



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11450

Hearing Date: January 27, 2020

Decision Issued: January 28, 2020

PROCEDURAL HISTORY

On October 1, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for criminal convictions.

On October 28, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 12, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 27, 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 employed Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and Ms. E were coworkers at the Facility.

Grievant was subject to a Warrant of Arrest charging him with a Class 1 Misdemeanor for violation of Va. Code § 18.2-137 for "intentionally destroy, deface, or damage a Samsung Galaxy S8 phone belonging to [Ms. E] with the value of, or damage to, such properly being less than \$1,000." Grievant pled, "guilty." On August 7, 2019, the General District Court Judge found Grievant, "guilty as charged." Grievant was sentenced to 12 months in jail with 12 months suspended for "36 months conditioned upon being of good character, keeping the peace, obeying this order and paying fines and costs." Grievant was also ordered to "complete 8 hours [of] anger management course within 120 days."

Grievant was subject to a Warrant of Arrest charging him with a Class 1 Misdemeanor for violation of Va. Code § 18.2-57.2 for "assault and batter [Ms. E] who is a family or household member." Grievant pled, "nolo contendere." On August 22, 2019, the General District Court Judge found, "facts sufficient to find guilt but defer

adjudication disposition to 8/20/20.” The Court required Grievant to, “complete anger management lass by 2/20/2020.”

The Warden testified that retaining Grievant as an employee would undermine the public’s perception of the Agency.

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

Operating Procedure 135.1IV(F)(3) provides:

Charges or situations that involve crimes against persons are subject to the disciplinary charge that could include termination.

Operating Procedure 135.1IV(F)(4) provides:

A conviction is not necessary to proceed with a disciplinary action. The Unit Head must determine whether the evidence is sufficient to have an impact on the DOC, its employees, and the public and its perception of the DOC.

Group III offenses include:

Criminal convictions for conduct occurring on or off the job which are plainly related to job performance⁴

Grievant was convicted of a Class 1 Misdemeanor for violation of Va. Code § 18.2-137 for “intentionally destroy, deface, or damage a Samsung Galaxy S8 phone belonging to [Ms. E].” The Court found facts sufficient to find guilt against Grievant for a Class 1 Misdemeanor for violation of Va. Code § 18.2-57.2 for “assault and batter [Ms. E].” The Agency was authorized by policy to treat “facts sufficient to find guilt” the same

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(V)(E)(2)(m).

as a verdict of guilty. Grievant committed a crime against a person, namely against Ms. E. Grievant's crime related to his job performance because he was responsible for supervising inmates convicted of crimes. The Warden was concerned about the public perception of the Agency if it employed someone as a corrections officer who had been convicted of a crime. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for criminal convictions. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he was capable of performing his work duties including carrying a weapon. Grievant's ability to perform his job duties and his otherwise satisfactory job performance does not provide a basis to reverse the Agency's disciplinary action.

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 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:

⁵ Va. Code § 2.2-3005.

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.