



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11709**

Hearing Date: September 29, 2021  
Decision Issued: October 20, 2021

**PROCEDURAL HISTORY**

On April 29, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for lack of civility in the workplace.

On May 28, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 14, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 29, 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 employed Grievant as a Corrections Officer at one of its locations. She had been employed by the Agency for approximately 13 years. No evidence of prior active disciplinary action was introduced during the hearing.

Corrections Officers working inside the Control Booth were able to control the opening and closing of gates inside the Facility. They could look through large windows into the pod where inmates were located. The Control Booth had two slots that could be opened by inmates in order to speak with corrections officers inside the Control Booth.

On January 6, 2021, Grievant was working in the Control Booth. She was upset, frustrated, and "stressed out." Inmates were continuously approaching the slots and attempting to speak with her. The phone inside the Control Booth kept ringing and she had to answer the phone several times.

The Inmate went to the slot and opened the metal flap in order to speak to Grievant. He began to ask Grievant to open the front hallway door. Before he could finish his sentence, Grievant kicked a chair with sufficient force that it landed at the slot. The Inmate's hands were inside the slot. The chair hit the metal flap which closed on the Inmate's right hand causing him injury. The Inmate cried out in pain.

Grievant did not apologize because she was in shock and the Inmate did not want to speak to her.

The Inmate asked Grievant for grievance forms. Grievant could not locate the forms immediately. The Inmate backed away from the slot to the steps, a distance of approximately ten feet. Once Grievant located the forms, she pushed them through the slot and they fell to the floor. The Agency perceived this as throwing the forms at the Inmate.

Grievant called and notified the Sergeant. Medical staff evaluated the injury to the Inmate's hand. The Inmate's right hand was swollen and fractured. The Inmate filed a complaint with the Agency. The Agency began and completed 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." 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>

DHRM Policy 2.35 governs Civility in the Workplace. This policy provides:

The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace. \*\*\*

DHRM Policy 2.35 defines Workplace Violence as:

Any physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.

Prohibited conduct under DHRM Policy 2.35 includes, but is not limited to:

Threatening to damage or vandalize or intentionally damaging or vandalizing property;

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

Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;

Group III Offenses include, “Acts of physical violence or fighting”, and “Violation of DHRM Policy 2.35 Civility in the Workplace or Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, (considered a Group III offense, depending upon the nature of the violation).”<sup>2</sup> DHRM Policy 2.35 provides:

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

On January 6, 2021, Grievant lacked civility in the workplace. She kicked a chair with sufficient force that it hit the slot and the metal flap slammed shut on the Inmate’s hand. The force was sufficient to fracture a bone in the Inmate’s hand. Grievant engaged in violent behavior. She injured the Inmate. Her behavior was inappropriate and unprofessional. 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, Grievant’s removal must be upheld.

Grievant argued she did not intend to harm the Inmate and did not expect the chair to hit the slot. It is not necessary for the Agency to prove Grievant intended to harm the Inmate in order to show Grievant acted contrary to DHRM Policy 2.35. The Agency showed that Grievant intended to kick the chair. She knew inmates regularly used the slot to communicate with corrections officers. Grievant should have foreseen that forcefully kicking the chair in the direction of the slot may put an inmate at risk of injury. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

*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

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1 (XIV)(B).

<sup>3</sup> Va. Code § 2.2-3005.

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 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].

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer