

Issue: Group I Written Notice (obscene language); Hearing Date: 08/20/15; Decision Issued: 08/24/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10642; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 09/02/15; EDR Ruling No. 2016-4226 issued 10/02/15; 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: 10642

Hearing Date: August 20, 2015
Decision Issued: August 24, 2015

PROCEDURAL HISTORY

On February 18, 2015, Grievant was issued a Group I Written Notice of disciplinary action for using obscene or abusive language.

On March 17, 2015, 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 July 14, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 20, 2015, 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. 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. He has been employed by the Agency for approximately 20 years.

Grievant was experiencing stress resulting from the closing of his former facility. He was concerned about staffing at the new facility.

On December 12, 2014, the Captain met with approximately 20 to 25 security staff prior to the start of their shifts. He addressed staffing concerns. Grievant became argumentative and expressed his opinion about staffing at the Facility. The Captain attempted to respond to Grievant's concerns but Grievant appeared to the Captain not to be satisfied by the Captain's comments. The Captain told Grievant he would continue to address Grievant's concerns after the meeting was concluded. The Captain continued to speak to the employees but Grievant again interrupted the Captain. The Captain again told Grievant that they would discuss the matter after the meeting. The Captain resumed speaking to the group. The Captain said he had spoken to the Warden about the issue. Grievant interrupted and said, "Mr. [Warden's last name]? Now that's an arrogant motherf—er right there."

Grievant spoke with the Captain in the Watch Office following the meeting. Grievant admitted what he had done was wrong and said that when the former facility closed he had lost his family. He asked to meet with the Warden to apologize to him and to speak to the employees on the following day to apologize to them. Grievant apologized to the Warden and the employees.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“Use of obscene or abusive language” is a Group I offense.⁴ On December 12, 2014, Grievant referred to the Warden as an “arrogant motherf—er.” Obscene language includes language relating to sex in an indecent or offensive way. “Motherf—er” is obscene because it refers to someone who would have sex with his mother (offensive behavior) and is intended as an insult. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for use of obscene or abusive language.

Grievant argued that following the incident, the Captain told him he would receive a reprimand rather than a written notice. The Captain testified that he did not recall making such a statement and that he did not have authority to make that determination. Even if Hearing Officer assumes for the sake of argument that the Captain told Grievant he would be counseled and not receive a written notice, the Captain would have done so without authority to bind the Agency. The Agency was within its authority to issue a Group I Written Notice in this case.

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”⁵ 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

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(2)(c).

⁵ *Va. Code § 2.2-3005.*

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 I 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
101 North 14th St., 12th 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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.⁶

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.