



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11501**

Hearing Date: May 18, 2020

Decision Issued: May 19, 2020

**PROCEDURAL HISTORY**

On January 28, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening or coercing persons associated with a State agency.

On February 25, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 9, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 18, 2020, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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. He had been employed by the Agency for approximately six years. Grievant had prior disciplinary action. Grievant received a Group I Written Notice on October 22, 2019 for unprofessional and disrespectful conduct.

Grievant carried OC spray (also known as pepper spray) in a holster while he worked. Grievant was supposed to use the spray if an inmate attacked him. He was to spray the inmate and step to the side. The spray could cause eye damage as well as a burning sensation.

On January 18, 2020, Grievant and the Nurse were working at the Facility. The Nurse was dispensing medication to inmates. She went to the Offender's cell to give him medication. Grievant accompanied the Nurse. Officer S was also near Grievant and the Nurse. They were within three to four feet of each other. Grievant told the Nurse words to the effect that he wanted to get closer to her so he could hug her. The Nurse rejected Grievant. She said, "Will you please get away from me!" Grievant un-holstered his OC spray and pointed it at the Nurse's face. He held the OS spray within a foot of the Nurse's face and acted as if he was going to spray her. Grievant was attempting to frighten the

Nurse. The Nurse was surprised and upset by Grievant's action. Grievant re-holstered the OC spray.

Officer S witnessed Grievant's behavior. He was surprised by Grievant's behavior because the Nurse had taken no action that would have justified Grievant pointing his OC spray at the Nurse. Officer S reported the incident to Facility managers who initiated an investigation.

## **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>1</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>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

"Threatening or coercing persons associated with any State agency" is a Group III offense.<sup>4</sup> On January 18, 2020, the Nurse rejected Grievant's request to hug her. In response, Grievant un-holstered his OC spray and pointed it in the Nurse's face. He did so in anger and with the objective of intimidating the Nurse. Grievant's behavior threatened the Nurse with physical harm. 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 denied the Agency's allegations. The Agency has presented sufficient evidence to support the Group III Written Notice with removal. Officer S's testimony was credible. Officer S observed Grievant point his OC spray at the Nurse. Grievant did not present any credible evidence showing Officer S had a motive to lie about Grievant.

The Agency also alleged Grievant sexually harassed the Nurse. The Nurse did not testify during the hearing. She was no longer employed by the Agency at the time of the hearing. Grievant contested the Nurse's written statements and objected to his inability to cross examine her. It is not necessary for the Hearing Officer to address the allegations supported solely by the Nurse's statements. There remains sufficient evidence to support the Group III Written Notice with removal.

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

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

<sup>4</sup> See, Operating Procedure 135.1 (II)(D)(2)(I).

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>5</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 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 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

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<sup>5</sup> Va. Code § 2.2-3005.

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>

[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

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