

Issue: Group II Written Notice with Suspension (unsatisfactory performance and abusive language); Hearing Date: 10/07/16; Decision Issued: 10/26/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10864; Outcome: Partial Relief; **Administrative Review**: EDR Ruling Request received 11/10/16; EDR Ruling No. 2017-4445 issued 12/15/16; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 11/10/16; DHRM Ruling issued 12/09/16; 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: 10864**

Hearing Date: October 7, 2016  
Decision Issued: October 26, 2016

#### **PROCEDURAL HISTORY**

On June 28, 2016, Grievant was issued a Group II Written Notice of disciplinary action with a 3 day suspension for unsatisfactory work performance and use of obscene or abusive language.

On July 1, 2016, 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 she requested a hearing. On September 6, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 7, 2016, 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. No evidence of prior active disciplinary action was introduced during the hearing.

On June 3, 2016, Offender R wanted to meet with her counselor. She asked to walk with the Commissary Manager. The Commissary Manager said ok and they walked to the gate where Grievant was working. When they arrived at the gate, the Commissary Manager asked Grievant if Offender R could go to meet with the counselor. In a rude tone, Grievant said that Offender R knew the proper procedure and policy. Grievant told Offender R to get with her officer. Offender R said, "Ok, I will get with my officer, thank you." Offender R walked out of the building.

Offender R was outside of the building talking to another offender and laughing. Grievant came out of the building and told Offender R "You keep up with your smart mouth, I will write you a charge for being rude and disrespectful, and you will lose your job." Grievant returned into the building.

### **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>

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>4</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.

On June 3, 2016, Grievant spoke in a rude tone to an inmate. Without justification, Grievant accused the inmate of having a smart mouth and threatened to charge the inmate with an offense so that the inmate would lose her job. Grievant’s work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice. A Group I Written Notice does not, by itself, authorize suspension of an employee. Grievant’s suspension must be reversed.

The Agency alleged that Grievant should receive a Group II Written Notice. Grievant’s behavior does not rise to the level of a Group II offense. Agency managers counseled Grievant about her interactions with inmates and staff. A general instruction to perform one’s job duties better is not in itself sufficiently specific to support a Group II Written Notice for violating instructions. To support a Group II Written Notice, an instruction must be more specific than an instruction to perform one’s job duties better.

The Agency alleged that on May 24, 2016, Grievant walked into a day room and yelled at inmates calling them addicts and pointed her finger at them in a disrespectful manner. The inmates were seated near a window instead of at a table. Grievant wanted them to move to the table. The video of the incident shows Grievant standing approximately eight to ten feet away from the inmates and gesturing at them. The video does not contain audio. The Agency’s evidence is based on inmate accounts who did not testify during the hearing. The evidence is insufficient for Hearing Officer to conclude Grievant behaved inappropriately on May 24, 2016. The Agency alleged but did not prove that Grievant used abusive language. Speaking to inmates from a distance of eight to ten feet instead of walking up next to them does not form a basis for disciplinary action in a prison setting. Grievant’s gestures were not so unusual as to justify disciplinary action.

---

<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)(B)(4).

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 further 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 is **reduced** to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

---

<sup>5</sup> Va. Code § 2.2-3005.

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 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 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.<sup>6</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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