



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11482

Hearing Date: March 13, 2020

Decision Issued: March 17, 2020

PROCEDURAL HISTORY

On November 18, 2019, Grievant was issued a Group I Written Notice of disciplinary action with removal for using obscene or abusive language, disruptive behavior, and insubordination.

On December 16, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 13, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 13, 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. Grievant had prior active disciplinary action. On May 30, 2019, Grievant received a Group III Written Notice with a 40 hour suspension.

On October 14, 2019, Grievant's Sister called the Facility and spoke with the Lieutenant. She said she had an emergency and needed to speak with Grievant. The Lieutenant asked the Sister to describe the emergency but without going into detail. The Sister said she was Grievant's sister and that she had to take her child to the hospital and she needed Grievant to take her. The Lieutenant told her that due to the security of the Institution, he could not just let Grievant leave like that. The Lieutenant told the Sister, he would give Grievant her message and get him relieved from his post as soon as possible. He suggested she call 911 in case Grievant could not get there in a timely manner. The Lieutenant said he did not know where the Sister lived.

After speaking with the Sister, the Lieutenant called the control booth in the unit where Grievant was working. He spoke with the Sergeant and asked to speak with Grievant. The Sergeant handed Grievant the telephone. The Lieutenant told Grievant about the Sister's call and what the Lieutenant told the Sister. Grievant became angry. He told the Lieutenant, "[h]ow the f—k you going to tell my sister to call 911." Grievant

said, “if that was your f—king mother or father you wouldn’t do no bulls—t like that.” The Lieutenant attempted to correct Grievant about using profanity. Grievant said, “I don’t care, f—k this s—t!” The Lieutenant ordered Grievant to report to the Watch Office, sign out on the duty roster, take his sister to the hospital, and return back to work with documentation when his Sister was finished, Grievant would be allowed to leave the Institution and take her home.

Grievant did not report to the Watch Office. The Lieutenant stopped Grievant on his way to the gate. Grievant said, “I’m calling the f—king Warden; this is some bulls--t.”

On October 22, 2019, Grievant was seated at a table during a staff meeting. The Captain was passing out cycle time sheets to be signed by employees and returned. The Captain was standing behind Grievant’s chair and gave Grievant his cycle sheet. Grievant noticed that the cycle sheet contained an error. It did not include all of his compensatory time worked. Grievant said aloud, “I’m not signing this s--t”. The Captain instructed Grievant to watch is offensive language. Grievant replied “Why are you getting so loud?” The Captain again instructed Grievant to watch his offensive language. Grievant stood up from his chair and faced the Captain. The Captain perceived Grievant’s behavior as aggressive, “like he wanted to come towards me.” Grievant again asked, “Why are you getting so loud?” The Captain instructed Grievant to leave the staff meeting.

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 a Group I offense. Disruptive behavior is a Group I offense.⁴ On October 14, 2019, Grievant was angry and repeatedly said “f—k” which is vulgar language. On October 22, 2019, Grievant disrupted the staff meeting by using profanity and standing up to confront the Captain. There was no need for Grievant to stand up to speak to the Captain. By doing so, Grievant acted to confront the Captain and give the Captain the impression that Grievant looked like he wanted to “come towards me.” Grievant’s behavior drew the attention of other staff and resulted in his removal from

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.

the staff meeting. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Upon the accumulation of a Group III Written Notice and a Group I Written Notice, an employee may be removed from employment. Grievant has accumulated a Group III Written Notice and a Group I Written Notice thereby justifying the Agency's decision to remove him from employment.

Grievant denied using vulgar language to the Lieutenant. The Sergeant could not recall whether Grievant used vulgar language to the Lieutenant since she was not focused on Grievant's phone call. The Lieutenant's testimony was credible. Grievant has not presented any credible motive for the Lieutenant to be untruthful. Grievant and the Lieutenant were friendly and "joked" at work prior to the incident. The Sergeant described Grievant's and the Lieutenant's relationship as one where they "played all the time."

Grievant admitted to saying he would not sign this "s—t" during the October 22, 2019 meeting but claimed only the staff next to him heard his comments. The evidence showed that Grievant disrupted the meeting by challenging the Captain and standing up when unnecessary 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 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**. Grievant's removal is **upheld** due to the accumulation of disciplinary action.

⁵ Va. Code § 2.2-3005.

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]

[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.