



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11520**

Hearing Date: July 1, 2020  
Decision Issued: September 4, 2020

#### **PROCEDURAL HISTORY**

On March 5, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy. On March 5, 2020, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance and failure to follow policy.

On March 26, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 7, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 2020, a hearing was held by audio conference.

#### **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 Food Service Supervisor at one of its facilities. Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on May 6, 2018. She received another Group II Written Notice on May 18, 2018.

Grievant fired an Inmate working in the kitchen because he did not wear his face mask. She had told him several times to properly wear his mask, but he refused to do so.

On January 11, 2020, Grievant called the Inmate to come to the kitchen to turn in his kitchen clothes. When the Inmate met Grievant, the Inmate said, "You fired me because I was Black!" Grievant responded sarcastically, "Yes, I fired you because you are Black." The Inmate was offended by Grievant's comment. Officer T heard Grievant's comment and was offended because you "don't joke about race."

At another time, Lieutenant B told the Inmate to go to the kitchen to get a bucket of hot water. Grievant did not know Lieutenant B told the Inmate to go to the kitchen. Grievant had forbidden the Inmate from entering the kitchen. The Inmate walked into the kitchen to get a bucket of hot water. Grievant was at a distance from the Inmate and yelled at the Inmate, "Get out of my kitchen, you are not allowed and do not belong in

my kitchen.” After Ms. F told Grievant that Lieutenant B told the Inmate to get a bucket of water from the kitchen, Grievant allowed the Inmate to enter the kitchen.

The Total Maintenance System (TMS) is the inventory system used by the Agency for food service. It accounts for food coming to the Facility and food eaten at the Facility. The inventory at the end of the month is supposed to account for food received during the month. Grievant was responsible for completing an inventory every month. She received adequate training to enable her to perform these duties.

On January 22, 2019, Grievant was instructed to complete the TMS on a daily basis. Grievant failed to do so.

Grievant failed to properly account to food at the Facility. She submitted inventory results to the Supervisor that contained an excessive number of errors. Grievant had stopped keying information into the system on a weekly basis as expected. In December 2019, the Supervisor instructed Grievant to complete the weekly inventory every Friday. On January 23, 2020, the Supervisor discovered that Grievant had not keyed any entries into TMS since January 2, 2020.

Grievant failed to make entries in the preventive maintenance book.

Grievant was responsible for keeping pull and inventory cards up to date. On several dates, these cards did not reflect the actual inventory in storage.

On January 17, 2020, a pallet of frozen meat was delivered to the Sallyport. Grievant observed the pallet but did not put it away immediately. She claimed a security staff member was responsible for putting the frozen meat in the freezer.

## **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>

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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).

### Group III Written Notice

Operating Procedure 135.2(F) requires:

1. At all times, employees should be respectful, polite, and courteous in the communications and interaction with offenders, as well as citizens and other employees.
2. Such practices are primary factors in providing a Healing Environment for effectively engaging others, resolving issues, maintaining order, control, good discipline, and redirecting behavior to a more positive result.

“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> When the Inmate falsely accused Grievant of firing him because of his race, Grievant responded with sarcasm. Her response offended the Inmate. Her response was not respectful, polite or courteous. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Grievant did not violate policy when she told the Inmate not to enter the kitchen. She did not know the Inmate had been instructed to go into the kitchen. She spoke loudly because she was not close to the Inmate.

The Agency argued Grievant should receive a Group III Written Notice. The Agency alleged Grievant engaged in “race discrimination towards an offender.” Grievant did not discriminate against the offender based on his race. The Inmate falsely accused Grievant of racial discrimination. Grievant’s response was sarcasm to show contempt for his false allegation. She did not discriminate against the Inmate because of his race.

### Group II Written Notice

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>5</sup> In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant failed to complete monthly inventories. She failed to update the TMS on a daily basis. She submitted inventories with excessive errors. She failed to make preventive maintenance entries. She failed to keep pull and inventory cards up to date. Grievant failed to put a delivery in storage. The Agency has presented sufficient evidence to show that Grievant’s work performance was unsatisfactory. Grievant had prior disciplinary action for unsatisfactory performance.

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<sup>4</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

The Agency argued Grievant should receive a Group II Written Notice for failure to follow instructions and/or policy. The evidence presented is best described as unsatisfactory performance. A generalized instruction to perform regular routine work duties is not specific enough to support the issuance of a Group II Written Notice for failure to follow instructions and/or policy.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated more than two active Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant denied the allegations against her but did not present sufficient evidence to show the Agency's evidence was unreliable.

*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 III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. The Agency's issuance to the Grievant of a Group II Written Notice is **reduced** to a Group I Written Notice. The Agency's decision to remove Grievant must be **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.

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<sup>6</sup> Va. Code § 2.2-3005.

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 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.