



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11678**

Hearing Date: July 28, 2021  
Decision Issued: August 17, 2021

**PROCEDURAL HISTORY**

On January 19, 2021, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On January 19, 2021, Grievant was issued a Group III Written Notice of disciplinary with demotion, transfer, and disciplinary pay reduction for gross negligence.

On February 1, 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 April 12, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 28, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Sergeant at one of its facilities until she was demoted to Corrections Officer. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was promoted to Sergeant on August 10, 2020. The Agency was supposed to ensure that Grievant completed Basic Skills for New Supervisors by February 10, 2021. Until she completed the training, she was to be partnered with an experienced supervisor. Grievant was paired with the Lieutenant for on-the-job training. Basic Skills classroom Training was scheduled for December 7, 2020 but Grievant cancelled the training due to her inability to attend.

On November 23, 2020, the Lieutenant gave Grievant a Notice of Needs Improvement/Substandard Performance. Grievant did not agree with the corrective action.

On November 24, 2020, Grievant spoke with Officer P about the Notice of Needs Improvement/Substandard Performance she received. She asked Officer P how to grieve the counseling. Officer P discussed how he would respond based on his prior military experience.

The Captain learned of the conversation and had the Lieutenant instruct Grievant to report to her office.

The Captain met with Grievant to discuss Grievant speaking with Officer P. The Captain asked Grievant if Grievant and Officer P were discussing Grievant's corrective action from the Lieutenant. Grievant said they were discussing Grievant's corrective action. The Captain said that Officer P was talking about how he was giving Grievant advice based on when he was in the military and he was late leaving from work. The Captain advised her to "please not talk to other line staff about problems her and [the Lieutenant] were having. I instructed her that when a supervisor or any other staff are being talked to, it is to stay amongst themselves and we as supervisors do not discuss these types of issues with officers as it can create a divide with staff. I went on to elaborate that we are all to act professionally and not discuss issues like this and as a supervisor we vent up and not down and it was nobody else's concern with what goes on with any supervisor or other staff."<sup>1</sup>

Several hours later on November 24, 2020, Grievant sent a text message to Sergeant D containing the corrective action she received from the Lieutenant along with a proposed letter of resignation. When the Captain learned of this, the Captain believed Grievant had violated her earlier instruction.

Grievant read and signed the Post Order for Shift Commander on October 20, 2020. She acknowledged that she had read, discussed the post with her supervisor, and understood the post.

The Front Entry post at the Facility was essential to the Facility's operations. The Front Entry post had a Post Order describing the duties of the post. The Facility provided employees approximately 64 hours of training before the employees were permitted to work the Front Entry post. The post had emergency procedures to follow.

On November 25, 2020, Grievant was working as Shift Commander at the Facility. She was responsible for supervising staff at the Facility. The Shift Commander Post Order required Grievant to:

The Shift Commander will read, sign, and adhere to Post Orders and ensure that all security staff assigned to the shift will do the same. \*\*\*

All correctional staff are responsible for the following:

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<sup>1</sup> Agency Exhibit p. 30.

- a) Read the post order before assuming duties of that post. Once you have read and understood the post order, address any questions/concerns with the immediate supervisor and have the post orders countersigned by the supervisor to verify that all issues have been addressed and resolved.
- b) Sign the Post Orders the first time each quarter you work any post.
- c) Follow the Post Orders.<sup>2</sup>

The Facility was short-staffed on November 25, 2020. Grievant called an adjoining Facility and requested assistance. Officer H left that facility and came to Grievant's Facility. Grievant gave Officer H a "general rundown of what to do." Grievant told Officer H all keys and equipment were present. Officer H assumed the Front Entry post at 8:02 a.m. Grievant did not give the Front Entry Post Orders to Officer H for Officer H to read and sign. Officer H began her duties at the Front Entry post without having read the Post Orders describing her duties. Grievant told Officer H to observe and not to open the front gate. At 8:04 a.m., Grievant left the Front Entry post area in order to assist with conducting inmate count. The count cleared at 8:08 a.m.

At 8:05 a.m., Mr. RP went to the armory at Front Gate entry and noticed Officer H was uncertain about what she needed to do. He left at 8:06 a.m.

When Mr. RP returned to his work area, he asked Mr. MP to go to the Front Entry gate to give assistance to Officer H. Mr. MP was a former Lieutenant at the Facility. Mr. RP said Grievant put Officer H at the Front Entry post with very little instruction and had left her alone.

