



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11719**

Hearing Date: November 17, 2021  
Decision Issued: December 14, 2021

**PROCEDURAL HISTORY**

On June 16, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On July 8, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 26, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 17, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel

**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. She had been employed by the Agency for approximately three years. On December 17, 2020, Grievant received a Group I Written Notice for unsatisfactory attendance.

Inmate H knew if he filed a Prison Rape Elimination Complaint against an employee, the Agency would remove that employee. He frequently targeted staff he did not like and filed false PREA complaints against them. The Inmate had filed PREA complaints against Grievant.

The Facility permits inmates to participate in video visits with visitors. An inmate must leave his cell, go to a post called the "Picket", and then enter the video conference room. The Agency charges forty cents per minute for use of the video conferencing visits. The Agency charges money from the beginning of the scheduled visit even if the inmate arrives late for the visit.

On May 30, 2021, Grievant worked in the Picket. She controlled the gates around the watch office including gates to the kitchen and medical units.

Inmate H had two video visits scheduled for May 30, 2021 with his female visitor. One visit was scheduled for 2 p.m. and the second was scheduled for 3:30 p.m. with the same female visitor.

Inmate H reported to the Picket for his first visit. He did not have a trip pass for the visitation. He walked into the visitation room and began his visit. He began speaking with the female visitor at approximately 2:07 p.m. and began complaining that the visit did not start on time. During the first video visit, Inmate H told his visitor, "C/o [Officer C] is screwing c/o [Grievant]. After the first visit ended, Grievant directed Inmate H to the treatment room where Inmate H waited for his second visit.

Inmate H was scheduled to have a video visit with his female visitor beginning at 3:30 p.m. on May 30, 2021. Inmate H entered the visitation room at approximately 3:33 p.m. During the video visit, the female visitor told Inmate H that a counselor at the Facility seemed educated. Inmate H told his female visitor that "most of these people are uneducated."

Shortly after 3:30 p.m. on May 30, 2021, Grievant called the watch office and spoke with Captain W and Lieutenant C. She told them that while observing Inmate H's video visit, Inmate H was making statements that Grievant was "f—king everyone on the [Facility] and "everyone up here was uneducated f—ks". Grievant did not tell Captain W that Inmate H made the statements prior to the video calls.

Captain W asked Officer D to bring Inmate H to the watch office. Officer D went to the video visitation room and ended the visit early at approximately 3:38 p.m. Officer D removed Inmate H and escorted him to the watch office to meet with Captain W. Captain W asked Inmate H about his comments. Inmate H was non-responsive. Captain W decided to end Inmate H's video visit based on what Grievant told him about Inmate H.

On June 2, 2021, Grievant completed an Incident Report stating:

On 05-30-21, I, [Grievant], was watching video visits in the Picket. [Inmate H] was saying [Facility] staff were uneducated f—ks and also started saying I was f—king everyone on the [Facility]. [Inmate H] told his visitor that I was watching the video visits and knew I was listening. I notified [Captain W].

On June 11, 2021, the Investigator interviewed Grievant regarding the incident. Grievant told the Investigator Inmate H had two video visits on May 30, 2021. She told the Investigator that she called Control for Inmate H to come for the 2 p.m. video visit and that Inmate H arrived late. Grievant asked Inmate H for his trip pass and Inmate H said he did not have one and then continued walking into the visitation room. Grievant said that if an inmate did not have a trip pass, the inmate was supposed to be returned to the building. After the visit, Inmate H came out of the room and went to the medical department. Inmate H told Grievant he was going to get his pills. She told Inmate H he could not go in there unless the nurses called for him and he could wait in the treatment

area. Inmate H went to the treatment area. Grievant said she let Inmate H enter the video visit room two minutes before the visit was to start.

The Investigator asked Grievant if anything was said when Inmate H was walking through the visitation area. Grievant answered that she accessed the door for Inmate H to come out of the treatment room and Inmate H said, "If you weren't too busy f—king everybody on the [Facility] you'd get me on my video visits on time." Grievant believed Inmate H was on time to his 3:30 p.m. visit. Grievant said she heard Inmate H saying "derogatory things about staff" so she notified Captain W about those things.

