



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11506

Hearing Date: May 22, 2020
Decision Issued: June 11, 2020

PROCEDURAL HISTORY

On February 4, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On March 4, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 23, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 22, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Agency Party Designee
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 the Facility. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's Husband worked as a Corrections Officer at the Facility. Officer S worked at the Facility. In July 2019, Grievant learned that her Husband and Officer S were in an inappropriate relationship.

On November 20, 2019, after 9 p.m., the Husband and Officer S parked their cars in a secluded area of the Facility's campus. The Husband was taking his one hour break. Officer S was off duty.

Grievant learned that her Husband was with Officer S. Grievant went to the location of the two vehicles. She began yelling at the Husband and engaged in a physical altercation with him. Officer S began to move her car. Grievant feared Officer S was going to run over Grievant because Officer S had run over the Husband's foot. Grievant got into Officer S's car. Officer S pulled Grievant's hair and they began a physical altercation. Officer S left the area leaving Grievant and the Husband and their two vehicles.

Grievant used her cell phone to call the Major. The Major instructed Sergeant B and Sergeant C to go to the secluded location. Once the two Sergeants arrived at the secured location, Sergeant C instructed Grievant and the Husband to leave the premises. Instead, they began arguing. Sergeant B noticed that Grievant's dress was already torn in several places. Sergeant C and Sergeant B stepped between the Husband and Grievant to separate them. Grievant tried to hit the Husband. Grievant hit Sergeant B in the back several times including hitting him in the head. The Husband said he had had enough and went to open his trunk and then got into his vehicle and returned to the Facility. Grievant remained at the secluded location but then later left the campus.

The Agency disciplined and removed from employment all three employees.

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

Group III offenses include, "[a]cts of physical violence or fighting."⁴ On November 20, 2019, Grievant went to a secluded location on the Facility campus and engaged in a physical altercation with Officer S. She also argued with and attempted to hit the Husband. As she was attempting to hit the Husband, she hit Sergeant B several times including his head. Grievant engaged in acts of physical violence and fighting. 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 asserted that she sought to be moved to another facility to avoid hearing rumors about her Husband and Officer S. The Agency offered to move Grievant to another shift but Grievant declined. Whether the Agency moved Grievant to another shift does not excuse her violent behavior.

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 Operating Procedure 135.1(II)(D)(2)(f).

Grievant asserted that she had been taking medication for bipolar and anxiety disorders. The Warden was not aware of Grievant's mental health concern. Based on EDR rulings, Grievant's mental health status does not affect the outcome of this case.

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.

Grievant argued that the disciplinary action was too harsh and that she should receive a second chance. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with removal. The Hearing Officer does not have discretion to alter the Agency's disciplinary action unless it exceeds the limits of reasonableness. In this case, the Agency's discipline does not exceed the limits of reasonableness. In light of the standard set forth in the Rules, 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

⁵ Va. Code § 2.2-3005.

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.