



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11744**

Hearing Date: February 7, 2022  
Decision Issued: February 16, 2022

**PROCEDURAL HISTORY**

On May 25, 2021, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On June 16, 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 October 12, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 7, 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 employs Grievant as a Psychology Associate I at one of its facilities. She has been employed by the Agency for approximately five years. The Warden described Grievant as a "great employee." No evidence of prior active disciplinary action was introduced during the hearing.

The Inmate had a history of attempting to manipulate staff at the Facility. The Warden was concerned the Inmate would attempt to manipulate Grievant and other staff. Two counselors would have to meet with the Inmate instead of one. The Warden met with Grievant on April 9, 2021 and instructed Grievant, "You will not be providing mental health services to [the Inmate] during his remaining time at [the Facility]." Grievant acknowledged that she understood the Warden's instruction.

The Warden sent an email on April 9, 2021:

In an attempt to manage a difficult inmate we have put a specific plan in place. The staff involved in our meeting this morning understand who will provide mental health services to [the Inmate]. The administration will continue to monitor the situation. Please see me if there are any questions.<sup>1</sup>

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<sup>1</sup> Agency Exhibit p. 14.

The Supervisor sent Grievant an email on April 9, 2021, in part:

Also, given the circumstances, you are not to be involved with [the Inmate] in any way. If a situation arises involving him while you are on call, I've asked [Ms. W] to let you know that someone else is to handle it. You are not to give any on-call orders involving him. You are to pass the call to [Ms. W].<sup>2</sup>

On May 11, 2021, Grievant and Ms. W questioned the Supervisor regarding how to interact with the Inmate. The Supervisor said that the Warden's order "was not permanent."

On May 12, 2021, the Inmate was placed in the medical unit where Grievant was working. The Inmate was placed in cell 4. Cell 3 was next to cell 4. The Inmate's status had been downgraded from "precaution" to "mental health observation." It was necessary to "take paperwork" and place it on the Inmate's cell door to reflect the change in status. The paperwork notified security staff of the Inmate's status and the reason for the Inmate being in the medical unit. Hanging paperwork on the outside of an inmate's cell door did not require an employee to speak with the inmate inside the cell.

The Supervisor spoke with Grievant. They discussed the change in the Inmate's status. The Supervisor asked Grievant to fill out the paperwork and take it to the medical unit. Grievant questioned the Supervisor about his statement to send Grievant to the medical unit given the Warden's order. The Supervisor said it should not be a problem. Grievant said she would take someone with her and the Supervisor agreed. Grievant said that since she was signing the paperwork she would "do a round." The Supervisor said "ok."

Grievant and Mr. G entered the medical unit. Mr. G took the Inmate's paperwork, walked to cell 4, and attached the paperwork to the outside of the Inmate's door and then walked away from the door. Grievant walked to cell 3 and began talking to the inmate in cell 3 while Mr. G stood nearby. Grievant spoke to the inmate in cell 3 for approximately four and a half minutes.

Grievant walked to cell 4 and began talking to the Inmate. Mr. G stood approximately three or four feet from Grievant as she spoke with the Inmate. Grievant continued to talk to the Inmate for approximately 12 minutes and she walked back to cell 3 and spoke with the inmate inside cell 3 for a few more minutes.

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<sup>2</sup> Agency Exhibit p. 15.

## 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>3</sup>

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure” is a Group II offense.<sup>4</sup> On April 9, 2021, Grievant was instructed by the Warden to not have any contact or communication with the Inmate. On May 12, 2021, Grievant approached the Inmate’s cell and spoke with the Inmate for approximately 12 minutes. Grievant acted contrary to the Warden’s instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that the Supervisor authorized her to speak with the Inmate. The evidence showed instead that Grievant assumed that the Supervisor would allow her to speak with the Inmate because the Supervisor said the Warden’s order was not permanent, that it was okay for her to prepare paperwork for the Inmate and post it on his door, and did not object when she said she would conduct rounds in the medical unit. Grievant’s false assumption did not override the Warden’s order. The Supervisor did not tell Grievant she could have contact with the Inmate. The Supervisor did not give Grievant permission to talk to the Inmate. Grievant should have continued to avoid the Inmate.

*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>5</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.

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<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> *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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].

*/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.