



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11407**

Hearing Date: November 8, 2019

Decision Issued: December 2, 2019

#### **PROCEDURAL HISTORY**

On May 13, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy, safety rule violation, and unauthorized use of State property.

On June 12, 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 August 19, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 8, 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 Power Plant Superintendent at one of its facilities. Grievant was responsible for supervising Mr. K who was responsible for supervising the Inmate. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had significant experience in operating boilers. Grievant considered himself to be a "safety guy." When he came to the Facility he upgraded procedures such as creating a "lock out, tag out" procedure. The Facility had unsafe breakers and boilers not operating safely and Grievant corrected most of those issues. Grievant received training regarding Operating Procedure 302.2 governing Control of Hazardous Materials.

The Facility employed an Institutional Safety Specialist (ISS). His full time duties were to "coordinate, monitor, and evaluate the facility's safety functions and advise management on recommended action to enhance safety programs. The institutional safety specialist will serve as a member of the facility executive team and shall report to the Warden or Assistant Warden."<sup>1</sup>

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<sup>1</sup> See, Agency Exhibit 5.

The Facility had several boilers used to heat the Facility. The boilers were fueled by coal. Employees could use a torch to light the coal.

In January 2019, all of the Facilities boilers were “down” meaning that they were not operating because they did not have lighted coal inside the boiler.

Grievant used his P-card (an Agency-issued credit card) to purchase a small container of charcoal lighter fluid. The label on the container said it was to be used to light charcoal briquettes. Grievant did not realize he had to obtain permission to purchase the lighter fluid. He did not have a torch or other items to use to start the fire so he decided to purchase the lighter fluid.

Grievant placed cardboard inside a boiler and sprayed it with lighter fluid. He then lit the lighter fluid which ignited the cardboard and ultimately the coal inside the boiler.

After using the fluid to light the boiler, Grievant placed the container in a Flammable Liquid Storage Cabinet. The cabinet was locked. Grievant also included the container in inventory. The fluid stayed in the cabinet for approximately four months until Mr. K took it out to allow the offender to clean paint brushes. This was without Grievant’s knowledge.

On April 26, 2019, Grievant was away from the Facility. Mr. K brought the Inmate to the Plant to paint a bathroom in the Plant. After the Inmate finished painting, the Inmate wanted to clean his paint brushes. A solvent that the Agency typically used to clean brushes was not effective. Mr. K believed the Inmate would be able to use the lighter fluid to clean his brushes. The lighter fluid was removed from the cabinet and placed in a bucket. The Inmate cleaned his brushes using the fluid in the bucket. Mr. K left the Inmate and went into an office. The Inmate completed cleaning the brushes and was unsure what to do with the left over lighter fluid. The Inmate opened the door to the boiler which had burning coal inside. The Inmate picked up the bucket and threw the fluid into the boiler. The fluid ignited and there was a “blow back” resulting in severe burns to the Inmate’s face and arms.

As a result of the injury to the Inmate, the Agency began an investigation. The Investigation included determining how the charcoal lighter fluid came inside the Facility.

The Energy and Environmental Administrator testified lighter fluid is a chemical.

### **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>2</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>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</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>5</sup>

Operating Procedure 302.1 governs Environmental Management Systems. Section II(G)(3)(c) provides:

Only approved fuel may be burned in boilers. No burning of waste, drugs, paper, waste products or any other unapproved/unpermitted fuel will be permitted.

The Instruction Manual for the boilers provided:

NEVER USE GASOLINE OR OTHER HIGHLY FLAMMABLE VOLATILE FUELS FOR IGNITING THE FIRE. LIGHT FIRE WITH A TORCH THROUGH THE ACCESS DOORS.<sup>6</sup>

Operating Procedure 302.2 governs Control of Hazardous Materials. Section IV(5) requires, “all requests for purchases of chemicals shall be routed through the ISS/USC for evaluation before purchase.” Evaluation of the chemicals was to include determining whether “the product is appropriate and labeled for the intended use.” Section (IV)6 provides:

Purchase of chemical products not currently in use in the unit:

- a. The person desiring to order a new chemical product should obtain an MSDS/SDS prior to order the material.
- b. The MSDS/SDS should be directed to the ISS/USC for review and approval prior to ordering.
- c. If a material is determined by the ISS/USC as being hazardous (Restricted) a replacement material should be substituted if possible.
- d. All requests for Restricted chemicals to be stored inside the secure perimeter must be approved by the ISS/USC, Unit Head, the Regional Environmental Specialist, and Regional Administrator prior to purchase.<sup>7</sup>

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

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

<sup>6</sup> Agency Exhibit 10.

Section IV(B)(9) provides:

**Control of Flammable Materials**

Any liquid or aerosol that is required to be labelled “Flammable” or “Combustible” under the Federal Hazardous Substances Labeling Act must be stored and used according to label recommendations in a way that does not endanger life or property.

In January 2019, Grievant purchases a combustible liquid chemical (lighter fluid). He did not obtain an MSDS/SDS and present it to the Intuitional Safety Specialist for approval prior to purchasing the lighter fluid. Because Grievant purchased the lighter fluid and placed it in the cabinet, the lighter fluid was available to Mr. K and the Inmate. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that he did not have time to sit down and read policies because of the level of work expectations for his position. Grievant argued that he did not have adequate training and did not know he was supposed to get approval from the ISS to bring the lighter fluid to the Facility and use it to light the boiler. The Agency provided Grievant with training regarding the policies for which it is taking disciplinary action. Grievant was notified adequately of the Agency’s expectations.

Grievant argued that he took no malicious actions to try to harm the Inmate. It was not necessary for the Agency to show that Grievant acted with a malicious intent.

Grievant argued the policy says “should” and not “shall”. Although Grievant’s correctly quotes the policy, the policy appears to be a directive and not provide an optional choice for employees.

*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>8</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

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<sup>7</sup> Agency Exhibit 5.

<sup>8</sup> *Va. Code § 2.2-3005.*

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 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:

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>

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

[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