



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11732**

Hearing Date: January 26, 2022  
Decision Issued: January 31, 2022

**PROCEDURAL HISTORY**

On May 13, 2021, Grievant was issued a Group III Written Notice of disciplinary action with an 80 hour suspension for conduct unbecoming a corrections officer and violation of DHRM Policy 2.35.

On June 11, 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 he requested a hearing. On September 20, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 26, 2022, 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 facilities.<sup>1</sup> He was employed by the Agency for approximately 14 years. His work performance was otherwise satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

As used by the Agency, the phrase "flipping the bird" refers to extending one's middle finger as a gesture to communicate "f—k you." The Agency described this as an "obscene gesture."

On April 25, 2021, Grievant was leaving the Facility at the end of his shift. He went to the master control booth to obtain his identification card. The Captain was a "cut up" and often joked with Grievant. The Captain was working in the booth and saw Grievant approach the booth. The Captain "flipped the bird" to Grievant. Grievant left the master control booth, went outside onto a walkway and approached a vestibule which connected to the front entry search area. Grievant and approximately 10 other corrections officers waited outside until the vestibule door was opened. After the door opened, Grievant and

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<sup>1</sup> Grievant left the Agency after this disciplinary action was issued in this case.

the other corrections officers entered the vestibule and waited. Inside the vestibule was a camera that connected to the master control booth. The Captain could see activity inside the vestibule.

Inmate count was being conducted while Grievant was leaving. The count did not “clear” meaning the different people counting inmates did not reach the same result. A recount was necessary. The Captain called the Front Entry Officer and told the Front Entry Officer to instruct the corrections officers in the vestibule to exit the vestibule and remain outside until the recount cleared.

The other corrections officers walked out of the vestibule. Grievant remained inside. He walked to a wall in the vestibule and sat down against the wall. He then raised his right hand and looked up to the camera as he “flipped the bird” to the camera. Grievant knew the Captain would see his action. After approximately 30 seconds, Grievant got up from the floor and began walking to the door to exit the vestibule. As he was about to exit through the door from the vestibule to the outside, Grievant turned and looked at the camera and “flipped the bird” at the camera. He then briefly positioned his back against the door edge to stop it from closing. He then removed his body and let the door slide closed. After a few minutes, the door slid open and Grievant began to enter the vestibule. He raised his left arm and while looking at the camera “flipped the bird” with his left hand.

As part of the due process, Grievant informed the Agency that the Captain had flipped him the bird first. The Agency investigated the matter and was unable to confirm that the Captain had done so.

## **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>

Inadequate or unsatisfactory job performance is a Group I Offense. Use of obscene or abusive language is considered a Group I depending on the severity, harshness, and impact of the language.<sup>3</sup> On April 25, 2021, Grievant “flipped the bird” to the Captain to express his frustration with the Captain asking Grievant and the other corrections officers to exit the vestibule and wait during the recount. Grievant’s behavior was inappropriate in the workplace and unsatisfactory to the Agency. His “language” was

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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.

by gesture and that gesture was obscene. Grievant's behavior constituted a Group I offense.<sup>4</sup>

Under certain circumstances, an offense typically associated with one offense category may be elevated to a higher level offense due to aggravating circumstances. The DOC may consider any unique impact that a particular offense has or could have on the DOC, and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.<sup>5</sup> Grievant's behavior may be elevated from a Group I offense to a Group II offense because he engaged in that behavior three times and in front of his co-workers. The Agency presented evidence that allowing Grievant's behavior to go undisciplined would signal other employees that they could disregard the authority of employees holding superior rank. Respecting rank was an essential practice among Agency employees.<sup>6</sup> Accordingly, Grievant's behavior supports the issuance of a Group II Written Notice. A suspension not to exceed 40 hours is appropriate after considering Grievant's years of service and the absence of prior active disciplinary action.

The Agency argued Grievant violated DHRM Policy 2.35. This policy governs Civility in the Workplace and allows agencies to issue Group I, Group II, or Group III Written Notices depending on the severity of the offense. The Agency uses its Operating Procedure 135.1 to place employees on notice of its Standards of Conduct. The Agency amended its Standards of Conduct to include reference to DHRM Policy 2.35 after the date of Grievant's offense. Thus, the Hearing Officer will not apply the terms of DHRM Policy 2.35.<sup>7</sup>

*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>8</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

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<sup>4</sup> The Agency also alleged Grievant's behavior was unbecoming a corrections officer. Unbecoming a corrections officer is not listed as a Group III offense. Although the Agency's list of offense is not all inclusive, the Agency did not establish how Grievant's conduct was unbecoming but not better described as inadequate or unsatisfactory job performance.

<sup>5</sup> See, Virginia Department of Corrections Operating Procedure 135.1. DHRM Policy only permits elevation from one offense level to the next higher offense level.

<sup>6</sup> In other words, the impact on the Agency was sufficient to elevate the disciplinary action to a Group II offense from either a Group I offense for unsatisfactory performance or a Group I offense for use of obscene language.

<sup>7</sup> The Agency did not present evidence of former DHRM Policy 2.30. The Agency did not present evidence of Attachment 2 to DOC Operating Procedure 135.1.

<sup>8</sup> *Va. Code § 2.2-3005.*

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 he only "flipped the bird" to the Captain because the Captain had done so when Grievant was at the master control booth getting his identification card. The Grievant argued the Captain should have been disciplined as well. The Agency investigated Grievant's allegation and was unable to conclude that the Captain flipped Grievant the bird. Neither party called the Captain as a witness. The Warden testified that even if the Captain had "flipped the bird" to Grievant, Grievant's behavior would have justified the issuance of disciplinary action because of the seriousness of the offense.

The fact that Grievant's behavior was provoked by an employee holding superior rank is a mitigating factor. Grievant was obligated to comply with the instructions of an employee holding superior rank and respect that employee's rank. Grievant was also entitled to rely on the example set by the Captain which justified "flipping the bird" in the workplace. If the Hearing Officer were to uphold the disciplinary action as a Group III offense, there would be a basis to mitigate the discipline to a Group II Written Notice with a five workday suspension. As part of its case in chief, the Agency has not presented evidence to support discipline higher than a Group II Written Notice with a five workday suspension. Thus, there is no basis to further mitigate that 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 an 80 hour suspension is **reduced** to a Group II Written Notice with a 40 hour suspension. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of 40 hours of the 80 hours of suspension. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue during that 40 hours of suspension.

## 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].

*/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.