



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11702**

Hearing Date: September 27, 2021  
Decision Issued: October 18, 2021

**PROCEDURAL HISTORY**

On March 2, 2021, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension, demotion, transfer and 15% disciplinary pay reduction for failure to follow policy and gross negligence.

On March 23, 2021, 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 she requested a hearing. On June 7, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 27, 2021, a hearing was held by remote conference.

**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. She had been employed as a Lieutenant until her demotion as part of this disciplinary action. No evidence of prior active disciplinary action was introduced during the hearing.

On September 4, 2020, the Agency Head sent all employees a memorandum regarding revised COVID19 screening questionnaire for employees and contractors attempting to enter a Facility. The questions were designed to determine whether the employee or contractor was in close contact with someone who had COVID19 or had experienced symptoms of COVID19. Security staff at each Facility were expected to ask the questions to individuals seeking entry to a Facility. If the employee or contractor said "yes" to any of the questions, the employee or contractor was to be denied entry into the Facility.

When an employee working as a Corrections Officer is promoted to Sergeant, the employee receives a 10% pay increase. When a Sergeant is promoted to Lieutenant, the employee receives a 10% pay increase.

Medical staff worked at the Facility for only 16 hours per day.

Individuals entering the Facility must be searched at the Front Entry.

On February 12, 2021, Grievant was working as the Watch Commander at the Facility. An Inmate's mother called an Ambulance Service and indicated that the Inmate needed emergency medical treatment. The Ambulance Service was not typically used by the Agency. At approximately 10:30 p.m., the Ambulance Service approached the Facility. Staff called Grievant and Grievant went outside to speak with the Ambulance Service employees. Grievant allowed the Emergency Medical Technicians to enter the Facility to speak with the Inmate. Grievant did not screen the Emergency Medical Technicians for COVID19. She did not search the EMTs for weapons or contraband. Grievant allowed the EMTs to enter the Facility and go to the Inmate's location in the special housing unit.

The EMTs concluded the Inmate needed to be taken to the Hospital. Grievant called the Major and told him that the EMTs wanted to take the Inmate to the Hospital. The Major called the Warden.

The Agency has salary pay sub-bands within pay bands. Grievant was a pay sub-band 11 as a Lieutenant and became a pay sub-band 8 as a Corrections Officer. The Agency's practice was to reduce the salary of demoted employees by 5% for each reduction in pay sub-band. The Agency has a Compensation Unit which reviews whether salary reductions are calculated correctly.

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

Operating Procedure 135.1 governs Standards of Conduct and provides the following definitions:

**Disciplinary Action** - A formal action taken to address unacceptable performance, behavior, or misconduct; disciplinary actions include the issuance of Written Notices, which may be accompanied by additional actions, such as transfer to an equivalent position in a different work area; reduced responsibilities within the current role and a disciplinary salary

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

action; transfer with reduced responsibilities and a disciplinary salary action; demotion; and termination.

**Disciplinary Demotion** - A management initiated assignment of an employee to the same or a different position in the same or lower Pay Band with fewer job responsibilities that must result in a minimum of a 5% reduction in base salary; in no case may an employee's salary exceed the maximum of the pay band following a disciplinary salary action.

**Disciplinary Salary Action** - Employees may be retained in their current positions and have their duties reduced, be demoted, or transferred to positions in the same or lower pay band with less job responsibilities in lieu of termination; the employee's salary in each case must be reduced by at least 5%. In no case may an employee's salary exceed the maximum of the pay band following a disciplinary salary action. DOC has the authority to transfer employees to equivalent positions as part of the disciplinary process without a reduction in salary.

**Disciplinary Suspension** - A disciplinary action that places an employee in a temporary status away from the workplace without pay and duties; for purposes of suspensions without pay, a workday is comprised of 8 hours for non-exempt employees. For exempt employees, a workday is comprised of the assigned hours scheduled to work on a normal day.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense. Group III offenses include, "Gross negligence on the job that results (or could have resulted) in the death, escape, or serious injury of a ward of the State or the death or serious injury of a State employee."<sup>2</sup>

Operating Procedure 445.1 governs Employee, Visitor, and Offender Searches. Section IV(A)(1) provides:

Searches of persons entering, leaving, or confined in DOC facilities are integral elements to a security and control program. Searches are effective deterrents in preventing the introduction of contraband into facilities, and contribute to the safety and well-being of all persons confined in, working in, or visiting a DOC facility. \*\*\*

The control of contraband through searches of employees, interns, volunteers, visitors, and offenders is imperative for the orderly operation of a correctional facility and for the safety and well-being of staff, the public, and offenders.

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<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

Section V(A) provides, "Any employee, intern, volunteer, official visitor, or offender visitor who enters a DOC facility shall be subject to a complete search."

On February 12, 2021, Grievant disregarded the Agency Head's COVID19 screening process designed to prevent infected people from entering the Facility. Grievant disregarded the search process meaning the EMTs could have brought weapons or contraband into the Facility. Grievant allowed people into the secured area of the Facility even though Facility managers had not requested them to come to the Facility. The arrival of the Ambulance Service could have been an elaborate escape attempt that could have resulted in the escape of an inmate. 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. However, DHRM Policy 1.60 (B)(3)(b) provides:

Mitigating circumstances for a Group III offense may support, as an alternative to termination, an employee's demotion or transfer to a position with reduced responsibilities and a disciplinary salary action with a minimum 5% reduction in salary; transfer to an equivalent position in a different work area; and/or suspension of up to 30 workdays.

Accordingly, the Agency's decision to demote Grievant from Lieutenant to Corrections Officer in lieu of termination is upheld. The Agency desired to remove Grievant's supervisory authority which is a decision supported by the evidence in this case. The Agency's decision to transfer Grievant to another Facility, suspend Grievant for five workdays, and impose a 15% disciplinary pay reduction is upheld.

Grievant objected to the Agency's decision to reduce her salary by 15 percent.

Operating Procedure 102.4 governs Compensation. This policy defines certain terms:

Pay Band - Nine step-less pay ranges established by DHRM to set a minimum and maximum salary for all classified positions in each band.

Pay Sub-band - A tool used to manage salaries within a pay band; reflects a portion of an existing pay band that has a defined minimum and maximum salary within that pay band.

Section VI(D)(3) provides:

There is a minimum 5% reduction in salary in disciplinary demotions. A reduction may be greater depending on the nature of the disciplinary issue, the number of sub-bands lower that result in the move, and whether the employee is moving out of a position covered by a special pay area.

Section VI(D)(4) provides:

There is not a required percentage reduction in salary in performance cases. However, a reduction may be appropriate depending on the nature of the performance issue, whether the new position is in a lower sub-band and whether the employee is moving out of a position covered by a special pay area. \*\*\*

The Organizational Unit Head and Human Resources Officer must secure appropriate written approval from the Compensation Unit as required before determining the salary level in a disciplinary or performance action.

When the Agency demoted an employee, its practice was to reduce the employee's salary by 5% for every reduction in pay sub-band. This practice is supported by the Agency's policies. Grievant was demoted three pay sub-bands, from a pay sub-band 11 to a pay sub-band 8. Accordingly, the Agency's decision to reduce Grievant's salary by 15% must be upheld.

### Mitigation

*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>3</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 five workday suspension, demotion, transfer, and 15% disciplinary pay reduction is **upheld**.

## **APPEAL RIGHTS**

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<sup>3</sup> *Va. Code § 2.2-3005.*

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 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.