosters to the Warden. The roster showed multiple positions with no staff assigned.

On October 2, 2019, the Assistant Warden asked Grievant to assist the Watch Commanders and Operations Lieutenants with gaining access to the key watch box daily report to ensure institutional key accountability. Grievant did not enable access to key watch box daily report for several Watch Commanders and Operations Lieutenants.

In October 2019, the Assistant Warden assigned Grievant with responsibility to develop an Operations Manual for offender deaths. The purpose of the Manual was to ensure continuity of operations among all shifts. Grievant did not develop an Operations Manual for offender deaths.

## **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> Grievant repeatedly failed to follow a supervisor’s instructions as discussed above. The

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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).

Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the issuance of two Group II Written Notices, an agency can transfer, demote, and reduce the pay of an employee in lieu of removal. Accordingly, the Agency's decision to transfer, demote, and reduce Grievant's pay must be upheld.

Grievant denied the Agency's allegations. He did not present any testimony to contradict the Agency's witnesses. He presented documents addressing his concerns. Those documents were not sufficient to contradict the Agency's evidence. The Agency's evidence was sufficient to support its decision to issue disciplinary action.

*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 transfer, demotion, and disciplinary pay reduction 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

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<sup>5</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 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.