



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11686**

Hearing Date: August 11, 2021  
Decision Issued: August 31, 2021

**PROCEDURAL HISTORY**

On February 24, 2021, Grievant was issued a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for violating safety rules where there is a threat of physical harm.

On March 12, 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 26, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 11, 2021, 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 Lieutenant at one of its facilities until her demotion to Corrections Officer with transfer and disciplinary pay reduction.

The Housing Unit had a foyer with at least two doors. One door opened into an interior outside yard. The door on the opposite end of the foyer opened into a Control Booth. The Control Booth contained a panel with buttons enabling the Control Booth Officer to open inmate cell doors and access doors. The Control Booth Officer's Post Order provides:

The Control Room door shall NOT be opened if there is an offender in the foyer or the counselor's office, (have offender returned to dorm) or if the outer, inner, or middle foyer door is unsecured.<sup>1</sup>

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<sup>1</sup> Agency Exhibit p. 82.

Grievant was working at the Facility on January 18, 2021 as the Operations Supervisor. She was the second highest ranking employee at the Facility at that time. Grievant's post order required that she comply with all Facility policies and practices.

On January 18, 2021 at approximately 7:13 p.m., Inmate E rushed into the dayroom and struck Inmate R who was seated. The two men fell to the floor and Inmate E continued to hit Inmate R. Inmate E was pulled off of Inmate R but then returned to continue hitting Inmate R. Security staff escorted Inmate E out of the dayroom, into the foyer, and then to the outside yard.

At approximately 7:16 p.m., Inmate R was escorted into the foyer by two security staff. Two other staff were also in the foyer. As Inmate R was about to be moved through the door to the outside yard, Inmate R refused to proceed and began a scuffle with security staff. While Inmate R was on the floor with other officers on top of him, two additional security staff entered the foyer. Grievant was inside the foyer.

The door from the outside yard into the foyer was propped open at 7:18 p.m. after OC gas was sprayed. If other inmates were in the yard outside of the foyer and wanted to enter the foyer, they could do so. The door remained open until 7:30 p.m.

Corrections Officer E was in the Control Booth when the struggle began. At 7:18:51, Grievant approached the Control Booth door and looked through the window at Corrections Officer E. Corrections Officer E opened the Control Booth door and Grievant entered the Control Booth while Corrections Officer E exited the Control Booth to assist with restraining Inmate R.

In order to observe the fight, Grievant held the door to the Control Booth partially open. While the Control Booth door was held open, anyone could enter the Control Booth from the foyer. Grievant held the Control Booth door open or ajar until 7:20:10 when Corrections Officer E returned to and Grievant exited the Control Booth.

## **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>

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

“Violating safety rules where there is a threat of physical harm” is a Group III offense.<sup>3</sup> One of the Agency’s safety rules was to make sure the door to the Control Booth was closed when an inmate was in the foyer. The Control Booth was central to the Agency’s security system because someone inside the Control Booth could allow inmates out of their cells and into prohibited areas of the Facility. If an inmate were to enter the Control Booth, the inmate could lock out security staff and open inmate cell doors and allow the inmate to congregate in areas where they were not permitted. If this happened, the Agency would lose control of the Facility. By keeping the Control Booth door open for approximately 79 seconds, Grievant created a risk that Inmate R or any inmate entering the foyer could have gotten inside the Control Booth. Having uncontrolled inmates with full access to the Facility could have resulted in physical harm to inmates and staff. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee or in lieu of removal to demote, transfer, and impose a disciplinary pay reduction. Accordingly, Grievant’s demotion, transfer, and disciplinary pay reduction must be upheld.

Grievant argued that the Agency failed to provide her with a reasonable opportunity to present her defenses to the disciplinary action. Her due process response was scheduled for February 12, 2021. When the Warden learned that he would not be working on February 12, 2021, the Warden asked to meet with Grievant and they met on February 11, 2021. Grievant believed she did not have adequate time to prepare for that meeting. If the Hearing Officer assumes for the sake of argument that the Agency failed to provide Grievant with a reasonable opportunity to respond, the outcome of this case does not change. Any defect in the due process provided by the Agency is cured by the hearing process. Grievant had the opportunity to prepare for the hearing and present to the Hearing Officer any defenses she would have otherwise presented to the Agency if she had been given adequate time to prepare for her meeting with the Warden.

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>4</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

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<sup>3</sup> See, Operating Procedure 135.1(V)(E)(2)(g).

<sup>4</sup> Va. Code § 2.2-3005.

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 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>

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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*

Carl Wilson Schmidt, Esq.  
Hearing Officer