



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11725**

Hearing Date: November 22, 2021  
Decision Issued: December 13, 2021

**PROCEDURAL HISTORY**

On July 16, 2021, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and leaving the worksite without permission. On July 16, 2021, Grievant was issued a Group II Written Notice with removal for displaying unprofessional behavior during a telephone conversation.

On July 23, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 16, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 22, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses  
Observer

**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 began working for the Agency on June 24, 2017. No evidence of prior active disciplinary action was introduced during the hearing.

On March 18, 2021, Lieutenant M verbally counseled Grievant "concerning demeanor on a day-to-day basis that can be perceived as unprofessional."<sup>1</sup>

On May 14, 2021, Sergeant S needed Grievant to relieve Sergeant K from his post so Sergeant K could take a one hour break. Sergeant S asked Grievant if she could "break" Sergeant K. Grievant said, "No" because she was currently doing property movement. Sergeant S asked Grievant to relieve Sergeant K once Grievant finished doing property movement. Grievant said, "No, I'm not going to do that." Sergeant K had to "pull" another employee from a post to relieve Sergeant K from post.

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<sup>1</sup> Agency Exhibit p. 71.

When security employees took breaks at the Facility, they typically retained their equipment. When employees ended their shifts and left the Facility, they returned all of their equipment before leaving so it could be used by other employees.

On May 22, 2021, Grievant was drafted to work overtime. She wanted to leave the Facility as soon as possible. She often avoided taking a break during the overtime work so that she could leave earlier.

At 9 a.m., Sergeant S approached Grievant and told Grievant he was relieving her so she could take a one hour break. Grievant said she was not going to take a break so she could go home sooner. Sergeant S explained that after breaks and count was completed the drafted officers would be relieved. Grievant said that “this was f—king bull s—t” and that the Sergeants needed to go to post so Grievant could go home.

Grievant took her break at approximately 9:05 a.m. and left the Facility. Before leaving, she turned in her equipment. While on break, Grievant called the Facility at approximately 9:18 a.m. and spoke with the Lieutenant. Grievant said she had a family emergency and would not be returning from her break. Grievant did not have permission to leave the Facility. Grievant later wrote that she received a telephone call from her babysitter who told Grievant that Grievant’s three year old daughter had a stomach ache. Grievant then called the Lieutenant to say she was going home to care for her daughter.

The Facility allowed offenders to purchase items such as soap, toothpaste, and other hygiene items. If offenders were indigent, the items were given to them without cost. The Facility’s business office staff were responsible for distinguishing between indigent and non-indigent offenders.

On June 25, 2021, Grievant was working as the property officer. The Business Office Accountant received 13 request for indigent service forms that had not been previously approved by the business office. The Accountant called Grievant and asked why Grievant approved the forms without prior approval from the business office. Grievant became “belligerent, rude, and used profanity.” Grievant said she approved the forms without realizing that they had not been approved by the business office staff. Grievant said inmates in 2B deserved free stuff because they did not have packages upon intake just two weeks ago. Grievant asked the Accountant if the soap would last the Accountant for two weeks. The Accountant said Grievant should not have approved the forms since they had policy to follow. The Accountant said what we do for one offender we have to do for all of them. Grievant said Grievant “f—ked up and we all make mistakes.” Grievant then said that the Accountant messed up all the time and then Grievant hung up the telephone.

## **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>2</sup>

#### Group II Written Notice – Failure to follow Instructions/ Leaving Workplace Without Permission

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>3</sup> On May 14, 2021, Sergeant S instructed Grievant to relieve Sergeant K from his post so he could take a break. Grievant refused to comply with the instruction.

"Leaving the work site during working hours without permission" is a Group II offense. Grievant was required by policy to obtain permission before ending her shift and leaving the Facility.<sup>4</sup> On May 22, 2021, Grievant left the Facility and went home without having permission to do so.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions and leaving the workplace without permission.

Grievant admitted refusing to relieve Sergeant K on May 14, 2021. She asserted she had a family emergency on May 22, 2021 which prevented her from returning to work. The Agency alleged before Grievant left the Facility she had formed the intent to leave without returning and that her claim of a sick child was a pretext. Grievant did not present credible evidence to rebut the Agency’s assertion. The Agency has established that Grievant left the Facility without permission.

#### Group II – Lack of Civility in the Workplace

Grievant was obligated to, “[c]reate and maintain a Healing Environment within the DOC by treating coworkers, supervisors, managers, subordinates, offenders, and other stakeholders with respect, courtesy, dignity, and professionalism; be open to communication and collaboration with colleagues in a manner that generates trust and teamwork.”<sup>5</sup>

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

<sup>3</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>4</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>5</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

Violation of DHRM Policy 2.35, Civility in the Workplace, can be a Group II offense depending on the severity of the offense.<sup>6</sup> On June 25, 2021, Grievant was rude, belligerent, and used profanity to the Accountant during their telephone call. Grievant said Grievant “f—ked up and we all make mistakes.” Grievant then said that the Accountant messed up all the time and then Grievant hung up the telephone. Grievant’s behavior lacked civility and rose to the level of a Group II offense.

Grievant denied cursing to the Accountant. The Agency presented sufficient evidence to show that Grievant cursed while talking to the Accountant. Grievant alleged the Accountant was condescending to her. Grievant did not testify to show how the Accountant spoke to her or otherwise provoked Grievant’s comments.

### Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant alleged the Agency failed to properly investigate her grievance due process. To the extent the Agency failed to provide Grievant with full procedural due process, she had the opportunity to present any evidence and defenses to the Hearing Officer during the hearing. The hearing process cured any defects in pre-hearing due process.

### 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>7</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 other employees had engaged in behavior far worse than her behavior yet they remained employed by the Agency. In order to establish the inconsistent

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<sup>6</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>7</sup> *Va. Code § 2.2-3005.*

application of disciplinary action, Grievant must show similarly situated employees engaged in similar behavior and were treated less harshly without reason. The behavior of other employees cited by Grievant was not similar to Grievant's behavior. 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 II Written Notice of disciplinary action for failure to following instructions/leaving the worksite without permission is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for lack of workplace civility is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## 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>

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

[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