



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11412

Hearing Date: November 12, 2019

Decision Issued: November 14, 2019

PROCEDURAL HISTORY

On July 31, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for a criminal conviction.

On August 9, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 26, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 12, 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 employed Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Except for the facts forming the basis of this disciplinary action, Grievant's daily work performance was satisfactory to the Agency. An essential function of Grievant's job was the ability to carry a weapon. For example, if Grievant was involved in transporting inmates from the Facility to another location, he would be required to carry a weapon to perform his job duties.

On March 24, 2019, Grievant was arrested at the Facility. He was charged with violating Code of Virginia § 18.2-282, Pointing, holding, or brandishing firearm, air or gas operated weapon or object similar in appearance, a Class 1 misdemeanor.

On April 9, 2019, a local General District Court entered a Protective Order. The Order provided:

Pursuant to Code of Virginia § 18.2-308.1:4, Respondent shall not purchase, transport or possess any firearm while this order is in effect.

The Order remained in effect until August 8, 2019.

On June 17, 2019, Grievant appeared in the local General District Court. He pled guilty as charged. He was sentenced to 60 days in jail with 60 days suspended for a period of two years.

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

DOC Operating Procedure 135.1, Attachment 1, Guidance on Criminal Convictions provides:

Misdemeanor convictions may result in a Group III charge and termination. The situation must be assessed as to the employee’s ability to function in his position including the ability to carry out all job requirements, the nature of the conviction, the impact of the conviction has on the DOC and its employees, the public and its perception of the DOC, and other mitigating factors including prior discipline, length of service, and performance.

On June 17, 2019, Grievant was convicted of a misdemeanor. He was subject to a protective order preventing him from possessing a weapon. The Protective Order prevented him from performing all of the essential functions of his job. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that the Protective Order expired on August 8, 2019 and he was able to perform all of the essential functions of his job. The Agency’s decision to remove Grievant was supported by the evidence because at the time of the disciplinary action on July 31, 2019, Grievant was not able to possess a weapon and not able to perform all of the essential functions of his position.

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).

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”⁴ 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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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 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

⁴ Va. Code § 2.2-3005.

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.