



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11445

Hearing Date: January 10, 2020

Decision Issued: January 13, 2020

PROCEDURAL HISTORY

On August 7 2019, Grievant was issued a Group I Written Notice of disciplinary action for unprofessional conduct and use of abusive language.

On September 3, 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 November 4, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 10, 2020, 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 one of its facilities. He has been employed by the Agency since 2007. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and Officer C had a longstanding personal conflict. They were both working at the Facility on July 1, 2019. Officer C and Grievant were involved in counting inmates. After they finished counting inmates, Officer C and Grievant spoke. Officer C told Grievant he looked red in the face and hoped Grievant would die. Officer C walked outside. While outside, Grievant approached Officer C and yelled at Officer C. Grievant made a series of statements to Officer C. Among those statements, Grievant said: "Your wife is a whore", "You are a child molester", and "Go f--k yourself." Officer C said, "F--k you back." Officer C walked away at the request of another employee who was with Officer C.

Officer C complained to the Agency about Grievant's behavior. The Agency began an investigation. Grievant admitted to making the statements for which he was disciplined. The Agency only disciplined Grievant for statements he admitted making. Officer C also received a Group I Written Notice.

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

“Use of obscene or abusive language [is] considered a Group I depending on the severity, harshness, and impact of the language.”⁴ On July 1, 2019, Grievant used obscene and abusive language. His comments were directed at Officer C and intended to insult and continue his conflict with Officer C. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant admitted his mistake and regretted the comments he made to Officer C. Grievant argued that the matter could have been addressed with the issuance of a Notice of Improvement Needed/Substandard Performance. Although the Agency could have counseled Grievant instead of taking disciplinary action, it was authorized by policy to issue disciplinary action.

Grievant argued that Officer C created a hostile work environment for him and that the Agency could have moved Officer C to another building. Grievant and Officer C had an ongoing personal conflict. They worked on different shifts but encountered one another during shift change. The Agency was aware of the conflict, but expected the employees to act professionally when working. Although the Agency could have moved one of the employees to another building, no Agency policy required it to do so.

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

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).

⁴ See, Operating Procedure 135.1(V)(C)(1)(d).

⁵ Va. Code § 2.2-3005.

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 I 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 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]

^[1] 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

Carl Wilson Schmidt, Esq.
Hearing Officer