Inmate H filed a complaint with the Agency alleging Grievant delayed his visitation start time in order to retaliate against him because he filed PREA complaints against Grievant. The Agency investigated the complaint.

### **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>

Group III offenses include:

Falsifying any records either by creating a false record, altering a record to make it false, or omitting key information, willfully or by acts of gross negligence including but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports statements, insurance claims, time records, leave records, or other official state documents.<sup>2</sup>

To establish falsification of records, the Agency must show that Grievant knew or should have known that the record she created was false.

The Agency alleged Grievant falsified her June 2, 2021 Incident Report containing four sentences. The first sentence states, "On 05-30-21, I, [Grievant], was watching video visits in the Picket." The first sentence is true. On May 30, 2021, Grievant was at her post

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

<sup>2</sup> See, DOC Operating Procedure 135.1, Standards of Conduct and Attachments.

in the Picket watching offender video visits. She was responsible for monitoring both of Inmate H's video visits.

The second sentence states, “[Inmate H] was saying [Facility] staff were uneducated f—ks and also started saying I was f—king everyone on the [Facility]. The video showed Inmate H saying employees at the Facility were uneducated. Saying employees were uneducated was not a violation of Operating Procedure 861.1 governing Offender Discipline. Saying employees were “uneducated f—ks”, however, violated Operating Procedure 861.1 which prohibits inmates from using “[v]ulgar or insolent language, gestures, or actions directed toward an employee.” By adding the word, “f—ks”, Grievant changed Inmate H's behavior from permissive to impermissible.

Grievant claimed Inmate H said that Grievant was “f—king everyone on the [Facility].” Inmate H did not make this comment during either video visit. During the first video visit, Inmate H told his visitor, “C/o [Officer C] is screwing c/o [Grievant]. Although saying “screwing” could subject an inmate to disciplinary action, saying “f—king” clearly would subject to the inmate to disciplinary action.

The second sentence of Grievant's incident report is materially different from Inmate H's actual behavior. That difference is sufficient to support the Agency's assertion that Grievant falsified a record.

Grievant argued that she heard what she heard and that the reception was sometimes difficult to hear. The Hearing Officer is not persuaded by this argument. It is not likely that poor reception would change “uneducated” to “uneducated f—ks.”

Grievant argued that Inmate H said Grievant “was f—king everyone on the [Facility]” while in a hallway before entering the visitation room. This argument is not persuasive. Grievant told Captain W that Inmate H made the comment during the video visit. Grievant wrote in the attachment to her Grievance Form A that she questioned Inmate H as to why he was late and not with the appropriate documentation and then Inmate H made the statement. Inmate H showed up to the first visit without appropriate documentation. Thus, Grievant's attachment suggests Inmate H made the statement before beginning the first video visitation. Grievant told the Investigator that Inmate H made the comment after he came out of the treatment room to begin the second video visit. Because the evidence is unclear as to when Inmate H said Grievant “was f—king everyone on the [Facility]”, the Hearing Officer cannot conclude that Inmate H actually made the statement.

The third sentence states, “[Inmate H] told his visitor that I was watching the video visits and knew I was listening.” During the video visitation, Inmate H indicated to the female visitor that Grievant was listening to the visitation. The third sentence is true.

The fourth sentence states, “I notified [Captain W].” This statement is true.

Based on the evidence presented, the Agency has established that Grievant falsified a record thereby justifying 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.

*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.

Grievant argued that the Agency inconsistently applied disciplinary action. Grievant presented examples of other employees who had falsified record but were not removed from employment. The examples presented by Grievant were not sufficiently similar to Grievant's behavior for the Hearing Officer to conclude that the Agency singled-out Grievant for disciplinary action. 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 14<sup>th</sup> St., 12<sup>th</sup> Floor

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<sup>3</sup> Va. Code § 2.2-3005.

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.