At 8:35 a.m., Mr. MP walked to the Front Gate and observed that Officer H was by herself. He asked Officer H if she needed help and she said yes. Mr. MP asked Officer H if she had read the post orders and Officer H said she did not know where the post orders were. He began to explain the telephone, laundry check-in sheet, and how offenders checked in. Officer H asked Mr. MP what certain buttons did, what to do when someone enters the armory, and how to turn on the laundry lights. Mr. MP showed Officer H how to lock the front door. As Mr. MP was getting Officer H to begin the check-in sheet, Grievant returned to the Front Entry gate. Mr. MP pushed the button to allow Grievant to enter. Grievant told Mr. MP not to worry about showing Officer H what to do and that she would take care of it. Grievant said she would tell Officer H what to do. Mr. MP left the Front Entry gate at 8:40 a.m.

Officer H left the Front Entry post at 9:47 a.m.

## **CONCLUSIONS OF POLICY**

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<sup>2</sup> Agency Exhibit p. 60 and p. 63.

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” is a Group II offense.<sup>4</sup>

### Group II Written Notice

The Agency argued that the Captain instructed Grievant not to talk about her counseling to any other staff including peers. Grievant argued that she construed the Captain’s instruction to prevent her from talking about her counseling to a subordinate and Sergeant D was not a subordinate.

Grievant has established the basis for her defense. The Captain’s instruction was sufficiently vague that the Agency has not established that Grievant was instructed to refrain from discussing her counseling with Sergeant D, a peer. The Captain instructed Grievant not to discuss her counseling with “line staff” and not to “discuss these types of issues with officers.”<sup>5</sup> It was reasonable for Grievant to believe she had been instructed not to discuss her counseling with subordinates only. The Group II Written Notice must be reversed.

### Group III Written Notice

Grievant’s Shift Commander Post Order and training informed her of her obligation to have Officer H read and sign the Front Entry Post Order before assuming the post. Violation of a Post Order is violation of Agency policy. Grievant failed to have Officer H read and sign the Front Entry Post Order before assuming that post. The Agency has established that Grievant failed to follow policy thereby justifying the issuance of a Group II Written Notice. The question becomes whether the Agency can elevate the Group II offense to a Group III offense.<sup>6</sup>

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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> The Captain instructed Grievant that her counseling was “nobody else’s concern.” Within the context of the discussion, it was reasonable for Grievant to construe “nobody” as corrections officers.

<sup>6</sup> The Agency did not establish that Grievant engaged in Gross Negligence. Grievant’s behavior was not so extreme as to show she engaged in gross negligence.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

The Agency has established a basis to elevate the Group II offense to a Group III offense. The Front Entry post was the most important post at the Facility. The Front Entry Officer controlled who entered or exited the Facility. The Front Entry Officer determine who could enter the armory where weapons were stored. If the Front Entry Officer mistakenly pushed the wrong button on a control panel, an inmate or visitor could enter or exit the Facility without authorization. The Front Entry Officer could allow an unauthorized person to enter the armory and obtain access to weapons. The Agency's issuance to Grievant of a Group III Written Notice must be upheld. Upon the issuance of a Group III Written Notice, an agency may remove an employee or in lieu of removal demote, transfer, and impost a disciplinary pay reduction. Accordingly, Grievant's demotion, transfer, and disciplinary pay reduction must be upheld.

Grievant argued that Officer H was a certified Correctional Officer who should have known how to perform her work duties. Grievant argued that she was away from the Front Entry for only a short time in order to conduct count. When she returned she was available for Officer H to ask questions if Officer H did not understand her duties. Although this may be true, Grievant was obligated to have Officer H read and sign the Front Enter Post Order before assuming that post and Grievant failed to provide Officer H with the Front Entry Post Order for review. Any amount of time that Officer H was left alone was significant.

Grievant argued she did not have a sign in book for Officer H to sign the Front Entry Post Order. This argument is not persuasive because Grievant did not present the Front Entry Post Order to Officer H for Officer H to read. Even if a sign in book was not available, Grievant acted contrary to policy because she did not let Officer H read the Front Entry Post Order.

Grievant argued she had not been given adequate training to perform Shift Commander duties at the Facility. This argument is not persuasive because having an employee sign a post order before assuming that post was a well-known expectation. Grievant knew or should have known she was obligated to have Officer H read and sign the Front Entry Post Order before assuming that post.

### 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

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<sup>7</sup> Va. Code § 2.2-3005.

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.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction 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*

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.