



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11616**

Hearing Date: February 22, 2021

Decision Issued: March 15, 2021

### **PROCEDURAL HISTORY**

On September 8, 2020, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow policy and instructions.

On September 21, 2020, 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 November 2, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 22, 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<sup>1</sup> Grievant as a Senior Electric Engineer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was accused of telling another person at the Facility that he would "slap the sh-t out" of that person. On April 28, 2020, Grievant was counseled that "verbal conversations said aloud could be taken out of context ..." and "[w]e have to keep professionalism at everything we do."

The Corrections Officer had been recently assigned to the Day Shift and was not familiar with Grievant.

On August 7, 2020, Grievant and an Inmate who was assisting him attempted to cross from one side of the Building to the other side by passing through the inner connector door ("middle door"). Inmates were not permitted to cross through the inner connector door. Sometimes inmates wore green clothing. Grievant usually did not wear

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<sup>1</sup> Grievant resigned from the Agency after the issuance of the Written Notice.

a green shirt so that he would not be identified as an inmate. On August 7, 2020, Grievant was wearing a green shirt.

Grievant and the Inmate approached the middle door. Grievant demanded that the Corrections Officer open the middle door and let them proceed through the door. The Corrections Officer thought Grievant was an inmate and denied Grievant's request. The Corrections Officer called Grievant an inmate and Grievant was offended. Grievant "exploded." Grievant said, "I'm not a da-n inmate. I have a green collared shirt with the Virginia DOC logo and a radio and tools in my hand. Do I look like a da-n inmate?" Officer 2 was working with the Corrections Officer. Grievant said aloud, "He's a f—king idiot." Grievant was referring to the Corrections Officer who was standing a few feet away from Grievant. Several other employees and inmates were near Grievant and heard him insult the Corrections Officer.

### **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>

Operating Procedure 135.2 sets forth Rules of Conduct for Governing Employee Relationships with Offenders. Section (II)(H)(1) provides:

At all times, employees should be respectful, polite, and courteous in their communication and interaction with offenders, as well as citizens and other employees.

Operating Procedure 145.3 governs Workplace Civility. Section IV provides:

It is the responsibility of all employees ... to maintain a non-hostile ... working environment, and to ensure that employment practices are free from ... inappropriate behavior.

"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 August 7, 2020, Grievant "exploded" and was upset by the Corrections Officer's inability to distinguish Grievant from an inmate. Grievant loudly called the Corrections Officer a "f—

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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.

king idiot” so that the Corrections Officer and several others could hear Grievant’s statement. Grievant’s behavior was inappropriate especially because it was in front of inmates. Grievant’s behavior lacked civility and was contrary to the Agency’s policy requiring respect and politeness among staff. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s five workday suspension is upheld.

Grievant argued that the Corrections Officer knew him and should have recognized him as an employee and not falsely accused him of being an inmate. He argued the discipline should be considered as no higher than a Group I offense. The Agency has presented sufficient evidence to support the disciplinary action as a Group II Written Notice. The Corrections Officer’s mistake was not sufficient to justify or excuse Grievant’s behavior even though it was annoying to Grievant.

*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 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 with a five workday suspension 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:

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<sup>4</sup> Va. Code § 2.2-3005.

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.