

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 10/13/16; Decision Issued: 10/17/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10868; 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: 10868**

Hearing Date: October 13, 2016

Decision Issued: October 17, 2016

#### **PROCEDURAL HISTORY**

On June 13, 2016, Grievant was issued a Group II Written Notice of disciplinary action with a one day suspension for failure to follow policy.

On June 29, 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 he requested a hearing. On September 12, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 13, 2016, a hearing was held at the Agency's office. Grievant was notified of the hearing date but did not appear at the hearing.

#### **APPEARANCES**

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 had prior active disciplinary action consisting of a Group I Written Notice for unsatisfactory work performance.

The Facility must be adequately staffed with corrections officers on a daily basis. When employees who are scheduled to work but do not report to work, the Facility selects employees on a rotating basis. The Facility maintains a list of employees to select for overtime work. Employees are required to work overtime when directed to do so.

During the week ending April 26, 2016, the Lieutenant selected Grievant to work overtime on April 29, 2016. The Lieutenant selected Grievant because it was his turn to work overtime.

The names of employees selected to work overtime were placed on a "draft sheet" showing the dates they were to work. The draft sheet was available to employees during pre-shift meetings and posted in the watch commander's office. Employees were supposed to check the draft sheet and sign the draft sheet to acknowledge that they knew they were to work overtime.

Grievant worked at the Facility during the week ending April 26, 2016 but he did not sign the sheet. On April 26, 2016, Grievant was leaving the Facility at the end of his shift. The Sergeant instructed officers including Grievant to sign the draft sheet.

When the Sergeant instructed Grievant to sign the draft sheet, Grievant said, “I’m not signing that s—t.” The Sergeant wrote on the draft sheet that Grievant refused to sign the sheet. The draft sheet noted that Grievant was to report to work on May 3, 2016. Grievant did not report to work on May 3, 2016.

## 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> “Refusal to work overtime hours as required” is a Group II offense.<sup>5</sup> Grievant was instructed to sign the draft sheet because he had been scheduled to work overtime. He refused to sign the draft sheet and failed to report for overtime work. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s one day suspension must be upheld.

*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

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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).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(g).

<sup>6</sup> *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 II Written Notice of disciplinary action with a one day suspension 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 14<sup>th</sup> St., 12<sup>th</sup> 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 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>7</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>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.