COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11390

Hearing Date: September 30, 2019
Decision Issued: October 18, 2019

PROCEDURAL HISTORY

On February 15, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and refusal to work overtime.

On March 7, 2019, 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 1, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 30, 2019, 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. 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 employs Grievant as a Corrections Officer at Facility G. He has been employed to work for the Agency for 13 years. No evidence of prior active disciplinary action was introduced during the hearing.

Facility A was short staffed and that placed the Agency's operations in a state of emergency at Facility A. The Agency decided to assign employees at Facility G to work at Facility A for a seven day period. The Agency would provide housing for employees and reimburse employees for their meal costs.

Managers at Facility G asked for volunteers to go to Facility A. If staff did not volunteer, then the managers would select employees from a draft list. Employees' names were placed at the top of the draft list on a rotating basis. Employees were notified during muster if their names were at the top of the draft list.

Grievant left work on short-term disability from July 30, 2018 until September 17, 2018. He returned to work on September 28, 2018 on light duty. He finished light duty on December 14, 2018 and resumed a regular shift.

On January 20, 2019, the Captain instructed Grievant to go to Facility A on January 29, 2019 to begin working for seven days with 11.5 hour shifts. Grievant said that he could go to work at Facility A but that he could not work on the Wednesday during that week because he had custody of his child and had to be home to attend to his child. Grievant did not show the court order to the Captain.

The Agency would not allow Grievant to work only six of the scheduled seven days at Facility A. The Warden described requiring only six of the seven day assignment as a "logistical nightmare."

Grievant refused to go to Facility A since the Agency would not permit him to take off the Wednesday. Grievant was concerned that if he did not care for his child on Wednesday that his former wife could filed a show cause against him and place his custody in jeopardy.

Grievant met with the Major and told the Major he would not go to Facility A because he had court ordered child custody and because the Agency was not requiring female officers to go to Facility A.

Another corrections officer went to Facility A in Grievant's place on beginning January 29, 2019.

Prior to August 2018, the Agency sent male and female officers to Facility A. The Agency did not send female officers to Facility A from August 2018 through March 2019 because the female barracks at Facility A were under renovation. Once the Agency obtained an occupancy permit for the female barracks, the Agency resumed sending female officers to Facility A.

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]

[1] Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

[2] Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

[3] Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.[4] On January 20, 2019, the Captain instructed Grievant to go to Facility A on January 29, 2019 to begin working for seven days with 11.5 hour shifts. Grievant refused to perform all of the seven day assignment. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice for failure to follow instructions.

Grievant argued that he was first notified of his commitment to go to Facility A was on January 20, 2019. The Agency presented evidence showing that Grievant attended muster on January 9, 2019, January 18, 2019, January 19, 2019, and January 20, 2019 and during those musters the muster minutes included, "[Facility A] commitment is currently only male staff until further notice." Thus, Grievant was aware that he was at risk of being assigned to work at Facility A as needed.

Grievant argued that he did not have adequate notice that he was scheduled to work at Facility A on January 29, 2019. The Agency presented evidence that a week would be adequate notice. Grievant cited DOC Policy 110.2

Grievant argued that he should have been permitted to work six of the seven days and the Agency would have another employee work in his place for the Wednesday he could not work. The Agency responded that permitting Grievant to take off one of the seven days would create a "logistical nightmare" because if the Agency permitted Grievant to work only six of the seven days, it would have to permit every other employee to do the same. The Agency has presented an adequate reason to explain its refusal to permit Grievant to work only six of seven days of the assignment.

Grievant argued the Agency discriminated against him based on his gender. The evidence showed that female corrections officers were not sent to Facility A because the Agency did not have housing to provide for them. Once housing was available, the Agency resumed sending female officers to Facility A. The Agency has presented a non-discriminatory reason for treating male and female corrections officer differently.

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 of the existence

[4] Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

[5] Va. Code § 2.2-3005.

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.

Grievant argued that his need to comply with his court ordered visitation was a basis to disregard the supervisor's order. The order did not prohibit Grievant from working at another location. Grievant feared that his former spouse would use his failure to assert custody on a day for which was entitled as a means of reducing his visitation. The Agency had the discretion to mitigate the disciplinary action based on Grievant's concerns. The Hearing Officer's standard for mitigation, however, differs from the Agency's standard. Only if Grievant's concern made the Agency's disciplinary action beyond the limits of reasonableness, can the Hearing Officer reduce the disciplinary action. Grievant's concern regarding child visitation does not make the Agency's disciplinary action exceed the limits of reasonableness.[6]

Grievant argued that the Agency did not take disciplinary action against several corrections officers who failed to report to work during a snow storm. The evidence showed that the Warden only became aware of the misbehavior after too much time had passed to take disciplinary action and the employees had been counseled for substandard performance. The Warden would have taken disciplinary action had he learned promptly that the employees failed to report as expected. The Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action.

In light of the standard set forth in the Rules, 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 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:

[6] According to the Captain, Grievant was scheduled to go to Facility A on another week but the Captain did not compel Grievant to go to Facility A because the Captain has previously approved Grievant's request to take leave. The Captain described this as a mistake. It would not for a basis to excuse Grievant's failure to go to Facility A as instructed on January 20, 2019.

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 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.[1]

[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

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